

**THE PRINCIPLE OF LOYALTY IN EU LAW: LEGAL BENCHMARKS FOR MEMBER
STATE CONDUCT IN THE EU UNDER ARTICLE 4(3) TEU**

A MAPPING OF THE
JURISPRUDENCE OF THE EU COURT OF JUSTICE
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Executive summary

The principle of loyalty, often conjointly with other principles or provisions of EU law, governs the obligations of the Member States in the Union. It is *lex specialis* to the more concrete obligations of the Member States laid down in primary and secondary EU law, and there needs to be a specific breach of the principle for the EU Court of Justice to establish the violation of Article 4(3) TEU. The principle regulated under Article 4(3) TEU contains three distinct obligations, and it stands for a high number of other obligations as specified in the jurisprudence of the EU Court of Justice. It combines substantive and procedural obligations for the Member States.

Its impact on the conduct of Member States includes requiring the involvement of the Member States in the effective application of EU law, requiring the Member States to refrain from the adoption of certain measures and of certain lines of conduct, pre-empting and freezing Member State conduct.

Its influence on Member State conduct is limited by other legal principles, such as the principle of legal certainty, and its application does not extend to the political dimension of EU decision-making.

The most elaborate obligations arising from the principle of loyalty can be found in the domains covering the participation of national courts and authorities in the effective enforcement of EU obligations in the Member States and the cooperation of the Member States with the EU institutions. While some of the obligations are rather broadly framed, in certain areas, such as the recovery of unlawful charges, or cooperation in the national enforcement of EU competition law, the jurisprudence of the Court of Justice has produced detailed requirements confining Member State conduct. Ideally, the principle of loyalty should prevent illegal conduct or conduct in bad faith from the Member States, and present legal benchmarks for Member State conduct which are taken into account before the Member States act.

Introduction

The aim of the legal mapping exercise is to identify and analyse the legal boundaries of the leeway available to the Member States under EU law to develop and regulate national policies. It is carried out under the working premise that the law governing EU policies provides a framework for Member State policy and regulatory action which may implement, supplement or correct European policies. EU law may also provide legal boundaries for autonomous Member State policies developed and executed in national competences. This legal mapping report offers an accessible and comprehensive overview of the principles, detailed rules and practices governing and delimiting Member State conduct in a selected EU policy area or under a selected principle of EU law. The report reveals considerable substantive and procedural limitations on Member State action. Member State governments interested in exploiting the room of manoeuvring under the EU legal framework must meet high standards of good governance and administration.

1 The principle of loyalty

The principle of loyalty, now regulated in Article 4(3) TEU (ex Article 10 EC, ex Article 5 EEC),¹ is one of the most fundamental organising principles of the EU polity. It is a key constitutional principle of the EU which laying down a general basis for the mutual obligations of the Member States and the Union institutions follows in the Treaties the enumeration of the values and objectives of the Union. It is a general constitutional principle in the sense that it applies to the whole of the Union with the exception of the Common Foreign and Security Policy which has its own loyalty principle in Article 24(3) TEU.² In the Court of Justice's formulation Article 4(3) TEU is available to ensure that the main task of the EU, which is to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.³ It is linked to the rule of law in sense that it provides a principled approach in law to governing the relations between the Member States and the EU institutions under the Union framework.⁴ Loyalty, on the one hand, may also be defined as a specific incarnation of the international law principle that treaties are to be interpreted in good faith. On the other, many of the obligations that the German Constitutional Court formulated on the basis of the '*Bundestreue*' ('federal good faith') concept do correspond to obligations that the Court of Justice has construed on the basis of loyalty.⁵

Its current formulation and position in the Treaties make loyalty a balanced principle governing the conduct of Member States in the Union. Firstly, Article 4(3) TEU regulates the obligations of both the Member States and the Union, which must 'in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties.' Secondly, it is regulated in

A core constitutional principle

A balanced constitutional framework

¹ See also Article 13(2) TEU on the duty of mutual sincere cooperation of the EU institutions.

² The consequence of this separation is, in particular, that whereas Article 24 TEU precludes the Commission to bring a Member State before the Court of Justice for breaching its duties under the CFSP, Member State actions jeopardising the attainment of the Union's external action objectives fall within the Court's jurisdiction in the light of Article 4(3) TEU. (Peter Van Elsuwege, The duty of sincere cooperation (Art. 4 (3) TEU) and its implications for the national interest of EU Member States in the field of external relations, [http://hpops.tk.mta.hu/uploads/files/UACES_Bilbao_PVE_\(2\).pdf](http://hpops.tk.mta.hu/uploads/files/UACES_Bilbao_PVE_(2).pdf))

³ Para. 41, Pupino (Case C-105/03) [2005] ECR I-5285

⁴ Para. 17, Imm. Zwartveld (Case C-2/88) [1990] ECR I-3365; Ketelsen Case C-37/97 [EU:C:1998:499], para 30; Joined Cases C-63/90 and C-67/90 *Portugal and Spain v Council* [1992] ECR I-5073, para. 52. It follows from that principle that Article 4(3) TEU cannot relate to a measure adopted by the EU legislature in a certain policy area which might possibly entail advantages or disadvantages for certain undertakings. Therefore, it is not possible to rule on the compatibility of such provisions of EU secondary law with Article 4(3) TEU. (See judgment in Case C-341/95 Bettati [EU:C:1998:353]), para. 77

⁵ Geert De Baere and Timothy Roes, EU Loyalty as Good Faith (2015), *International and Comparative Law Quarterly*, Vol. 64 Issue 4, pp. 830, 855 and 856.

Article 4 TEU together with the principle of conferral⁶ and the principles of Member State equality and of the protection of national identities, which are included in the Treaties to confine Union action. Thirdly, loyalty as the principle available to protect the interests of the Union⁷ must be interpreted together with the treaty provisions allowing in the form of derogations or other exceptions enable the Member States to set their own interests against their Union obligations.

Loyalty is not simply a general principle but also includes many of the most significant principles of EU law. Fundamental rules of EU legal system such as (1) national courts must grant effective remedies for breach of EU law rules; (2) directives can have direct effects; (3) the doctrine of exclusive implied treaty-making powers of the EU; or (4) legal duties on the EU institutions to cooperate with one another and with Member States' authorities all have their origin in Article 4(3) TEU.⁸

The principle of loyalty also serves as a legal umbrella for concrete obligations addressed to Member State parliaments, governments, courts and administrative authorities as identified in the jurisprudence of the EU Court of Justice. These obligations have been developed on top of the specific obligations concretised in EU primary and secondary law and their actual meaning ('tenor'/'significance') of which 'depends, in each particular case, on the provisions of the Treaty or on the rules laid down within its general framework.'⁹ The Court of Justice explicitly recognised the *lex specialis* nature of concrete obligations of EU law to the general obligation established under Article 4(3) TEU.¹⁰ It has substantive and procedural aspects: for example, it can demand from the Member States to achieve the substantive results laid down in a directive or it can require the Member States to follow certain procedural avenues when acting independently

The basis of other principles

An umbrella for obligations

⁶ See for instance, in the field of external relations, Case C-370/07, Commission v. Council (CITES), [2009] ECR I-8917

⁷ M. Klamert, *The Principle of Loyalty in EU Law* (Oxford, OUP, 2014), 19.

⁸ John Temple Lang, *The core of the constitutional law of the Community - Article 5, EC Treaty*, http://ec.europa.eu/competition/speeches/text/sp1995_024_en.html#foot4

⁹ Deutsche Grammophon (Case 78/70) [1971] ECR 487; para. 4, Geddo (Case 2/73) [1973] ECR 865

¹⁰ para. 12, Heylens (Case 222/86) [1987] ECR 4097 'since freedom of movement of workers is one of the fundamental objectives of the Treaty, the requirement to secure free movement under existing national laws and regulations stems (...) from Article 5 of the Treaty'. On the other hand, in infringement procedures under Article 258 TFEU, '...there are no grounds for holding that [a Member State] has failed to fulfil the general obligations under [Article 4(3) TEU], which is separate from the established failure to fulfil the more specific obligations incumbent upon that Member State under [other provision(s) of the EU Treaties or secondary legislation]' (C-60/13 Commission v United Kingdom EU:C:2014:219, para. 61; see, by analogy, Case C-392/02 Commission v Denmark, para. 69; Case C-19/05 Commission v Denmark, para. 36; and Case C-334/08 Commission v Italy, para. 75. In other words, the principle of loyalty applies when there is another rule of law or policy which defines the objective, but it does not apply when there is a specific rule dealing with the issue in the case concerned. (Temple Lang, *The Duty of Cooperation of National Courts...*, 27).

under the scope of EU law in the domestic or in the international policy arena.

For the Member States, the freezing effect of the principle of loyalty on legislative and administrative discretion holds perhaps the most significant restriction. The obligations of abstention and the pre-emption of Member State conduct could follow from both the substantive and the procedural aspects of loyalty. Most commonly, the Member States are prevented from regulating and administering completely autonomously domestic policies in areas covered by EU law by the substantive requirement that the attainment of Treaty objectives must be avoided or by the procedural rule that in doing so they must cooperate with the EU institutions in the available procedural avenues. The freezing effect of the loyalty principle can be temporal (e.g., in the period of developing EU policies, implementing directives or negotiating international agreements), or it can affect the way domestic affairs can be regulated and administered.

The freezing effect

Member State 'judicial authorities' have a particular relevance in meeting the obligations incorporated in the principle of loyalty.¹¹ National courts are burdened with the obligations that through their individual participation in the EU judicial system EU law is applied and respected in the national legal systems,¹² on the one hand, and that they cooperate with the EU institutions in the enforcement of EU law, on the other.¹³ While the Member State enjoy autonomy in designating the national courts with jurisdiction to participate in the domestic enforcement of EU law and in regulating procedures at law, national courts are bound to give effect to EU obligations, apply and interpret national law so that the effectiveness of EU law will not be impaired, and to make national remedies available in procedural circumstances which do not discriminate between claims made under domestic and EU law and do not make the exercise of rights derived from EU law impossible in practice.¹⁴

A judicial focus

The principle of loyalty, as indicated above in connection with the obligations of national courts, needs to be interpreted together with the recognition in EU law of Member State autonomy and discretion.¹⁵ Member

Autonomy and discretion

¹¹ Para. 31, Case C-94/00 *Roquette Frères* [2002] ECR I-9011. Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12

¹² They are 'entrusted with ensuring the legal protection which subjects derive from the direct effect of provisions of Community law', para. 12, Case 811/79 *Ariete* [1980] ECR 2545.

¹³ Para. 18, *Imm. Zwartveld* (Case C-2/88) [1990] ECR I-3365; para. 32, Case C-94/00 *Roquette Frères* [2002] ECR I-9011 where 'the Community authorities and national authorities are called upon to assist in the attainment of the objectives of the Treaty by the coordinated exercise of their respective powers'.

¹⁴ *Inter alia*, para. 12, Case 811/79 *Ariete* [1980] ECR 254

¹⁵ EU law can both respects discretion subject to requirements (e.g. to introduce criminal penalty alongside existing sanctions) and confirm the use of discretion (e.g. when criminal penalties are introduced alongside existing sanctions), *infra n.*

State autonomy in designing the institutional framework for law and administration is recognised in the jurisprudence in the general formula that although under Article 4(3) TEU must take every appropriate measure to ensure the fulfilment of Treaty obligations 'it is for them to determine which institutions within the national system shall be empowered to adopt the said measures.'¹⁶ National discretionary choices – in implementing EU measures or in imposing sanctions – are also accepted.¹⁷ In exercising both local autonomy and discretion, Member State choices come under the known substantive and procedural restrictions derived from loyalty, mainly in the form of the obligations to ensure the effective enforcement of EU obligations and to cooperate in good faith with the EU institutions.

¹⁶ Para. 3, Joined cases 51 to 54-71 *International Fruit Company NV European Court reports 1971 Page 01107*

¹⁷ *Infra n.*

2 The general obligations of the Member States under Article 4(3) TEU

General obligations

Most generally, the principle of loyalty or sincere cooperation under Article 4(3) TEU governing the relations between the Member States and the Union requires – in fields covered by EU law – the Member States to take all measures necessary to guarantee the application and effectiveness of EU law,¹⁸ and it imposes on the EU institutions and the Member States mutual duties of loyal cooperation.¹⁹ In a broader formulation, under Article 4(3) TEU the Member States are required to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty, to facilitate the achievement of the Union's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.²⁰ In the Court of Justice's interpretation, these obligations apply 'in all areas corresponding to the objectives of the Treaty'.²¹ Translated into the language of the effectiveness of EU law it entails that the Member States and their authorities are under the obligation not to undermine either the effect or the effectiveness of EU law.²² In another formulation, Member States and all national authorities²³ have a duty to take whatever action is necessary to make the [European Union] legal system work in the way that

¹⁸ Para. 46, *Commission v Ireland* Case C-354/99 EU:C:2001:550; *Case 68/88 Commission v Greece* [1989] ECR 2965, para. 23 and para. 17, *Imm. Zwartveld* (Case C-2/88) [1990] ECR I-3365 *if necessary by instituting criminal proceedings*;

¹⁹ para. 48, *Franex NV* (Case C-275/00) [2002] ECR I-10943 para. 79 *Germany v Commission* (Case C-344/01) [2004] ECR I-2081; para. 17, *Imm. Zwartveld* (Case C-2/88) [1990] ECR I-3365; *Case 230/81 Luxembourg v European Parliament* [1983] ECR 255, paragraph 37., *Case C-37/97 Ketelsen* EU:C:1998:499, para 30, *Joined Cases C-63/90 and C-67/90 Portugal and Spain v Council* [1992] ECR I-5073, para 52, *Case C-341/95 Bettati* EU:C:1998:353, para 77

²⁰ Para. 22, *Commission v Belgium* (Case 85/85) [1986] ECR 1149; para. 21, *Commission v Council* (ERTA) (Case 22/70) [1971] ECR 263; *Opinion 1/03* [2006] ECR I-0000, paragraph 119. These components may find expression in individual Treaty provisions or in provisions of secondary law requiring the fulfilment of EU obligations or abstention from jeopardising the fulfilment of Treaty objectives, paras 36-37, *Commission v Germany* (Heavy Goods Vehicles) (Case C-195/90) [1992] ECR I-3141; *Commission v France* (Fisheries) (Case C-304/02) [2005] ECR I-06263 Para. 98, *Commission v Germany* (TIR Carnets) (Case C-105/02) [2006] ECR I-9659; Para. 42, *Commission v Italy* (Public Works Contracts) (Case 274/83) [1985] ECR 1077

²¹ Para. 119, *Lugano Convention* (Opinion 1/03) [2006] ECR I-1145;

²² *Banks & Co* (Case C-390/98) [2001] ECR I-6117; *case C-212/94 FMC* [1996] ECR I-389

²³ Including local authorities, para. 60, *Case C-518/11, Judgment* EU:C:2013:709 *UPC Nederland*. The obligations resulting from Article 4(3) TEU also apply to State enterprises (at least when acting as regulatory bodies) and private bodies insofar as State powers have been delegated to them. (Temple Lang, *The core of the constitutional law...* [n5])

it is objectively intended to work, and a corresponding duty to avoid any action which would interfere with this working.²⁴

In particular, that the authorities of the Member State must take the general or particular measures necessary to ensure that EU law is complied with within that State.²⁵ It falls to a Member State to recognise the consequences, in its internal order, of its adherence to the Union and, if necessary, to adapt its procedures for budgetary provision in such a way that they do not form an obstacle to the implementation, within the prescribed time-limits, of its obligations within the framework of the Treaty.²⁶ In this context, the Member States are allowed, however, to choose the measures which they consider appropriate, including the imposition of sanctions which may even be criminal in nature.²⁷

Regarding the potential reciprocal nature of the obligations under Article 4(3) TEU of the Member States, on the one hand, and the EU institutions, on the other, it was held that any breach by the EU institutions of Article 4(3) TEU 'cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations' which may arise, among others, under Article 4(3) TEU.²⁸ Consequently, the Member States may not unilaterally adopt, on their own authority, corrective or protective measures designed to obviate any breach by an institution of rules of EU law.²⁹ In other circumstances, where cooperation between the judicial authorities of the Member States and the EU institutions was necessary because the national judicial authorities were exercising their jurisdiction in matters relevant for the Union, the Court of Justice was keen to emphasise that this obligation of

Compliance

Reciprocity

²⁴ John Temple Lang, *The Duty of Cooperation of National Courts in EU Competition Law*, 2014, Vol. 17, No. 1, 40. The above mentioned obligations of national authorities fall broadly into the following categories: (1) a duty to implement Community law; (2) a duty to supplement Community action when necessary; (3) a duty to avoid conflicting or interfering with Community institutions; (4) a duty to inform the Commission to enable it to do its job. (Temple Lang, *The core of the constitutional law...* [n5])

²⁵ Para. 39, *Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others* (Case C-495/00) [2004] ECR I-2993

²⁶ Para. 11, *Commission v Italy (Premiums for Grubbing Fruit Trees)* (Case 30/72) [1973] ECR 161 *Case C-339/00 Ireland v Commission* [2003] ECR I-0000, paragraph 71, and the *case-law cited*

²⁷ Para.32,

²⁸ Para. 26. *Commission v Greece (IMO)* (Case C-45/07) [2009] ECR I-701

²⁹ *Ibid.* In *Commission v Austria (Brenner Motorway)* (Case C-205/98) [2000] ECR I-7367, Austria pleaded in general (without directly challenging the admissibility of the infringement action) that allowing the Council to fail to restore legality to the situation (adopt a new directive in place of an annulled directive) and, therefore, allowing it to perpetuate a state of illegality to the detriment of the Member States is incompatible with the reciprocal duty of sincere cooperation under Article 4(3) TEU (para. 39). The claim was not rejected on the merits but on the ground that infringement procedures can be commenced on account of the Member State concerned failing to observe an annulled directive which was to continue to take effect.

cooperation was of reciprocal nature.³⁰ It is likely that here reciprocity was used as a synonym for mutuality.

Article 4(3) TEU may serve as the basis of some form of solidarity among the Member States which, in turn, could serve as the basis of their obligations and prevent the unilateral adoption of measures by the Member States in breach of the Treaties.³¹ The early jurisprudence spoke openly about a duty of solidarity of the Member States, which was accepted by them through the fact of their accession to the EU and which was claimed to strike 'at the fundamental basis of the Community legal order', making a principled link between the advantages of EU membership and the obligation to respect EU law.³² This duty prevents a Member State from unilaterally breaking, 'according to its own conception of the national interest', the 'equilibrium between advantages and obligations flowing from its adherence to the Community', which act would bring into question the equality of Member States before EU law and create discrimination 'at the expense of the nationals, and above all of the nationals of the State itself which places itself outside the Community rules'.³³ It is unclear from the jurisprudence whether solidarity as raised here would provide an actual constitutional basis for Member State obligations which is distinct from the principle of loyalty.

Importantly, the territorial extension of a common policy as a result of the unification of a Member State or of the accession of a new Member State 'constitutes a new material fact which does not have the effect of releasing Member States from their obligation to take all appropriate measures for guaranteeing the operation and efficacy of the Community law applicable at the material time'.³⁴ This also applies to the obligation on national courts to penalise breaches of EU law in the absence of corresponding EU provisions.³⁵

The principle of loyalty, when read together with the Treaty provisions on fundamental economic freedoms, could lead to establishing the breach of EU law by the Member State concerned by abstaining from taking action or failing to adopt adequate and appropriate measures to deal with actions by private individuals on its territory which create obstacles to intra-Union free movement.³⁶ In other words, under the Treaty provisions on fundamental

Solidarity

Territorial
growth

Actions of
private
individuals

³⁰ Inter alia, para. 31, Case C-94/00 *Roquette Frères* [2002] ECR I-9011.

³¹ Para. 16, *Commission v France* (Case 6 & 11/69) [1969] ECR 523

³² Paras. 24-25, *Commission v Italy* (Premiums for Slaughtering Cows) (Case 39/72) [1973] ECR 101

³³ Para. 24.

³⁴ Para. 28, *Criminal Proceedings against André Allain et al* (Case C-341/94) [1996] ECR I-4631

³⁵ Para. 29, *ibid.*

³⁶ Para. 39, *Commission v France* (Case C-265/95) [1997] ECR I-6959; paras. 54, 57-58, *Schmidberger* (Case C-112/00) [2003] ECR I-5659, (without the need to distinguish between

economic freedoms read together with Article 4(3) TEU, the Member States are required to take all necessary and appropriate measures to ensure that the fundamental freedoms are respected on their territory (to deal with obstacles to the fundamental freedoms which are not caused by the States).³⁷

The principle of loyalty also requires national authorities to adopt measures, including all necessary procedures and penalties, to enforce EU law against private parties. They are required to enforce it effectively and as rigorously as they enforce corresponding rules of national law.³⁸

National courts also have a duty under Article 4(3) TEU not to enforce clauses in contracts between private parties which are contrary to EU law.³⁹

They must give injunctions and compensation for breach of individual rights given by EU law,⁴⁰ against private parties, as well.⁴¹

As to the implementation of EU directives, and previously ECSC Treaty recommendations, by the Member States, the principle⁴² holds that although the Member States are free to choose the ways and means of implementation that freedom does not affect the obligation imposed on the Member States to adopt, in their national legal systems, all the measures necessary to ensure that the directive (recommendation) is fully effective, in accordance with the objective which it pursues.⁴³ The obligation to achieve the result envisaged in the directive (recommendation) and the duty to take all appropriate measures,⁴⁴ whether general or particular, to ensure the fulfilment of that obligation, is binding in all authorities of the Member States including, for matters within their jurisdictions, the courts.⁴⁵ The Member

Implementing
directives

cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods, paras. 60-62).

³⁷ Paras. 30-35. Paras. 58-59.

³⁸ Temple Lang, *The core of the constitutional law...* [n5]

³⁹ Temple Lang, *Developments, Issues, and New Remedies...*, 1923

⁴⁰ See in particular *Courage v Crehan* Case C-453/99 [2001] ECR I-6297, discussed below.

⁴¹ Temple Lang, *The core of the constitutional law...* [n5]

⁴² It is not based on every occasion directly on Article 4(3) TEU. Most commonly, a joint interpretation of Article 4(3) TEU and Article 288 TFEU. Occasionally, on Article 288 TFEU and the directive itself.

⁴³ Para. 15, *Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891; para. 23, *Criminal proceedings against André Allain and Steel Trading France SARL*, Case C-341/94 ECLI:EU:C:1996:356; para. 40, *Inter-Environnement Wallonie* (Case C-129/96) [1997] ECR 7411

⁴⁴ ...and the obligation to refrain from any measure which could jeopardise the attainment of objectives pursued by directives (C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268, para. 56; C-104/10 ECLI:EU:C:2011:506 *Kelly*, para. 36; C-415/10 *Meister* ECLI:EU:C:2012:217, para. 41)

⁴⁵ Para. 26, *Von Colson*; para. 25 *Allain* para. 43, *Dorsch Consult* Case (C-54/96) [1997] ECR I-4961; para. 38 *Engelbrecht* (Case C-262/97) [2000] ECR 7321; para. 40, *Inter-Environnement Wallonie* (Case C-129/96) [1997] ECR 7411; para. 18 *EvoBus Austria* (Case C-111/97) [1998] ECR I-5411 *Regarding CFSP common positions*, para. 42 *Pupino*, para. 52, *Gestoras ProAmnistía and Others v Council* (Case C-354/04 P) [2007] ECR I-1579; para. 52, *Segi and Others v Council* (Case C-355/04 P) [2007] ECR I-1657; *Impact*, para. 41; C-

States cannot plead provisions, practices or circumstances in their internal legal order to justify a failure to comply with obligations under directives.⁴⁶ They are also prevented from relying on their late implementation of a directive as justification to fulfil, or late fulfilment of, other obligations imposed by that directive.⁴⁷ When a directive lays down unequivocal obligations on the competent national authorities, Member States which have not transposed the directive cannot consider themselves relieved from compliance with those obligations after the period for transposition has expired and cannot exclude, by a transitional provision, the application of the provisions of the directive; to allow the State such a right would have the effect of allowing it to defer the time-limit for transposition by it.⁴⁸

The jurisprudence, although without reference to Article 4(3) TEU, has also established that directives must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.⁴⁹ The principle of legal certainty requires, in particular, appropriate publicity for the national measures adopted pursuant to EU rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by EU law.⁵⁰ Read in light of the choices available to the Member States in implementing directives under Article 288 TFEU, these obligations do not necessarily entail that the Member States implement directives through legislative action and that they enact the requirements of a directive in a specific express legal provision, since depending on its content the general legal context may be sufficient for its implementation.⁵¹ Particularly, the existence of general principles of constitutional or administrative law may render transposition by specific legislative or regulatory measures unnecessary, provided that they actually ensure the full application of the directive by national administrative authorities and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are placed

Precise and
clear
implementation

177/10 Judgment ECLI:EU:C:2011:557 08/09/2011 Rosado Santana, para. 51; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, para. 110; Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECR I-0000, para. 72; Case C-53/10 Franz Mücksch [ECLI:EU:C:2011:585], para. 30.

⁴⁶ Case C-33/90 *Commission v Italy* [1991] ECR I-5987, paragraph 24, and Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 27; para. 30, C-53/10 Judgment

ECLI:EU:C:2011:585 15/09/2011 Franz Mücksch

⁴⁷ para. 33, C-442/06 Judgment ECLI:EU:C:2008:216 10/04/2008 Commission v Italy

⁴⁸ *ibid.*

⁴⁹ para. 37, *Commission v Poland* (Case C-29/14) ECLI:EU:C:2015:379; *Commission v Greece*, C-81/07, EU:C:2008:172, paragraph 19

⁵⁰ para. 37, *Commission v Poland* (Case C-29/14) ECLI:EU:C:2015:379; *Commission v Belgium*, C-415/01, EU:C:2003:118, paragraph 21

⁵¹ para. 38, *Commission v Poland* (Case C-29/14) ECLI:EU:C:2015:379

in a position to know the full extent of their rights and obligations and, where appropriate, to be able to invoke them before the national courts.⁵²

In this context, it is also of relevance that although before the end of the transposition period for a directive the Member States are not obliged to adopt the measures necessary to ensure that the result prescribed by the directive is achieved, it follows from Article 4(3) TEU in conjunction with Article 288 TFEU and from the directives themselves that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.⁵³ In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive.⁵⁴ All the authorities of the Member States concerned have such an obligation to refrain from taking measures, including the national courts which, from the date upon which a directive has entered into force, must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.⁵⁵ According to the Court of Justice, it is for the national court to assess whether the national measure in question was adopted in violation of this requirement, in which it must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.⁵⁶

As to the direct applicability of EU measures, the Member States are under a duty not to obstruct the direct applicability (then, direct effect) inherent in

Transposition
period

Directly
applicable
measures

⁵² *Ibid* and *Commission v France*, C-296/01, EU:C:2003:626, paragraph 55

⁵³ Para. 45 *Inter-Environnement Wallonie* (Case C-129/96) [1997] ECR 7411; Para. 38, *VTB-VAB and Galatea* (Joined cases C-261/07 and C-299/07) [2009] ECR I-2949; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 67. This obligation to refrain from taking such measures is also owed by the Member States, under Article 4(3) TEU in conjunction with Article 288(3) TFEU, during a transitional period in which they are authorised to continue to apply their national systems, even though those systems do not comply with the directive in question (Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, para. 42; Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, para. 42; C-167/09 Judgment ECLI:EU:C:2009:393 26/05/2011 *Stichting Natuur en Milieu and Others*).

⁵⁴ (*ATRAL*, paragraph 59 and *Mangold*, paragraph 68; para. 121, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057).

⁵⁵ Para. 39, *VTB-VAB and Galatea* (Joined cases C-261/07 and C-299/07) [2009] ECR I-2949; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 122 and 123

⁵⁶ Paras 46-47, *Inter-Environnement Wallonie* (Case C-129/96) [1997] ECR 7411, In case the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time. (Para. 48) Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed. (para. 49)

regulations and other rules of EU law.⁵⁷ Strict compliance with this obligation is ‘an indispensable condition of simultaneous and uniform application’ of regulations throughout the EU.⁵⁸ The Member States are, therefore, prevented from neither adopting nor allowing national organisations having legislative power to adopt any measure which would conceal the Union nature and effects of any legal provision from the persons to whom it applies.⁵⁹ Furthermore, the Member States are under a duty not to take any measure which might create exemptions from an EU regulation or affect an EU regulation adversely.⁶⁰ In assessing this, not only the express provisions of an EU regulation but also its aims and objectives must be taken into account.⁶¹

The duty of the Member States to implement EU regulations follows – beside Article 288 TFEU – from Article 4(3) TEU.⁶² In case EU law, including its general principles, does not include common rules to this effect, the implementation of EU regulations will take place in accordance with the procedural and substantive rules of national law.⁶³ The Member States must, however, the uniform and equal application of EU law, and that national rules comply with the principle of effectiveness (i.e., they must not have the effect of making it virtually impossible to implement EU regulations).⁶⁴

The general duty of loyalty under Article 4(3) TEU has a specific expression in the obligation in ex Article 292 EC (now Article 344 TFEU) to have recourse to the EU judicial system and to respect the exclusive jurisdiction of the Court of Justice.⁶⁵

A failure to fulfil specific obligations under a directive, or under any other source of EU law, can consume the breach of Article 4(3) TEU, unless there is a ‘distinct failure’ (or ‘specific failure’)⁶⁶ to observe the principle of loyalty.⁶⁷ Loyalty has indeed been held to be subsidiary to more specific Treaty provisions on the ground that its ‘wording’ is ‘so general that there

Implementing
regulations

Article 344
TFEU

Distinct
breach

⁵⁷ Para. 5, *Amsterdam Bulb* (Case 50/76) [1977] ECR 137

⁵⁸ Para. 6.

⁵⁹ Para. 7.

⁶⁰ Para. 8.

⁶¹ Para. 9.

⁶² Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau* [1995] ECR I-4069, paragraph 26; Case C-290/91 *Peter v Hauptzollamt Regensburg* [1993] ECR I-2981, the Court held (at paragraph 8

⁶³ Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau* [1995] ECR I-4069, paragraph 26

⁶⁴ *ibid.* For Member States obligations under Article 4(3) TEU related to compliance with regulation, see also -327/09 Judgment ECLI:EU:C:2011:249 14/04/2011 *Mensch und Natur*, para. 31

⁶⁵ Para. 169, *Commission v Ireland (MOX Plant)* (Case C-459/03) [2006] ECR I-4635

⁶⁶ E.g., failure to cooperate in the infringement procedure.

⁶⁷ Para 38, *Commission v Germany (Heavy Goods Vehicles)* (Case C-195/90) [1992] ECR I-3141; Para. 13, *Case C-48/89 Commission v Italy* [1990] ECR I-2425 *Commission v Belgium (Case C-374/89)* [1991] ECR I-367 Para. 43, *Commission v Greece (Market in Feed Grain)* (Case C-35/88) [1990] ECR I-3125

can be no question of applying' it 'independently when the situation concerned is governed by a specific provision of the Treaty',⁶⁸ or that it is sufficient to interpret a specific provision of the Treaties alone 'to provide the referring court with the reply that it needs'.⁶⁹ Furthermore, the application of Article 4(3) TEU in the available procedural avenues, such as infringement procedures against the Member States, is excluded when the particular infringement of EU law must be examined under a particular Treaty rule following a particular procedural avenue (i.e., under EU State aid law).⁷⁰ In a similar vein, the breach of the duty of sincere cooperation by not providing information to the Commission in infringement procedures will not lead to establishing the failure of the Member State concerned to meet its obligations when that procedure was launched in regards of another, more fundamental infringement (e.g., failure to transpose a directive).⁷¹ Finally, it needs to be mentioned that when distinct Treaty provisions regulate duties of sincere cooperation, such as Article 13(2) TEU concerning the cooperation of the EU institutions, the breach of those provisions will be examined independently.⁷²

Article 4(3) TEU may not provide in every circumstance judicially enforceable obligations, especially, when the EU policy in question is under construction. It was held in an early case that despite the fundamental relevance of an EU policy under development⁷³ and despite the obligation of cooperation between the Member States and the EU institutions to ensure the creation and maintenance of the conditions necessary for the development of the common policy, until the procedural framework laid down by the Treaties for the realisation of the common policy⁷⁴ is not put into operation, Article 4(3) TEU, read together with the relevant specific Treaty provision, allow the Member States⁷⁵ 'such freedom of decision that the obligation to contained in these provisions cannot confer on interested parties rights which the national courts would be bound to protect.'⁷⁶ It added, in particular, that a Council resolution, which is primarily an

Future policies

⁶⁸ Para. 19, *Compagnie Commerciale de l'Ouest and Others* (Joined cases C-78/90 to C-83/90) [1992] ECR I-1847 Para. 18, *Corsica Ferries* (Case C-18/93) [1994] ECR I-1783. See also para. 69, *Case C-392/02 Commission v Denmark* (Communities' own resources)

⁶⁹ Para. 30, *Dreessen* (Case C-31/00) [2002] ECR I-663

⁷⁰ Para. 16, *Commission v France* (National Agricultural Credit Fund) (Case 290/83) [1985] ECR 439

⁷¹ paras. 32-34, *Commission v Poland* (Case C-29/14) ECLI:EU:C:2015:379

⁷² See C-48/14 Judgment ECLI:EU:C:2015:91 12/02/2015 *Parliament v Council*

⁷³ Here, monetary policy to complete a single economic region in Europe. The Court suggested that in case the parities between the currencies of the various Member States do not remain fixed, the process of integration envisaged by the Treaties will be retarded or prejudiced, para. 39, *Schlüter* (Case 9/73) [1973] ECR 1135.

⁷⁴ Here, the procedures to be followed in order to coordinate the economic policies of Member States and to remedy an disequilibria in their balances of payments.

⁷⁵ Despite the duty imposed on each of them to regard the EU policy on rates of exchange as a matter of common concern.

⁷⁶ Para. 39, *Schlüter* (Case 9/73) [1973] ECR 1135.

expression of the future policy direction favoured by the Council and the government representatives of the Member States 'cannot for its part, either, by reasons of its content, create legal consequences of which parties might avail themselves in court.'⁷⁷

Article 4(3) TEU is not available under every framework of cooperation among the Member States. It was held that the obligation for cooperation in arrangements established by the Member States outside the Treaty framework⁷⁸ (here, European Schools) must be distinguished from the obligation of cooperation under the Treaties, which is governed by under Article 4(3) TEU.⁷⁹ Considering the broad scope of EU obligations, the Court added that such arrangements may fall under the scope of Article 4(3) TEU and violate the obligations regulated therein when they impede the implementation of the Treaties, or secondary EU legislation, or the functioning of the EU institutions.⁸⁰

In case the Member States cooperate outside the Treaty framework and their cooperation does not violate the provisions of the Treaty and/or contribute to attaining the objectives of the Treaty (e.g., the ESM Treaty), the violation of Article 4(3) TEU cannot be established.⁸¹

Obligations under Article 4(3) TEU cannot be enforced *contra legem* and in violation of the principle of legal certainty.⁸² In particular, the Member States cannot be required to impose on individuals obligations contained in legislation of general application which is not published in the Official Journal of the European Union in the official language of those States.⁸³ The Court of Justice held that the Member States cannot be made to bear the adverse effects of a failure by the Union administration to comply with its obligation to make available to those individuals, on the date of accession, the entire *acquis communautaire* in all the official languages of the Union.⁸⁴ It argued further that the knowledge of the person concerned of the applicable EU rules is not sufficient to make EU legislation which has not been properly published in the Official Journal of the European Union enforceable against an individual.⁸⁵ It also claimed that making EU legislation available through electronic means does not equate to a valid publication in the Official Journal of the European Union in the absence of

The scope

Legal certainty

⁷⁷Para. 40, Schlüter (Case 9/73) [1973] ECR 1135.

⁷⁸ They do not have a legal basis in the Treaties and are not part of the law created by the Union and derived from the Treaties, and, therefore, the provisions of the Treaties do not apply to them.

⁷⁹ Paras. 36-38, Hurd (Case 44/84) [1986] ECR 29

⁸⁰ Para. 39, Hurd (Case 44/84) [1986] ECR 29

⁸¹paras. 148-152, C-370/12 Judgment ECLI:EU:C:2012:756 27/11/2012 Pringle

⁸² *Infra n.*

⁸³ Para. 41, Skoma-Lux (Case C-161/06) [2007] ECR I-10841

⁸⁴Para. 42, Skoma-Lux (Case C-161/06) [2007] ECR I-10841

⁸⁵para. 46, Skoma-Lux (Case C-161/06) [2007] ECR I-10841

any rules in that regard in EU law and cannot make that form of making EU legislation available to be sufficient for it to be enforceable.⁸⁶

The principle of loyalty does not bind the Member States in the EU political (decision-making) process. The Court of Justice made it clear that under Article 4(3) TEU, the Council cannot be prevented from adopting a legislative measure on the basis of the attitude of the Member States within the Council at the time of the adoption of the measure in question, as ‘the defence by each Member State of its interests in the Council’ is manifestly outside the scope of that obligation.⁸⁷ It was also held that in the EU decision-making process the fact that a minority of Member States oppose the adoption of an EU measure does not vitiate that decision and entail its annulment.⁸⁸ It was added that Article 4(3) TEU has no effect on the choice of the legal basis of EU legal measure, and consequently, on the legislative procedure to be followed when adopting them.⁸⁹

In the *Commission v Council (State aid for agricultural land)* cases, the Commission was unsuccessful arguing that the political override by the Council of the Commission’s condemnation of the aid granted by the Member State concerned (extension of existing aid scheme granted by the Council) relieved that Member State ‘of the obligation of cooperation with the Commission’ and ‘undermined the results of the dialogue previously held between the Commission and that Member State’.⁹⁰ The Court of Justice held that despite the general obligation of cooperation between the Commission and the Member States under Article 108(1) TFEU, the fact that the Member State concerned did not make any specific commitment concerning the aid scheme authorised by the Council prevents the Council decision from being regarded as having relieved that Member State of a specific obligation of cooperation ‘in so far as it has not in any way

EU decision-making

Political override

The role of the Court of Justice

⁸⁶Paras. 48-50, *Skoma-Lux (Case C-161/06)* [2007] ECR I-10841

⁸⁷Paras. 51-53, *Portugal and Spain v Council (Joined cases C-63/90 and C-67/90)* [1992] ECR I-5073, the obligation was defined as the obligation of the Member States to guarantee the application and effectiveness of EU law and the duty of sincere cooperation attaching to the Council as an institution.

⁸⁸para. 66, *Portugal v Council (Textiles) (Case C-149/96)* [1999] ECR I-8395

⁸⁹para. 67, *Portugal v Council (Textiles) (Case C-149/96)* [1999] ECR I-8395. The same was held under Article 13(2) TEU concerning the duty of mutual sincere cooperation between the EU institutions: when the legal basis selected by the Council for an EU measure was lawful and appropriate, the criticised treatment of the Parliament in the legislative procedure under that legal basis is “solely a result of the choice made by the framers of the treaties and not from an infringement of the principle of sincere cooperation”, paras. 59-60, *Parliament v Council (Case C-48/14)* (ECLI:EU:C:2015:91) see, to that effect, judgment in *Parliament v Commission*, EU:C:2012:472, paragraph 82

⁹⁰C-121/10 Judgment ECLI:EU:C:2013:784 04/12/2013 *Commission v Council*; C-118/10 Judgment ECLI:EU:C:2013:787 04/12/2013 *Commission v Council*; C-117/10 Judgment ECLI:EU:C:2013:786 04/12/2013 *Commission v Council*; C-111/10 Judgment ECLI:EU:C:2013:785 04/12/2013 *Commission v Council*

undermined the results of the previous dialogue between the Commission and that Member State.⁹¹

The concrete principles and obligations resulting from Article 4(3) TEU were developed gradually in the case-law of the Court of Justice. However, the Court has often avoided an express reference to Article 4(3) TEU, or cited its previous judgments⁹² without making it explicit that the principles and rules involved are based on the loyalty principle or the corresponding Treaty Article.⁹³

There are significant results in the case law which have been incorporated into subsequent EU secondary legislation or Treaty⁹⁴ amendments. The principle, for instance, that conflicts between national courts and the European Commission in competition cases should be avoided was considered so important that it is now written into the principal competition law enforcement regulation, Regulation 1/2003, Article 16, which essentially embodies the principle stated in the judgment.⁹⁵

⁹¹ paras. 89-90, 95-96, 104-105; 88-89 respectively.

⁹² See for instance *Köbler v Republik Österreich* Case C-224/01 [2003] ECR and the case-law on the interpretation of equivalence and effectiveness principles, discussed below.

⁹³ Temple Lang, *Developments, Issues, and New Remedies...*, 1923

⁹⁴ See for instance Article 3(2) TFEU on the exclusive implied treaty-making powers of the EU.

⁹⁵ *Masterfoods* Case C-344/98 [2000] ECR I-11369, discussed below. Temple Lang, *The Duty of Cooperation of National Courts...* [n21], 35

3. Loyalty and the legislative discretion of the Member States

3.1 The influence of EU law

Article 4(3) TEU, just as other provisions of EU law, must be applied even in policy areas where the Member States retained their competences, or, in the absence of complete harmonisation in the field, the Member States regulate a particular area on their own.⁹⁶ The same applies in the case when EU rules leave the Member States to choose between various methods of implementation.⁹⁷ Beside the principle of loyalty, these include the principles of legal certainty and the protection of legitimate expectations, the principles of proportionality and non-discrimination, and they must respect fundamental rights.⁹⁸

In the area of criminal legislation and criminal procedural law, which ‘are matters for which the Member States are responsible’, EU law – including Article 4(3) TEU – can affect Member State legislative conduct.⁹⁹ Although the specific provisions of EU primary and secondary law may leave the competence of the Member States to address ‘criminal matters’ in the given common policy area unaffected, the Member States are obliged to ‘adjust their legislation in that area in order to ensure compliance with European Union law.’¹⁰⁰ In particular, the Member States are prevented from applying rules, ‘even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.’¹⁰¹

In this context, Article 4(3) TEU could require the Member States to avoid – in order to remedy the failure of the coercive measures adopted by them – introducing much harsher criminal penalties which risks jeopardising the

⁹⁶ Para. 13, *Criminal Proceedings against Hans van Lent* (Case C-232/01) [2003] ECR I-11525. By analogy Case C-121/00 *Hahn* [2002] ECR I-9193, paragraph 34

⁹⁷ Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, para. 35; *Joined Cases 201/85 and 202/85 Klensch and Others* [1986] ECR 3477, paragraph 10

⁹⁸ Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, para. 36

⁹⁹ para. 53, Case C-61/11 PPU *El Dridi* [2011] ECR I-0000 and para. 33, Case C-329/11 *Achughbabian*.

¹⁰⁰ Para. 54 and para. 33, respectively.

¹⁰¹ Para. 55 and para. 33, respectively. It follows both from the duty of loyalty of the Member States and from the requirements of effectiveness referred to in Directive 2008/115 that the obligation imposed on the Member States by Article 8 of that directive to carry out the removal must be fulfilled as soon as possible, para. 43, Case C-430/11 *Sagor* [ECLI:EU:C:2012:777]; para. 45, Case C-329/11 *Achughbabian*; Case C-61/11 PPU *El Dridi* [ECLI:EU:C:2011:268], para. 55 and Case C-38/14 *Zaizoune* [ECLI:EU:C:2015:260], para. 34. It is important that the national provisions applicable must not be capable of compromising the proper application of the common standards and procedures introduced by the said directive, para. 43, Case C-329/11 *Achughbabian*

attainment of the objective pursued by the original administrative act issued by them under EU law, when the use of coercive measures is subjected to the principles of proportionality and effectiveness in the applicable EU directive.¹⁰² Essentially, the criminal, or other coercive measure must not produce an outcome which contradicts the objective of the EU measure in question and undermines the effectiveness of its provisions requiring the Member States to introduce coercive measures in order to achieve that objective.¹⁰³ The Member States are, however, not precluded from adopting, with respect to the principles and objective of the applicable directive, provisions, which may be of criminal nature, regulating the situation in which the coercive measures envisaged by them have not resulted in the desired outcome.¹⁰⁴

3.2 Abstention obligations and pre-empting Member State action

Commission v Belgium (Case 85/85) [1986] ECR 1149

Under Article 4(3) TEU, the Member States must refrain from adopting any measure which is incompatible with the provisions of EU law.¹⁰⁵ (para. 22)

Municipal by-laws are also affected, (para. 23) and the availability of judicial review in national law is irrelevant (para. 24).

The latter was rejected on the ground that 'the existence of remedies available through the national courts cannot in any way prejudice the making' of infringement procedures 'since the two procedures have different objectives and effects'. (para. 24)

3.3 Unilateral conduct

Lord Bruce of Donington (Case 208/80) [1981] ECR 2205

While the Member States are entitled to tax incomes derived by the members of the European Parliament, under their obligations in Article 4(3) TEU they must not take measures which are likely to interfere with the proper internal functioning of the institutions of the EU which includes taxing the subsistence and travel expenses and allowances of MEPs which enables them to attend all the meetings and participate in all the activities of the Parliament and its organs. (paras. 13-15)

¹⁰² paras. 57-59, and Para. 44, Case C-430/11 Sagor ECLI:EU:C:2012:777

¹⁰³ See paras. 44-45, Case C-430/11 Sagor ECLI:EU:C:2012:777 and paras. 45-46, Case C-329/11 Achughbabian

¹⁰⁴ para. 60, Case C-61/11 PPU *El Dridi and para. 46*, Case C-329/11 Achughbabian.

¹⁰⁵ Here national measure compelling EU officials and other EU servants to register in population registers and attaching unfavourable consequences to non-registration.

Commission v Belgium (Case C-6/89) [1990] ECR I-1595

Under Article 4(3) TEU, the Member State are prevented from unilaterally interfering with the system adopted for financing the Union and apportioning financial burdens among the Member States (reducing the national salary paid to teaching staff seconded to European Schools and thereby increasing the EU's share of their financing). The connected technical ground is also relevant because of the unilateral conduct in breach of the duty of cooperation and assistance: the Member States may not plead provisions, practices or circumstances existing in its own legal system in order to justify a breach of EU obligations.

Hurd (Case 44/84) [1986] ECR 29

Under Article 4(3) TEU, the Member State are prevented from unilaterally interfering with the system adopted for financing the Union and apportioning financial burdens among the Member States (taxing the European supplement paid to member of the teaching staff of a European School which burdens the Union budget with the obligation to supplement the funds available to European Schools). This would be particularly problematic when other Member States followed similar practices as that 'would be an effective transfer of funds from the Community budget to the national budget, and the financial consequences would be directly detrimental to the Community.' (para. 41-45)

Here, the direct effect of Article 4(3) TEU was raised and rejected on the ground that the substance of the obligation to refrain from adopting unilateral measures that would interfere with the financing of the Union is not sufficiently precise; therefore, it is for each Member State to determine the method by which the illegal conduct is ceased. (paras. 46-48)

3.4 Freezing effect on national legislative discretion in a common policy framework (untaken EU measures)

France v United Kingdom (Sea Fisheries) (Case 141/78) [1979] ECR 2923

Under Article 4(3) TEU, the duty of cooperation applies in the development stage of a common policy, which is 'particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field (...) in which worthwhile results can only be attained thanks to the co-operation of all the member states.' (para. 8)

In particular, when in such circumstances a Member State introduces a unilateral measure that measure must first be notified to the other Member States and to the Commission. In case the adoption of the measure is subject to concrete obligations under EU law, those must also be observed (here, seeking the approval of the Commission and consulting the Commission at all stages of the procedure). (para. 9)

Commission v United Kingdom (Sea Fisheries) (Case 804/79) [1981] ECR 1045

(Ireland v Commission (Sea Fisheries) (Case 325/85) [1987] ECR 5041; Netherlands v Commission (Sea Fisheries) (Case 326/85) [1987] ECR 5091; Germany v Commission (Sea Fisheries) (Case 332/85) [1987] ECR 5143)

Under Article 4(3) TEU, when the Council fails to adopt the required measure, the Member States must facilitate the EU's accomplishment of its task and refrain from any measures likely to jeopardise the achievement of the aims of the Treaty. In particular, the Member States are imposed upon special duties of action and action in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Union action. (para 28)

This is the case, especially, in policy areas reserved to the powers of the Union, which cannot be undermined by measures adopted unilaterally by the Member States, and where the 'Member States may henceforth act only as trustees of the common interest',¹⁰⁶ where a Member State cannot, in the absence of appropriate action on the part of the Council, bring into force any interim (conservation) measures which may be required by the situation except as part of a process of collaboration with the responsible EU institution (here, the Commission) and with due regard to its general tasks (here, the task of supervision) or to the objectives, reservations or conditions which might be formulated by the EU institution in question (here, the Commission). (paras. 29-30)

In such cases, the available EU measures, 'as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers', imposes on the Member States 'not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.' (para. 31)

This process of cooperation between the Member States and the Commission can be 'confirmed by a practice which has been widely followed' in as much as the Commission has given its views on a large number of national (conservation) measures notified to it by the Member States and has put forward, where appropriate, reservations or conditions. (para. 32)

3.5 Freezing effect on national legislative discretion in a common policy framework (Member State conduct under the scope of EU competition law)

3.5.1 The general principle

Article 4(3) TEU (duty to cooperate) read together with Articles 101 and 102 TFEU imposes the following limitations on Member State conduct (in order

¹⁰⁶ This means that if an EU measure envisages supplementary EU measures, and none have yet been adopted, Article 4(3) TEU requires Member States to adopt measures on behalf of the EU even if Member States no longer have powers of their own to adopt national measures. (Temple Lang, Community Constitutional Law..., p. 658)

to ensure the full and uniform application of EU law and the effectiveness of its implementing measures).¹⁰⁷

- Articles 101 and 102 TFEU can 'require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings';¹⁰⁸
- Articles 101 and 102 TFEU prevent the Member States to require or encourage ('favour') the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or to reinforce their effects, or to divest their own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.¹⁰⁹

The measure must, however, fall within the scope of Article 101 or 102 TFEU and/or must not be permitted by a parallel EU policy/prescribed by EU legislation¹¹⁰ (e.g., compulsory sectoral pension fund, or national rules freezing the prices of products subject to EU legislation).¹¹¹

It must be established that the national measure in question has the effect described in the general principle. For example,

- the fixing in legislation tariffs/retail price does not entail that the undertakings affected were required or encouraged to participate in anti-competitive conduct;

¹⁰⁷ Para. 11, *Criminal Proceedings against José António Batista Morais* (Case C-60/91) [1992] ECR I-2085 In para. 47, *Consorzio Industrie Fiammiferi (CIF)* (Case C-198/01) [2003] ECR I-8055 it was suggested that it also has a Treaty (in the post-Maastricht TEC) base in the Treaty provisions requiring that in the context of their economic policy the activities the Member States observe the principle of an open market economy with free competition

¹⁰⁸Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20; and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 34; para. 45, *Consorzio Industrie Fiammiferi (CIF)* (Case C-198/01) [2003] ECR I-8055(para. 29, *Mauri* (Case C-250/03 [2005] ECR I-1267para. 46, *Cipolla* (Joined cases C-94/04 and C-202/04) [2006] ECR I-11421 Para. 22, *Criminal Proceedings against André Marchandise et al* (Case C-332/89) [1991] ECR I-1027 Para. 65, *Albany International* (Case C-67/96) [1999] ECR I-5751 Para. 16, *Cullet* (Case 231/83) [1985] ECR 305 Para. 144, *Gebrüder Reiff* (Case C-185/91) [1993] ECR I-5801; *Yellow Cab Verkehrsbetrieb* (Case C-338/09) ECLI:EU:C:2010:814; Case C-393/08 *Sbarigia* [2010] ECR I-6337, para. 31; *SOA Nazionale Costruttori* Case C-327/12 ECLI:EU:C:2013:827, para. 37; C-162/12 *Airport Shuttle Express* ECLI:EU:C:2014:74, para. 37

¹⁰⁹para. 30, *Mauri* (Case C-250/03 [2005] ECR I-1267para. 47, *Cipolla* (Joined cases C-94/04 and C-202/04) [2006] ECR I-11421 para. 46, *Consorzio Industrie Fiammiferi (CIF)* (Case C-198/01) [2003] ECR I-8055 *Van Eycke*, paragraph 16; *Reiff*, paragraph 14; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; *Centro Servizi Spediporto*, paragraph 21; and *Arduino*, paragraph 35 Para. 22, *Criminal Proceedings against André Marchandise et al* (Case C-332/89) [1991] ECR I-1027 Para. 65, *Albany International* (Case C-67/96) [1999] ECR I-5751 Para. 144, *Gebrüder Reiff* (Case C-185/91) [1993] ECR I-5801; *SOA Nazionale Costruttori* Case C-327/12 ECLI:EU:C:2013:827, para. 38; C-184/13 *API* ECLI:EU:C:2014:2147 paras 28 to 38

¹¹⁰ In this case, the breach of Article 4(3) TEU is more likely to be established in connection with the special EU rules in question, para. 30, *Hans Buys*.

¹¹¹paras. 56-58, *Maatschappij Drijvende Bokken* (Case C-219/97) [1999] ECR I-6121, para. 30, *Procureur Général v Hans Buys et al* (Case 5/79) [1979] ECR 3203

- the participation of professional organisations in the regulatory process or , the fixing of tariffs in ‘tariff boards’ by tariff experts appointed by the minister as proposed by trade organisations does not mean that they are called upon to negotiate and conclude agreements on prices;
- the involvement of economic operators in some aspects of the regulatory process or the participation in ‘tariff boards’ of tariff experts recommended by trade organisations to be appointed by the minister does not entail that public powers (for fixing tariffs) were delegated to private economic operators;
- the obligation of fixing of retail prices does not confer a dominant position of class of traders in so far as those rules do not interfere with the freedom of each of those traders to determine those prices independently;
- no delegation of public powers to economic operators took place as the powers were available to the authorities on the basis of an official legislative instrument.

SA G.B.-INNO-B.M. v Association des Détaillants en Tabac (ATAB) (Case 13/77) [1977] ECR 2115

It is for the national court to assess the national measures (here, fixing of retail prices) having regard to all the conditions for the application of the relevant provisions of EU law, in particular, whether the undertakings concerned (here, tobacco manufacturers and importers) are in a dominant position and whether they can oblige other undertakings (here, retailers) to adhere to the prices for sale to consumers. (paras. 36-37)

The national court must also assess, taking into account the obstacles to trade generated, the legal conditions whether the measure as such is capable of affecting trade between the Member States. (para. 38)

Leclerc (Case 229/83) [1985] ECR

The obligations arising from these Treaty provisions are not specific enough to preclude the Member States from enacting legislation of the type at issue on competition in an economic sector (here, price fixing in book retail), provided that such legislation is consonant with the other specific Treaty provisions (e.g., the provisions on the fundamental freedoms).¹¹² (para. 20)

Van Eycke (Case 267/86) [1988] ECR 4769

The national measure may be regarded as intended to reinforce anti-competitive conduct ‘only if it incorporates either wholly or in part the terms of agreements concluded between undertakings and requires or encourages compliance on the part of those undertakings.’ A significant indirect inducement to comply with the legal measure in question is alone insufficient when no evidence is available as to the measure confirming anti-competitive practices. This is for the national court to establish

¹¹² This interpretation has been confirmed in *Echirolles Distribution SA v Association du Dauphine* Case C-9/99 [2000] ECR. 1-8207, para. 24

through the collection of evidence. (para. 18)

Yves Aubert (Case 136/86) [1987] ECR 4789

A ministerial order which makes an agreement which violates Article 101 TFEU generally binding will not be permitted. (para. 25)

Syndicat des Libraires de Normandie v L'Aigle Distribution (Case 254/87) [1988] ECR 4457

The question whether the conduct constituted a violation of Article 101 or 102 TFEU is a question of fact the assessment of which, in this context, is a matter for the national court. (para. 13)

4. The effective enforcement of EU law at the national level

In this domain, Member State obligations find their origin in the Court of Justice's jurisprudence variably in Article 4(3) TEU and in other principles or more concrete legal provisions of EU law. Often, they would be based on legal principles (e.g. the right to effective judicial protection) which have gained recognition in EU law independent from to core obligations of Article 4(3) TEU. The different legal bases can be listed and combined in a single judgment so as to provide a more rounded footing for the legal obligation imposed on the Member States (e.g., *Francovich*). The different demands addressed to the Member States, nonetheless, share common features. They require in the different areas of domestic law and administration the effective enforcement of EU obligations and the effective (judicial) protection of rights provided to individuals by EU law.

There are multiple examples of the effective enforcement obligation being imposed in various forms on the Member States without reference to Article 4(3) TEU: concerning national remedies,¹¹³ or the right to effective judicial protection.¹¹⁴ It is not, however, excluded that the obligation of (right to) judicial and effective legal protection of an individual's rights under EU law is based on Article 4(3) TEU,¹¹⁵ which could be read together with the obligation on providing effective remedies under Article 19(1) TEU.¹¹⁶ The obligations of the Member State under EU directives could follow directly from what is now Article 288 TFEU,¹¹⁷ or from Article 288 TFEU combined with Article 4(3) TEU.¹¹⁸ In the majority of cases, the direct effect of provisions of directives and their primacy over conflicting national legislation is based on the preceding jurisprudence of the Court of Justice establishing

¹¹³Case C-268/06 *Impact* [2008] ECR I-2483, paras. 44 and 45 46

¹¹⁴ Case C-432/05 *Unibet* [2007] ECR I-2271, para. 44, and Case C-268/06 *Impact* [2008] ECR I-2483, para. 54.

¹¹⁵para. 58, C-235/09 Judgment ECLI:EU:C:2011:238 12/04/2011 DHL Express France with reference to the provisions of the relevant EU measure requiring the Member States to provide for the measures, procedures and remedies necessary to ensure the enforcement of the rights provided by that EU measure.

¹¹⁶para. 52, C-404/13 Judgment ECLI:EU:C:2014:2382 19/11/2014 ClientEarth

¹¹⁷Para. 20, *Ratti* (Case 148/78) [1979] ECR 1629 and para. 8, *Kolpinghuis Nijmegen* (Case 80/86) [1987] ECR 3969 based on the binding effect prescribed to directives by Article 288 TFEU. The same reasoning also led to excluding the horizontal direct effect of directives as the binding effect of directives is recognised in Article 288 TFEU only in connection with the Member States, para. 9, para. 8, *Kolpinghuis Nijmegen* (Case 80/86) [1987] ECR 3969.

¹¹⁸ Article 288 TFEU provides that directives are binding, as to the result to be achieved, upon each Member State to which they are addressed. It follows from this binding effect of directives and the obligation of cooperation laid down in Article 4(3) TEU that the Member State to which a directive is addressed cannot evade the obligations imposed by the directive in question, para. 22, *Moormann* (Case 190/87) [1988] ECR 4689.

these principles.¹¹⁹ The jurisprudence could also rely on a general requirement of effectiveness¹²⁰ and on the principle that the Member States cannot rely against individuals on their own failure to honour obligations which a directive entails.¹²¹

In determining Member State obligations, EU law operates with a general requirement of effectiveness.¹²² National courts, in particular, are called upon, within the exercise of their jurisdiction, to apply and give full effect of provisions of EU law and to refuse to apply any provision of national law which is contrary to EU obligations,¹²³ in doing which they will have to take due account of the principle of the retroactive application of the more lenient penalty.¹²⁴ It is also expressed in formulas such as the executive force of EU law 'cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty' and 'giving rise to discrimination prohibited' in the Treaties,¹²⁵ or that it is for all the authorities of the Member States to ensure observance of the rules of EU law within the sphere of their competence.¹²⁶

Member State obligations in the implementation of EU obligations are summarised in the following judgment.

AIMA (Joined cases C-231/00, C-303/00 and C-451/00) [2004] ECR I-2869

It is for the Member States 'to ensure that Community rules are implemented within their territories. In so far as Community law, including its general principles, does not include common rules to that effect then, when the national authorities implement Community rules, they are to act in accordance with the procedural and substantive rules of their own national law'. (para. 56)

'Nevertheless, when adopting measures to implement Community legislation, national authorities must exercise their discretion in compliance with the general rules of Community law, which include the principles of proportionality, legal certainty and the protection of legitimate expectations.'¹²⁷ (para. 57)

¹¹⁹ Para. 23, *Moormann* (Case 190/87) [1988] ECR 4689; para. 7, *Kolpinghuis Nijmegen* (Case 80/86) [1987] ECR 3969; Case 8/81 *Becker* [1982] ECR 53.

¹²⁰ The effectiveness of the obligations laid down in a directive would be weakened if persons were prevented from relying on it on legal proceedings and national courts prevented from taking it into consideration as an element of EU law, para. 21, *Ratti* (Case 148/78) [1979] ECR 1629.

¹²¹ Para. 22, *Ratti* (Case 148/78) [1979] ECR 1629 and para. 8, *Kolpinghuis Nijmegen* (Case 80/86) [1987] ECR 3969.

¹²² *Supra n.*

¹²³ para. 61, C-61/11 PPU Judgment ECLI:EU:C:2011:268 28/04/2011 El Dridi

¹²⁴ *ibid.* Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59

¹²⁵ *Costa v ENEL* (Case 6/64) [1964] ECR 585

¹²⁶ see Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13; para. 20, *Kühne & Heitz NV* (Case C-453/00) [2004] ECR-837

¹²⁷ Implementation of EU directive or implementation of Treaty obligations directed to the Member States (e.g., under Article 325 TFEU protecting the financial interest of the EU)

The use of the discretion available to the Member States will be assessed in light of the wording and purpose of the relevant EU provisions (here an EU regulation), the objectives and the general scheme of the relevant EU legal framework, and of the general principles of EU law. (para. 58)

The obligations of national courts in the application of EU law were summarised in the following judgment.

Filipiak (Case C-314/08) [2009] ECR I-11049

A national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.¹²⁸ (para 81)

Pursuant to the principle of the primacy of EU law, a conflict between a provision of national law and a directly applicable provision of the Treaty is to be resolved by a national court applying EU law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State. (para. 82)

The incompatibility with EU law of a subsequently adopted rule of national law does not have the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by EU law.¹²⁹ (para. 83)

In particular, the deferral by the Member State organ with the competence to make such declarations (here, national constitutional court) of the date on which the national provision at issue will lose its binding force does not prevent lower national courts from respecting the principle of primacy of EU law and from declining to apply that measure in the proceedings before them, if they find that measure to be contrary to EU law. (para. 84)

In earlier rulings, it was also made clear that direct effect and supremacy, as applied in national law,¹³⁰ are alone insufficient to ensure that the Member States meet their obligations under EU law because the contested national

must comply with the EU Charter of Fundamental Rights, *Akerberg Fransson*, Judgment of 26 February 2013, (Case C-617/10) nyr, paras. 27-28.

¹²⁸ see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 61; and Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 138

¹²⁹ Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 21)

¹³⁰ Here, by the national constitutional court.

provisions remain part of national law. In the Court of Justice's reasoning, direct effect and supremacy 'do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law' as 'the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law.'¹³¹

4.1 The general principle governing the obligations of national courts

The principle of cooperation following from the Article 4(3) TEU requires the national courts to ensure 'the legal protection which citizens derive from the direct effect of the provisions of Community law.'¹³² In the absence of EU rules, it is for the domestic legal system of each Member State 'to designate the competent courts having jurisdiction and to determine the procedural rules/conditions governing procedures designed to ensure' that legal protection (intended to fully safeguard the rights which individuals derive from EU law.¹³³ In another formulation, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from EU law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court of Justice to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on EU law may give rise in the national judicial system.¹³⁴

4.2 National courts and their duty of interpretation under EU law

Von Colson (Case 14/83) [1984] ECR 1891

(para. 12, Kolpinghuis Nijmegen (Case 80/86) [1987] ECR 3969)

Under Article 4(3) TEU, read together with Article 288 TFEU, national courts in applying national law and, in particular, the provisions of national law specifically introduced in order to implement a directive are required to

¹³¹ Para. 12 *Commission v Italy (Recovery of Undue Payment)* (Case 104/86) [1998] ECR 1799

¹³² *Rewe* (Case 33/76) [1976] ECR 1989; *Comet* (Case 45/76) [1976] ECR 2043; Para. 19, *Factortame* (Case C-213/89) [1990] ECR I-2433; *Case 811/79 Ariete SpA v Amministrazione delle finanze dello Stato ((1980))* ECR 2545 and *Case 826/79 Mireco v Amministrazione delle finanze dello Stato ((1980))* ECR 2559

¹³³ *Rewe* (Case 33/76) [1976] ECR 1989; *Comet* (Case 45/76) [1976] ECR 2043; para. 42, *Francovich* (Joined cases C-6/90 and C-9/90) [1991] ECR I-5357; *Case 60/75 Russo v AIMA* [1976] ECR 45, *Case 158/80 Rewe v Hauptzollamt Kiel* [1981] ECR 1805

¹³⁴ Para. 35, *Connect Austria* (Case C-462/99) [2003] ECR I-5197; Para. 40 *Dorsch Consult Case (C-54/96)* [1997] ECR I-4961; para. 22 *Case C-76/97 Tögel v Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357; *Case 179/84 Bozzetti v Invernizzi* [1985] ECR 2301, paragraph 17, and *Case C-258/97 HI* [1999] ECR I-1405, paragraph 22;

interpret their national law in the light of the wording and purpose of the directive in order to achieve the result referred to in Article 288 TFEU¹³⁵. (para. 6)

Mücksch (Case C-53/10) EU:C:2011:585

The principle of interpreting national law in conformity with EU law imposed by EU law requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive at issue. (para. 33)

Kolpinghuis Nijmegen (Case 80/86) [1987] ECR 3969

This obligation of national courts is, however, limited by the general principles of law and, in particular, the principles of legal certainty and non-retroactivity. Therefore, the duty of interpretation cannot have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the directive in question. (para. 13)

This obligation of national courts applies both before and after the expiry of the period prescribed for the implementation of the directive in question. (Para. 15)

Pupino (Case C-105/03) [2005] ECR I-5285

In order to ensure that the Union is able to fulfil its tasks, Article 4(3) TEU must apply in former non-Community pillars, in the area of police and judicial cooperation in criminal matters based on cooperation between the Member States and the EU institutions. (para. 42)

It, therefore, requires national courts to interpret national law as far as possible in the light of the wording and purpose of EU framework decisions in order to attain the result which it pursues and thus comply with the Treaties. (para. 43)

This is, however, limited by the general principles of law, in particular, by the principles of legal certainty and non-retroactivity, which prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law. (paras. 44-45)

The obligation of national courts when national law cannot receive an application which would lead to a result compatible with that envisaged by the EU framework decision in question (cannot serve as the basis for an interpretation of national law *contra legem*). That principle does, however, require that, where necessary, the national court consider the whole of

¹³⁵ To ensure, for matters within its jurisdiction, the full effectiveness of European Union law when it determines the dispute before it, para. 32, C-53/10 Judgment
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national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision. (para. 47)

Connect Austria (Case C-462/99) [2003] ECR I-5197

(Paras. 40-44 Dorsch Consult Case (C-54/96) [1997] ECR I-4961; paras. 22-27, Case C-76/97 Tögel v Niederösterreichische Gebietskrankenkasse [1998] ECR I-5357 paras. 22, Hospital Ingenieure (Case C-258/97) [1999] ECR I-1405)

Under Article 4(3) TEU, national courts, when applying national law, whether adopted before or after an EU directive, must interpret that law, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view.¹³⁶ (para. 38)

That obligation requires the national court to determine whether domestic law establishes suitable mechanisms to recognise the right of individuals to appeal against decisions of the national regulatory authority. In circumstances such as those in the main proceedings, the national court is required in particular to determine whether that right of appeal may be exercised before the court or tribunal competent to review the lawfulness of actions taken by the public authorities. (para. 39)

In case the application of national law in accordance with the requirements of a directive is not possible, the national court must fully apply EU law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would, in the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied.¹³⁷ (para. 40)

This also applies for provisions of national procedural law preventing national courts by excluding their competence to comply with a directive. (para. 41)

Dorsch Consult Case (C-54/96) [1997] ECR I-4961

(paras. 22-27, Case C-76/97 Tögel v Niederösterreichische Gebietskrankenkasse [1998] ECR I-5357 paras. 22, Hospital Ingenieure (Case C-258/97) [1999] ECR I-1405)

In case the Member State has failed to designate a body competent to hear appeals in relation to legal matters regulated in a directive (here, public service contracts), individuals must be allowed to rely in law on that directive against the defaulting Member State. Although this is only a minimum guarantee and it does not justify the Member State concerned absolving itself from taking in due time the implementing measures sufficient to meet the purpose of each directive (i.e., it is not a full replacement for the measure the Member State has failed to implement), it may 'have the effect of enabling individuals to rely, as against a Member

¹³⁶Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 26; *EvoBus Austria*, cited above, paragraph 18; *HI*, cited above, paragraph 25; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraphs 38 and 39 Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26; para. 34, Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661

¹³⁷*Engelbrecht*, paragraph 40 'lead to a result contrary to Community law'.

State, on the substantive provisions' of the Directive in question (i.e., despite the missing procedural avenue envisaged by the directive, it substantive provisions can be made effective though their enforcement against the Member State concerned). (para. 44)

As an alternative, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred. (para. 45)

EvoBus Austria (Case C-111/97) [1998] ECR I-5411

That obligation requires the national court to determine whether the relevant provisions of domestic law allow recognition of a right for individuals to review in relation to awards of public service contracts in the water, energy, transport and telecommunications sectors. In circumstances such as those in point in the main proceedings, the national court is required in particular to determine whether that right to review may be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts. (para. 19)

As an alternative, when express provisions of national law prevent the interpretation of domestic law in conformity with the directive in question, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred. (paras. 21-22)

Engelbrecht (Case C-262/97) [2000] ECR 7321

That obligation requires the national court to determine whether the relevant provisions of domestic law allow recognition of a right for individuals to review in relation to awards of public service contracts in the water, energy, transport and telecommunications sectors. In circumstances such as those in point in the main proceedings, the national court is required in particular to determine whether that right to review may be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts. (para. 19)

As an alternative, when express provisions of national law prevent the interpretation of domestic law in conformity with the directive in question, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred. (paras. 21-22)

4.3 The obligation to review final administrative and judicial decisions

By virtue of Article 4(3) TEU, all the authorities of the Member States, including the administrative and judicial bodies, must ensure the observance of the rules of European Union law within the sphere of their competence.¹³⁸

Kühne & Heitz NV (Case C-453/00) [2004] ECR-837

(paras. 51-53, i-21Germany GmbH and Arcor AG & Co. K G (Joined cases C-392/04 and C-422/04) [2006] ECR I-8559)

Being obliged to apply EU law in their sphere of competence as interpreted by the Court of Justice in a preliminary ruling procedure, which interpretation provides 'the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force', to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation, national administrative authorities following Article 4(3) TEU must review, where an application for such review is made to it, final administrative decisions in order to take account of that interpretation by the Court. It is for the national administrative authority to determine to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question. (paras. 12-22, 25, 27)

This is not an absolute obligation as legal certainty is a general principle of EU law which protects the finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies. (para. 24)

(In accordance with the principle of legal certainty, EU law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, para. 51, i-21Germany GmbH and Arcor AG & Co. K G (Joined cases C-392/04 and C-422/04) [2006] ECR I-8559. The Kühne & Heitz obligation is a limit to this principle in certain cases, para. 52)

The conditions of meeting this obligation are (para. 26):

- under national law it has power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

i-21Germany GmbH and Arcor AG & Co. K G (Joined cases C-392/04 and C-422/04) [2006] ECR I-8559

The Kühne & Heitz obligation does not apply when all legal remedies available have not been exhausted, for instance, when the person

¹³⁸ Case C-2/06 Kempster [2008] ECR I-411, para. 34 and the case-law cited; C-91/08 Wall ECLI:EU:C:2010:182, para. 69

concerned did not avail itself of the right to appeal against the administrative decision. (para. 53)

In such circumstances, the obligation of administrative authorities to review final administrative decisions (the obligation of national courts to acknowledge, in order to safeguard the rights which individuals derive from EU law, the existence of such an obligation on the part of the administrative authority) is determined on the basis of the general legal principles applicable to national remedies and procedures. (paras. 56-69)

This entails that the obligation of national administrative authorities to withdraw administrative decisions can be based on the principles of national law governing those powers of national administrative authorities. In case those powers can be exercised on the ground that the administrative decision is manifestly incompatible with domestic law, they must be available when the decision is manifestly incompatible with EU law. (para. 69)

It is for the national court to ascertain whether legislation which is clearly incompatible with EU law constitutes manifest unlawfulness within the meaning of the national law concerned. (para. 71)

If that is the case, it is for the national court to draw the necessary conclusions under its national law with regard to the withdrawal of the administrative decisions in question. (para. 72)

Kempter (Case C-2/06) [2008] ECR I-411

It cannot be inferred from *Kühne & Heitz* that, for the purposes of the third condition established by that judgment, the parties must have raised before the national court the point of Community law in question. In order for that (third) condition to be satisfied, it is sufficient if either the point of Community law the interpretation of which proved to be incorrect in light of a subsequent CJEU judgment was considered by the national court ruling at final instance or it could have been raised by the latter of its own motion. (para. 44)

Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. Nevertheless, the Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law (as interpreted subsequently by the Court) to be made to the competent administrative authority within a reasonable period, in a manner consistent with the Community principles of effectiveness and equivalence. (paras. 59-60)

Kapferer (Case C-234/04) [2006] ECR I-2585

Having regard to the general legal principle of *res judicata*, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law by the decision at issue. (paras. 20-21)

This is not affected by the obligation laid down in *Kühne & Heitz* on national authorities to review final administrative decisions as that obligation comes with the condition, *inter alia*, that the national authority in

question should be empowered under national law to reopen that decision, which condition needs to be satisfied. (para. 23)

Byankov (C-249/11) EU:C:2012:608

In case national legislation (i) prevents citizens of the Union from asserting the right conferred on them by Article 21 TFEU to move and reside freely against absolute territorial prohibitions that have been adopted for an unlimited period and (ii) prevents administrative bodies (since the administrative procedure, which has become final, may be reopened only in narrowly defined circumstances) from acting upon a body of case-law whereby the Court has confirmed the illegality, under EU law, of such prohibitions, cannot reasonably be justified by the principle of legal certainty and must therefore be considered, in this respect, to be contrary to the principle of effectiveness and to Article 4(3) TEU. (para. 81)¹³⁹

It can be seen from the case-law¹⁴⁰ that, in defining the scope of obligation to review final administrative decisions, the Court has taken account of the particular features of the situations and interests at issue in order to strike a balance between the requirement for legal certainty and the requirement for legality under EU law. (para. 77)

4.4 National remedies

Rewe (Case 33/76) [1976] ECR 1989 and Comet (Case 45/76) [1976] ECR 2043

The conditions of national courts providing legal protection of rights derived from EU law:¹⁴¹

- the procedural conditions in national law cannot be less favourable than those relating to similar actions of a domestic nature;
- the procedural conditions and time limits must not make it impossible in practice to exercise the rights which the national courts are obliged to protect.¹⁴² (para. 5)

Giving effect to general legal principles, such as legal certainty, in national procedural law (e.g., reasonable periods of procedural time-limits) cannot be criticised.

¹³⁹ See also Case C-2/08 Fallimento Olimpiclub [2009] ECR I-7501, paras. 30 and 31

¹⁴⁰ See in particular Kühne & Heitz, paras. 25 and 26; i-21 Germany and Arcor, paras. 53, 63 and 64; Kempter, paras. 46, 55 and 60; and Fallimento Olimpiclub, paras. 22, 26 and 31

¹⁴¹ Para. 43, Francovich (Joined cases C-6/90 and C-9/90) [1991] ECR I-5357 the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

¹⁴² See also Case C-312/93 Peterbroeck [1995] ECR I-4599, para. 12; and Case C-416/10 Križan and Others [2013] ECR, para. 85; C-93/12 Agroksulting-04 ECLI:EU:C:2013:432 para. 36

Factortame (Case C-213/89) [1990] ECR I-2433 (interim relief)

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law.¹⁴³ (para. 20)

The full effectiveness of EU law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by EU law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule. (para. 21)

The effectiveness of preliminary ruling procedures would also be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice. (para. 22)

Kofisa Italia (Case C-1/99) [2001] ECR I-207 (right to effective judicial protection) (interim relief)

Under Article 4(3) TEU, in connection with the right to effective judicial protection under EU law before national courts, the national courts in exercising their powers of judicial control of administrative authorities must ensure the legal protection which persons derive from the direct effect of provisions of EU law. (paras. 46-47)

In particular, they must be able to suspend the implementation of a decision of a national administrative authorities, despite the restrictive regulation of those powers in national law, as 'a court seised of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.' (para. 48)

Francovich (Joined cases C-6/90 and C-9/90) [1991] ECR I-5357 (tort liability)

Under Article 4(3) TEU, among the other available legal bases, the Member States are obliged to make good for losses and damages as a result of breaches of EU law for which the Member States can be held responsible. The obligations of the Member States under Article 4(3)

¹⁴³ Paras. 22-23, *Case 106/77 Amministrazione delle finanze dello Stato v Simmenthal SpA* ((1978)) ECR 629

include the obligation to nullify the unlawful consequences of a breach of EU law. (para. 36)¹⁴⁴

Inter-Environnement Wallonie and Terre wallonne (Case C-41/11) EU:C:2012:103 (tort liability)

The obligation to nullify the unlawful consequences of a breach of EU law is owed, within the sphere of its competence, by every organ of the Member State concerned. (para. 43)¹⁴⁵

Brasserie/Factortame Joined cases C-46/93 and C-48/93 [1996] ECR I-1029 (tort liability)

The obligation to cooperate under Article 4(3) TEU was regarded besides the twin principle of the full effectiveness of EU law and the effective protection of rights derived from EU law, which both are “principles inherent in the Community legal order, as the broader principled basis of the conditions of state liability. (para. 39)

Köbler v Republik Österreich Case C-224/01 [2003] ECR

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules, the full effectiveness of these rules would be called in question and the protection of individual rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of EU law attributable to a decision of a court of a Member State adjudicating at last instance. Therefore, individuals must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of their rights derived from EU rules owing to a decision of a court adjudicating at last instance. (paras. 33 and 36)

Courage v Crehan Case C-453/99, [2001] E.C.R. 1-6297

The full effectiveness of Article 101 TFEU would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition, even if the claimant was a party to the contract. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. (paras. 26 and 27)

However, Community law does not preclude, provided that the principles of equivalence and effectiveness are respected, national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party.

¹⁴⁴ See also Case C-420/11 Leth (EU:C:2013:166) para. 37; Wells, paras. 66 to 69.

¹⁴⁵ See also case C-8/88 Germany v Commission [1990] ECR I-2321, para. 13; Wells, para.

A litigant should not profit from his own unlawful conduct, where this is proven. (para. 31)

4.5 Penalties introduced within national discretion for the breach of EU law

4.5.1 The general principle

Article 4(3) TFEU requires the Member States to introduce sanctions for breaches of provisions of EU legislation (directives and regulations) where the EU measure ‘does not specifically provide for any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions.’¹⁴⁶

The Member States, ‘while the choice of penalties remains within their discretion’,¹⁴⁷ ‘must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.’¹⁴⁸

¹⁴⁶ Para. 23, *Case 68/88 Commission v Greece* [1989] ECR 2965; *Case C-213/99 de Andrade* [2000] ECR I-11083, paragraph 19; *Case C-36/94 Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573 (which concerned regulations), para. 20; *Case C-382/92 Commission v United Kingdom* [1994] ECR I-2435 (which concerned directives), para. 55; Criminal Proceedings against Maria Amélia Nunes and Evangelina de Matos (Case C-186/98) [1999] ECR I-4883, para. 9; Para. 58, Criminal Proceedings against Syuichi Yonemoto (Case C-40/04) [2005] ECR I-7755; para. 14, Joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and others* [1996] ECR I-1435; para. 40, *Commission v United Kingdom (Collective Redundancies)* (Case C-383/92) [1994] ECR I-2479; Para. 55, *Commission v United Kingdom (Employees Rights)* (Case C-382/92) [1994] ECR I-2435; *Case C-7/90 Vandevenne and Others* [1991] ECR I-4371, paragraph 11 para. 46, *Commission v Ireland* Case C-354/99 ECLI:EU:C:2001:550; Criminal proceedings against André Allain and Steel Trading France SARL, Case C-341/94 ECLI:EU:C:1996:356, para. 24. It requires ‘the Member States to take all measures necessary to guarantee the application and effectiveness of Community law’.

¹⁴⁷ In the early jurisprudence, it was recognised that the “Member States are competent to adopt such sanctions as appear to them to be appropriate.”, para. 33, *Amsterdam Bulb* (Case 50/76) [1977] ECR 137

¹⁴⁸ Para. 24, *Case 68/88 Commission v Greece* [1989] ECR 2965; *Case C-213/99 de Andrade* [2000] ECR I-11083, paragraph 19; *Case C-36/94 Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573 (which concerned regulations), para. 20; *Case C-382/92 Commission v United Kingdom* [1994] ECR I-2435 (which concerned directives), para. 55; Criminal Proceedings against Maria Amélia Nunes and Evangelina de Matos (Case C-186/98) [1999] ECR I-4883, paras. 10-11; Para. 60, Criminal Proceedings against Syuichi Yonemoto (Case C-40/04) [2005] ECR I-7755; para. 14, Joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and others* [1996] ECR I-1435; para. 40, *Commission v United Kingdom (Collective Redundancies)* (Case C-383/92) [1994] ECR I-2479; Para. 55, *Commission v United Kingdom (Employees Rights)* (Case C-382/92) [1994] ECR I-2435; *Case C-7/90 Vandevenne and Others* [1991] ECR I-4371, paragraph 11 Para. 46, *Commission v Ireland*

In the absence of EU harmonisation in the field, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with EU law and its general principles, and consequently with the principle of proportionality.¹⁴⁹

4.5.2 Introducing adequate penalties

Under Article 4(3) TEU, sanctions that lack practical effect and deterrent value will not be accepted, especially, when the person will only be penalised (and only to that extent) when the penalty imposed exceeds the sums which he is otherwise required to pay.¹⁵⁰

4.5.3 Introducing dissuasive penalties

The severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality.¹⁵¹

4.5.4 Introducing proportionate penalties

Following the general requirements, the national penalties introduced must ensure that they provide less restrictive alternatives (i.e., the most restrictive penalty is not the only penalty available) and that they are not imposed in contravention with EU law (i.e., for the breach of time-limits which contradicts similar rules laid down in EU law, or in order to achieve an administrative aim which is incompatible with the EU law framework).¹⁵²

4.5.5 Introducing penalties which are comparable to those applicable in national law

As to the requirement of imposing penalties or determining their amount under conditions which are comparable to those applicable under national

Case C-354/99 ECLI:EU:C:2001:550; Criminal proceedings against André Allain and Steel Trading France SARL, Case C-341/94 ECLI:EU:C:1996:356, para. 24; Kušionová Case C-34/13 [ECLI:EU:C:2014:2189], para. 59.

¹⁴⁹ Para. 20, De Andrade (Case C-213/99) [2000] ECR I-11083; para. 21, Case C-36/94 *Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573

¹⁵⁰ Paras. 41-42, *Commission v United Kingdom (Collective Redundancies)* (Case C-383/92) [1994] ECR I-2479 (here, the penalty may be set off in full or in part against any amounts otherwise payable); Paras. 56-57, *Commission v United Kingdom (Employees Rights)* (Case C-382/92) [1994] ECR I-2435.

¹⁵¹ Para. 45, C-565/12 Judgment ECLI:EU:C:2014:190 27/03/2014 LCL Le Crédit Lyonnais; Case C-418/11 *Texdata Software* [2013] ECR, paragraph 51

¹⁵² Paras. 21-23, De Andrade (Case C-213/99) [2000] ECR I-11083; paras. 21-24, Case C-36/94 *Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573

law to infringements of the same nature and gravity, it is for the national court to make that assessment in the circumstances of the given case.¹⁵³

4.5.6 Introducing penalties which ensure compliance with human rights standards

The penalty introduced (here, interim measure to prevent the sale by auction of the family home used as security for credit in foreign currency) must not only meet the requirements of the general test, but in the context of the proportionality requirement also requirements which express that the loss of a family home places the family of the consumer in a particularly vulnerable position, and that the loss of a home is one of the most serious breaches of the right to respect for the home (under both ECHR law and the Charter) and that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed.¹⁵⁴

4.5.7 The diligence of national authorities

With respect to infringements of EU law, the national authorities must proceed with the same diligence as that which they bring to bear in implementing corresponding national laws.¹⁵⁵

4.5.8 The necessity to introduce criminal penalties

In case an EU regulation does not make specific provision for a penalty in cases of infringement or lays down particular penalties but does not exhaustively list the penalties that the Member States may impose, for instance, in order to protect the financial interests of the Union,¹⁵⁶ the Member States may have to introduce criminal penalties, even in the case that EU legislation only provides for civil sanctions.¹⁵⁷

4.5.9 Introducing a system of strict criminal liability

The introduction of a system of strict criminal liability for penalising the breach of an EU regulation is not in itself incompatible with EU law.¹⁵⁸ Even if it is assumed that the national measures introduce a system of strict criminal liability or fails to take into account the degree of involvement of the various persons concerned, it is for the national court to determine whether the penalty complies with the earlier mentioned general requirement, in

¹⁵³ Para. 24, *De Andrade* (Case C-213/99) [2000] ECR I-11083; para. 24, Case C-36/94 *Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573

¹⁵⁴ Paras. 60-65, C-34/13 Judgment ECLI:EU:C:2014:2189 10/09/2014
Kušionová

¹⁵⁵ Para. 25, *Commission v Greece (Community's Own Resources)* (Case 68/88) [1989] ECR 2965

¹⁵⁶ In this case, the Member States are also bound by the Treaty obligation to fight fraud affecting the financial interests of the EU.

¹⁵⁷ *Criminal Proceedings against Maria Amélia Nunes and Evangelina de Matos* (Case C-186/98) [1999] ECR I-4883, paras 12-14.

¹⁵⁸ Para. 36, *Ebony Maritime* (Case C-177/95) [1997] ECR I-1111

particular, whether it is dissuasive, effective and proportionate.¹⁵⁹ In making that determination, the national court must take account, in particular, of the objectives pursued by the EU measure in question *which may be a matter of important public interest*.¹⁶⁰

4.6 Recovery of unlawfully collected national charges

4.6.1 General principle

The right to a refund of charges levied in a Member State in breach of the rules of European Union law is the consequence of the rights conferred on individuals by provisions of European Union law prohibiting such charges, and they complement those rights. The Member State is, therefore, required in principle to repay charges levied in breach of European Union law.¹⁶¹ It is for the legal system of each Member States, 'in the present state of Community law and in the absence of Community rules' concerning the recovery of unlawful national charges, 'to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law', which conditions must meet the general requirements of equivalence¹⁶² and effectiveness.¹⁶³¹⁶⁴ However, EU law does not prevent 'a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients' and national courts are not prevented from taking into account in accordance with national law of the fact that the charges in question could have been passed onto purchasers when

¹⁵⁹ Para. 37, *Ebony Maritime* (Case C-177/95) [1997] ECR I-1111

¹⁶⁰ Para. 38, *Ebony Maritime* (Case C-177/95) [1997] ECR I-1111 (here, bring to an end the state of war and massive violations of human rights and humanitarian law); Para. 19, *Case C-326/88 Anklagemyndigheden v Hansen* [1990] ECR I-2911;

¹⁶¹ Para. 17, *Case C-398/09 Lady & Kid* [2011] ECR I-7375; *Case 199/82 San Giorgio* [1983] ECR 3595, paragraph 12

¹⁶² To decide whether the procedural rules are equivalent, the national court must determine objectively whether the rules are similar, taking into account the role of those rules in the procedure as a whole, as well as the operation of the procedure and any special features of the rules. (*Preston v Wolverhampton Healthcare* Case C-78/98, [2000] ECR. 1-3201, para. 61; *Case C-326/96 Levez* [1998] ECR I-7835, para. 44)

¹⁶³ para. 12, *Ariete* (Case 811/79) [1980] ECR 2545; Para. 25, *Denkavit* (Case 61/79) [1980] ECR 1205; para. 12, *San Giorgio* (Case 199/82) [1983] ECR 3595; *Dounias v. Ikonomikon* Case C-228/98, [2000] ECR. 1-577, para. 58;

¹⁶⁴ Member States are also required under Article 4(3) TEU *not to adopt, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were levied though not due under that legislation.* (*Weber's Wine World Handels-GmbH v Abgabenberufungskommission* Case C-147/01 [2003] ECR. I-11365 paras. 86 and 92; *Case 240/87 Deville* [1988] ECR 3513, para. 13; *Case C-343/96 Dillexport* [1999] ECR I-579 paras. 38 and 39; *Case C-62/00 Marks & Spencer* [2002] ECR I-6325, para. 36

incorporated in the prices of the undertaking liable for the charge.¹⁶⁵ Thus, such national measures will be compatible with EU law 'where it is established that the person required to pay such charges has actually passed them on to other persons.'¹⁶⁶

4.6.2 Passed on charges

In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.¹⁶⁷

None the less, since such a refusal of reimbursement of a tax levied on the sale of goods is a limitation of a subjective right derived from the legal order of the European Union, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law.¹⁶⁸

Even where it is established that the burden of the charge levied though not due has been passed on to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment, since even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales.¹⁶⁹

Similarly, the Member State may not reject an application for reimbursement of an unlawful tax on the ground that the amount of that tax has been set off by the abolition of a lawful levy of an equivalent amount. Although reimbursement of an unlawful levy to a trader who has passed on the amount to his customers can, in the conditions set out above, lead to unjust enrichment, that is not so in the case of an alleged abolition of other taxes in relation to the introduction of a tax contrary to European Union law.¹⁷⁰

That abolition falls within the ambit of choices made by the State in the field of taxation which express its general policy in economic and social matters. Such a choice can easily have the most diverse of consequences which,

¹⁶⁵ Para. 25, *Denkavit* (Case 61/79) [1980] ECR 1205; para. 13, *San Giorgio* (Case 199/82) [1983] ECR 3595; para. 13, *Ariete* (Case 811/79) [1980] ECR 2545

¹⁶⁶ Para. 13, *San Giorgio* (Case 199/82) [1983] ECR 3595; para. 18, *Case C-398/09 Lady & Kid* [2011] ECR I-7375; para. 21, *Joined Cases C-192/95 to C-218/95 Comateb and Others* [[ECR I-165]

¹⁶⁷ Para. 19, *Case C-398/09 Lady & Kid* [2011] ECR I-7375; para. 22, *Joined Cases C-192/95 to C-218/95 Comateb and Others* [[ECR I-165]

¹⁶⁸ Para. 20, *Case C-398/09 Lady & Kid* [2011] ECR I-7375

¹⁶⁹ Para. 21, *Case C-398/09 Lady & Kid* [2011] ECR I-7375; paras. 29-32, *Joined Cases C-192/95 to C-218/95 Comateb and Others* [[ECR I-165]

¹⁷⁰ Paras. 22-23, *Case C-398/09 Lady & Kid* [2011] ECR I-7375

disregarding the potential difficulties in ascertaining whether and, if so, to what extent one tax has, in reality, purely and simply replaced another, preclude the reimbursement of an unlawful tax in such a context's being regarded as giving rise to unjust enrichment.¹⁷¹

Denkavit (Case 61/79) [1980] ECR 1205

The limits which may be lawfully imposed on the exercise of the right to context unlawful taxation or to claim repayment thereof, and the distinction which could be made between the conditions relating to the refusal to pay a tax or to contesting the levying thereof and those relating to the recovery of taxes which have already been paid previously, without EU legislation being available on this matter, are for national legislation to implement having regard to the general requirements on the judicial protection of rights derived from EU law. (para. 27)

Commission v Italy (Recovery of Undue Payment) (Case 104/86) [1998] ECR 1799

Under Article 4(3) TEU, read in conjunction with other relevant Treaty articles, the Member States are prevented from placing the burden on the taxpayer of proving by documentary evidence alone, in the face of mere allegations by the national administration, that the national taxes and charges, in respect of which he is seeking repayment as they were collected in breach in EU law, have not been passed on to other persons, and also from giving that provision retroactive effect. (para. 13.)

San Giorgio (Case 199/82) [1983] ECR 3595

Any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of unlawfully levied charges is not permitted. In particular, presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced (e.g., excluding any other form of evidence than documentary evidence) can be found to violate EU law. (para. 14)

San Giorgio (Case 199/82) [1983] ECR 3595

The requirement of equivalence cannot be construed as justifying national legislative measures intended to render any repayment of unlawful charges virtually impossible, even if the same treatment is extended to taxpayers who have similar claims arising from an infringement of national tax law (i.e., extending rules of evidence which have been found to violate EU law to a number of national taxes will not make those rules compatible with EU law). (para. 17)

4.7 Interim relief against EU measures before national courts

¹⁷¹ Para. 24, Case C-398/09 Lady & Kid [2011] ECR I-7375

Atlanta Fruchthandelsgesellschaft (Case C-465/93) [1995] ECR I-3761

When a national court orders interim relief concerning a national administrative measure based on an EU regulation which is the subject of a reference for a preliminary ruling on its validity, it is obliged under Article 4(3) – in the context of assessing the conditions for the grant of interim relief – ‘to respect what the Community court has decided on the questions at issue before it.’ In case the Court on previous occasions failed to find the invalidity of the EU regulation in question, ‘the national court can no longer order interim measures or must revoke existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. The same applies of the Court of First Instance, in a judgment which has become final and binding, has dismissed on the merits an action for annulment of the regulation or a plea of illegality.’ (para. 46)

4.8 The right to effective judicial protection before national courts (alternative judicial avenues to direct challenges before EU Courts)

Atlanta Fruchthandelsgesellschaft (Case C-465/93) [1995] ECR I-3761

In the complete system of legal remedies and procedures designed to ensure the judicial review of EU measures, procedures before national courts are considered as alternatives to direct actions before the EU Courts and national courts are bound to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. The right to an effective action before national courts must be guaranteed when individuals are unable, by reason of the conditions for admissibility laid down in the Treaties for the action for annulment, to challenge EU measures directly. The national courts are, thus, obliged under Article 4(3) TEU ‘so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act’¹⁷² and by asking those courts to make a reference to the Court of Justice for a preliminary ruling on legality. (paras. 37-42)

(The same holds true where a natural or legal person invokes a failure to take a decision which it considers to be contrary to EU law, para. 29, Ten Kate Holding (Case C-511/03) [2005] ECR I-8979)

Ten Kate Holding (Case C-511/03) [2005] ECR I-8979

Under Article 4(3) TEU, the Member States are not obliged towards their citizens to bring an action for annulment or an action in respect of a failure to act. (para. 28)

¹⁷² See also *Commission v Jégo-Quéré* Case C-263/02 P [ECLI:EU:C:2004:210], para. 32; *Case C-50/00 P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 39

EU law does not, however, in principle preclude national law from containing an obligation on a Member State to bring an action for annulment or failure to act for the benefit of one of its citizens or providing for liability to be imposed on the Member State for not having acted in such a way. The Member States are, however, bound under Article 4(3) TEU to avoid inundating EU Courts with actions, some of which would be patently unfounded, thus jeopardising the proper functioning of the Court of Justice. (paras. 31-32)

4.9 Giving effect to the freezing effect of EU law on national legislative discretion in competition law

Conorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055

The primacy of EU law requires any provision of national law which contravenes an EU rule to be disapplied, regardless of whether it was adopted before or after that rule. (para. 48)

This duty applies not only to national courts but also to all organs of the State,¹⁷³ including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable EU law to be fully applied. (para. 49)

National competition authorities, which are responsible for ensuring that EU competition provisions are applied, must be able to declare a national measure contrary to the combined provisions of Articles 4(3) TEU and 101 and 102 TFEU, and to disapply that measure, as otherwise EU competition rules and their freezing effect on national legislative (and administrative discretion), when interpreted together with Article 4(3) TEU, would be rendered less effective. (para. 50)

In this connection, it is irrelevant that when undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for the infringement of EU law. (para. 51) Member State obligations under the combined provisions of Articles 4(3) TEU and 101 and 102 TFEU are distinct from those to which undertakings are subject under the Treaties, and they continue to exist and require the national competition authority to disapply the national measure at issue. (para. 51)

Concerning the possibility of imposing penalties on the undertakings concerned, it needs to be taken into account whether or not the national legislation precludes undertakings from engaging in autonomous conduct which might prevent, restrict or distort competition and, if it does, whether the facts at issue pre-dated or post-dated the national competition authority's decision to disapply the relevant national legislation.¹⁷⁴ (para 52.)

¹⁷³Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 31

¹⁷⁴ In paras. 52-57, the Court of justice comes to the following scenarios: The national authority (a) may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation; may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was

4.10 The protection of consumer interests

The case-law shows that national courts may have a special duty to protect the interests of consumers and claimants and therefore to develop effective remedies to deal with such situations,¹⁷⁵ as the system of protection introduced by EU secondary legislation is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier.¹⁷⁶ This means that national courts should not be prevented (by national procedural rules) from considering of its own motion the question whether national law is compatible with EU law,¹⁷⁷ should interpret national legislation, if possible, in accordance with EU directives,¹⁷⁸ and should interpret EU measures so as to give such effective protection as the measure was intended to provide.¹⁷⁹

required by the national legislation; (b) may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard; may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard; (c) may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or encouraged by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted. may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or encouraged by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.

¹⁷⁵ John Temple Lang, *Developments, Issues, and New Remedies - The Duties of National Authorities and Courts under Article 10 of the EC Treaty*, Vol. 27 *Fordham Int'l L.J.* 2003-2004, 1913

¹⁷⁶ *Oceano Grupo Editorial SA v. Murciano Quintero* Case C-240/98, [2000] ECR. 1-4941, para. 25

¹⁷⁷ *Peterbroeck Van Campenhout & Cie SCS v Belgium*, Case C-312/93 [1995] ECR 1-4599 para. 21; *Kraijveld BV and Others v Gedeputeerde Staten van Zuid-Holland*, Case C-72/95 [1996] ECR 1-5403

¹⁷⁸ *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] ECR 1-4135.

¹⁷⁹ *Coote v. Granada*, Case C-185/97, [1998] ECR 1-5199

5. Institutional cooperation between the Member States and the EU institutions

5.1 Member State legislative autonomy

Commission v Belgium (Case 186/85) [1987] ECR 2029 (Staff Regulations¹⁸⁰)

Under Article 4(3) TEU (and without considering the detailed provisions of the EU measure concerned), the Member States are prevented from adopting any provisions affecting EU law (here, the Staff Regulations) (and amending an earlier practice consistently followed by it) without consulting the EU institutions concerned. (para. 39)

This applies in the case when the Member State concerned and the Union exercise overlapping competences (regulating overlapping family allowances provided by the Belgium and the Union to officials of the EU). (para. 40)

Melchior (Case C-647/13) EU:C:2015:54

Under Article 4(3) TEU (in conjunction with the relevant EU measure (here, the Staff Regulation), but without relying on a specific provision), the Member States are precluded from maintaining national legislation which does not permit years of employment completed by an EU national in the service of an EU institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme.¹⁸¹ (para. 25)

Such national legislation was liable to discourage employment with an EU institution which consequence cannot be accepted in the light of the duty of genuine cooperation and assistance which Member States owe the European Union.¹⁸² (para. 26)

C-166/12 Časta EU:C:2013:792

The Member States' obligation to make it possible to transfer to the European Union pension scheme pension rights acquired by European Union officials with respect to their earlier duties and to establish in that regard a calculation method falls within the scope of application of Article 4(3) TEU.¹⁸³ (para. 37)

The Member States enjoy broad discretion in adopting their national

¹⁸⁰ Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ 1968 L 56, p. 1), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1)

¹⁸¹ para. 45-48, *My* (EU:C:2004:821); C-166/12 Časta (ECLI:EU:C:2013:792), para. 32

¹⁸² *ibid.*

¹⁸³ See also Case C-52/96 *Commission v Spain* [1997] ECR I-4637, para. 9

legislation implementing the Staff Regulations' rules related to the value of pension rights acquired in the national scheme and intended to be transferred to the EU pension scheme. (paras. 31 to 32)

If the calculation of the capital value of pension rights stems logically from the nature, principles and rules of the pension system in force in a Member State, the consistency of that method with European Union law cannot be called into question. It is only in the case in which the method for calculating that capital significantly diverges, to the advantage or disadvantage of the official, from the nature of the principles and rules of the national pension system that the legislation of the Member State concerned is likely to constitute a barrier to the free movement of workers guaranteed by Article 45 TFEU or to infringe the obligations provided for in Article 4(3) TEU.¹⁸⁴ (para. 36)

It also follows from Article 4(3) TEU, in conjunction with the Staff Regulations that, for the purposes of calculating the amount of the capital value of pension rights acquired under the national pension scheme and intended to be transferred into the European Union pension scheme, account is not to be taken of the period during which the official had already participated in that scheme. (para. 37)

5.2 Member State legislative autonomy and developing EU policies

Otto Scheer (Case 30-70) [1970] ECR 1197 (proactive stance)

Under Article 4(3), the Member States may be obliged to intervene in the introduction of new EU policy by preparing legislative or other measures for the purpose of enabling them to assume fully, on the entry into force of the new EU measures, the functions devolving on them in the interest of the Union. (paras. 8-9)

Schlüter (Case 9/73) [1973] ECR 1135 (freezing effect)

Despite the fundamental relevance of an EU policy under development (here, monetary policy to complete a single economic region in Europe)¹⁸⁵ and despite the obligation of cooperation between the Member States and the EU institutions to ensure the creation and maintenance of the conditions necessary for the development of the common policy, until the procedural framework laid down by the Treaties for the realisation of the common policy (here, the procedures to be followed in order to coordinate the economic policies of Member States and to remedy an disequilibria in their balances of payments) is not put into operation Article 4(3) TEU

¹⁸⁴ Therefore, Article 4(3) TEU does not preclude application of the method for calculating the capital value of pension rights acquired earlier, even where that method results in the amount of capital to be transferred into the European Union pension scheme being set at a level of not even half the amount of the contributions paid by the official and his former employer into the national pension scheme.

¹⁸⁵ In case the parities between the currencies of the various Member States do not remain fixed, the process of integration envisaged by the Treaties will be retarded or prejudiced, para. 39.

(read together with the relevant specific Treaty provision) allow the Member States¹⁸⁶ 'such freedom of decision that the obligation to contained in this Article (read together with the relevant specific Treaty provision) cannot confer on interested parties rights which the national courts would be bound to protect.' (para. 39)

Moreover, a Council resolution, which is primarily an expression of the future policy direction favoured by the Council and the government representatives of the Member States 'cannot for its part, either, by reasons of its content, create legal consequences of which parties might avail themselves in court.' (para. 40)

5.3 Member State legislative autonomy and the implementation of EU policies

Commission v United Kingdom (Sea Fisheries) (Case 804/79) [1981] ECR 1045 (freezing effect)

In policy areas reserved to the powers of the Union, a Member State cannot, in the absence of appropriate action on the part of the Council, bring into force any interim (conservation) measures which may be required by the situation except as part of a process of collaboration with the responsible EU institution (here, the Commission) and with due regard to its general tasks (here, the task of supervision). (paras. 29-30)

In such cases, the available EU measures, 'as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers', imposes on the Member States 'not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.' (para. 31)

This process of cooperation between the Member States and the Commission can be 'confirmed by a practice which has been widely followed' in as much as the Commission has given its views on a large number of national (conservation) measures notified to it by the Member States and has put forward, where appropriate, reservations or conditions. (para. 32)

5.4 The implementation obligations of the Member States

Commission v Belgium (Case C-236/99) [2000] ECR I-5657 (directives)

Under Article 4(3) TEU, the failure of the Commission to state the reasons for refusing to extend the implementation period of a directive does not liberate the Member State concerned comply with its implementation obligations. (para. 32)

¹⁸⁶ Despite the duty imposed on each of them to regard the EU policy on rates of exchange as a matter of common concern.

Impact (Case C-268/06) [2008] ECR I-2483 (directives)

The Member States' obligation, pursuant to a directive, to achieve the result envisaged by a directive, and their duty, under Article 4(3) TEU, to take all appropriate measures to ensure the fulfilment of that obligation, is binding on all the authorities of the Member States. Such obligations devolve on the authorities, also, in their capacity as a public employer. (para. 85)¹⁸⁷

Criminal Proceedings against Antoine Kortas (Case C-319/97) [1999] ECR I-3143 (directives)

Under Article 4(3) TEU, the Commission and the Member States must cooperate in good faith when the Member States, proceeding under Article 114 (4) and (5) TEU, want to maintain in force provisions of national law which are incompatible with a harmonisation measure. On the one hand, it is incumbent on the Member States to notify such measures as soon as possible. On the other, the Commission 'must demonstrate the same degree of diligence and examine as quickly as possible the provisions submitted to it.' (para. 35)

While the failure of the Commission to act with due diligence may constitute a failure to fulfil its obligations, it cannot affect the full application of the harmonisation measure concerned. (the respective breaches of the obligation of cooperation do not cancel out each other) (para 36)

The Member State concerned may, however, bring proceedings before the Court against the Commission for a declaration to that effect and, where appropriate, may apply for interim relief. (para. 37)

The direct effect of a directive, where the deadline for its transposition into national law has expired, is not affected by the notification made by a Member State pursuant to Article 114(4) TEU Treaty seeking confirmation of provisions of national law derogating from the directive, even where the Commission fails to respond to that notification. (para. 38)

Even though there is no time-limit for the Commission to respond to such notification, it must act with all due diligence in discharging its responsibilities. (para. 34)

Commission v Germany (Market in Wine) (Case C-217/88) [1990] ECR I-2879 (regulations)

Under Article 4(3), the Commission and the Member State are obliged to work together in good faith in order to overcome difficulties in the implementation of EU obligations while complying in full with the provisions of the Treaty. (para. 33)

This applies, in particular, when a Member State in implementing EU

¹⁸⁷ See also C-429/09 Judgment ECLI:EU:C:2010:717; Fuß, para. 39

obligations encounters unforeseeable difficulties which make it absolutely impossible to carry out those obligations. In such a case, it must submit those problems to the Commission and suggest to it appropriate solutions. The duty of cooperation will be violated when the difficulties are not such as to make implementation absolutely impossible, no suggestions were proposed to the Commission as to an appropriate solution, and the Member State concerned unilaterally decides not to continue with the implementation of its EU obligations. (para. 33)

Sweden v Commission (Public Access to Documents) (Case C-64/05 P) [2007] ECR I-11389 (regulations in a multi-layered framework)

In case the implementation of rules of EU law is entrusted jointly on the EU institutions and the Member States and is based on a dialogue to be carried on between them (here, following Article 4(5) of Regulation No 1049/2001), they must under Article 4(3) TEU act and cooperate in such a way that those rules are effectively applied. (para. 85)

This entails commencing without delay a genuine dialogue regarding the application of those rules, while paying attention to observing the time-limits laid down in the measure in question. (para. 86)

The decisions by the Member State concerned (here, objection to disclosure of documents), following such dialogue, must state their reasons, and the EU institution concerned will not accept those decisions when no reasons are given at all or the reasons are not put forward in terms of the applicable EU measure. In case, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution can, if that follows from the applicable legal rules, give a decision to the contrary (here, give access to the document). (paras. 87-88)

The EU institution must also provide reasons for its decisions in a manner that it is shown how the rules of the EU measure in question were applied. The information should enable the person concerned to understand the origin and grounds of the decision and the competent court to exercise, if need be, its power of review. (para. 89)

5.5 Implementing EU State aid decisions

5.5.1 The general principle

When a Member State 'in giving effect to a Commission decision on state aid encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission', it 'must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a reciprocal duty of

genuine cooperation (...), work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions'.¹⁸⁸

5.5.2 Political, legal and practical (administrative) difficulties

The condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled the difficulties to be overcome.¹⁸⁹

Belgium v Commission ('Maribel Scheme') (Case C-75/97) [1999] ECR I-367

Irrelevant issues will not be accepted. (para 89)

Commission v Portugal (Case C-404/97) [2000] ECR I-4897

Member State claims stating that it is impossible to understand the operative part of Commission decisions (here, the use of the plural instead of the singular) will be rejected on grounds that it is 'indissociably linked' to the statement of reasons of the decisions and it needs to be interpreted with regards to the reasons which led to its adoption. Also, the matter can be taken up with the Commission upon the receipt of the decision in question. (paras. 41-43.)

Member State claims stating that it is impossible to understand the nature of the orders in Commission decisions will be rejected on grounds that in the interpretation of such decisions the relevant interpretation of the law by the Court of Justice needs to be taken into account. (para. 44)

Insurmountable internal difficulties (e.g., financial difficulties, the risk of the Member State concerned incurring liability under law) will not justify a failure to comply with obligations under EU law. (paras. 52-53)

Commission v Spain (Magefesa Group) (Case C-499/99) [2002] ECR I-6031

¹⁸⁸ Para. 88, Belgium v Commission ('Maribel Scheme') (Case C-75/97) [1999] ECR I-3671; Case C-348/93 Commission v Italy [1995] ECR I-673, paragraph 17; C-349/93 Commission v Italy [1995] ECR I-0000, para. 13; Commission v Germany (Primary Aluminium) (Case 94/87) [1989] ECR 175, para. 9; Case 52/84 Commission v Belgium ((1986)) ECR 89, para. 16; Case C-183/91 Commission v Greece [1993] ECR I-3131, paragraph 19; Paras. 39-40, Commission v Portugal (Case C-404/97) [2000] ECR I-4897; Para. 24, Commission v Spain (Magefesa Group) (Case C-499/99) [2002] ECR I-6031 Case C-378/98 Commission v Belgium [2001] ECR I-5107, paragraph 31; para. 114, Greece v Commission (State Aid) (Case C-278/00) [2004] ECR I-3997; Case C-214/07 Commission v France, para. 45; C-507/08 Judgment ECLI:EU:C:2010:802 22/12/2010 Commission v Slovakia

¹⁸⁹ Para. 10, Germany (Primary Aluminium) (Case 94/87) [1989] ECR 175; para. 25, Commission v Spain (Magefesa Group) (Case C-499/99) [2002] ECR I-6031, para. 90, Belgium v Commission ('Maribel Scheme') (Case C-75/97) [1999] ECR I-3671; Case C-280/95 Commission v Italy [1998] ECR I-259, paragraph 14

This will be difficult to establish when the majority of Member State actions taken in compliance with the decision are carried out after the time-limit established in the decision and when in this period the prohibited aid was continued. (para. 26)

Similarly, the Member State need to inform the Commission of the measures it proposed to take or of the difficulties it encountered, it must ensure that the measures it took will in fact ensure compliance with the decision, and it needs to reach agreement with the Commission or demonstrate to the Commission of the absolute impossibility of recovering the aid. (para. 27)

Commission v Belgium (Case 52/84) [1986] ECR 89

The duty of cooperation will be violated when the conduct of the Member State concerned was limited after the expiry of the date of compliance to contesting the accuracy of the reasons included in the decision, to pleading that it was impossible to comply with the decision on account of national legal provisions, and to requesting the Commission to clarify a minor issue (acting in bad faith). (para. 16)

5.6 EU procedures (general)

Nikolaou (Case C-220/13 P) EU:C:2014:2057 (remedies before the Courts of the European Union)

The actions and remedies before the Courts of the European Union (here, the action for damages against the Union) are independent and have their own particular place in the system of means of redress and subject to conditions for their use formulated in the light of their specific purpose. Although findings made in national proceedings (here, criminal proceedings) relating to facts which are the same as those investigated in the course of a procedure before EU Courts may be taken into account by the EU Court hearing the case, the latter is not bound by the legal characterisation of the facts made by the national (criminal) court; rather, it is for the EU Court, exercising its discretion to the full, to undertake an independent examination of those facts in order to determine whether the conditions to be satisfied in order for the EU law remedy to be granted (here, for the Union to incur non-contractual liability) (paras. 54-55)

Italy v Commission (Case C-400/99) EU:C:2005:275

Under Article 4(3) TEU, and in order not to delay the procedure, it is the responsibility of a Member State which considers that the measures in question do not constitute aid to provide the Commission, at the earliest moment possible, after the Commission has drawn its attention to those measures, with the information on which its position is based. If that information is such as to remove any doubts as to the absence of any element of aid in the measures examined, the Commission cannot initiate the State aid procedure. Conversely, if that information is not such as to overturn the doubts as to the existence of elements of aid and if doubts also exist as to the compatibility thereof with the common market, the

Commission must then initiate that procedure. (para. 48)

As is the case when the question arises of the very existence of elements of aid, in the context of the principle of sincere cooperation between Member States and the institutions under Article 4(3) TEU and in order not to delay the procedure, it is the responsibility of the Member State which considers that the aid in question is existing aid to provide the Commission at the earliest stage possible with the information on which that position is based, as soon as the Commission draws its attention to the measures concerned. (para. 55)

Mediaset (Case C-403/10 P) EU:C:2011:533 (State aid procedure)

The Commission can legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid. No provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount. The recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law.¹⁹⁰ Further, the obligation on a Member State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation incumbent upon the Commission and the Member States of sincere cooperation in the implementation of Treaty rules concerning State aid.¹⁹¹ (paras. 126-127)

Mediaset (Case C-69/13) EU:C:2014:71 (State aid procedure)

Where the national court entertains doubts or has difficulties as regards the quantification of the amount of aid to be recovered, it remains open to it to contact the Commission for assistance in accordance with the principle of cooperation in good faith [laid down in Article 4(3) TEU], read in conjunction with paras. 89 to 96 of the Commission notice on the enforcement of State aid law by national courts. (para. 30)

Although, in order to ensure that a Commission decision declaring an aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid in question, but not identifying the individual recipients of that aid and not determining the precise amounts to be recovered is executed, the national court is bound by that decision, it is not, however, bound by the positions adopted by that institution in the execution of that decision. Nevertheless, under the principle of cooperation in good faith laid down in Article 4(3) TEU, the national court

¹⁹⁰ In so far as these national rules and procedures do not have the effect of making the recovery required by European Union law practically impossible and do not undermine the principle of equivalence with procedures for deciding similar but purely national disputes (Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, para. 90; Case C-69/13 *Mediaset* ECLI:EU:C:2014:71, para. 34).

¹⁹¹ Case C-415/03 *Commission v Greece* [2005] ECR I-3875, paragraph 40). Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraph 90-91

must take the statements of position into account as a factor in the assessment of the dispute before it.¹⁹² (para. 32)

Commission v Germany (Case C-527/12) EU:C:2014:2193 (State aid procedure)

If a Member State encounters difficulties in implementing a Commission decision ordering the recovery of aid, it must submit those problems for consideration by the Commission asking, in a reasoned manner, for the extension of the prescribed period and suggesting appropriate amendments to that decision, so that the Commission may take an informed decision. In such a case, and in the light of Article 4(3) TEU, a duty of cooperation in good faith is imposed on the Member State concerned and the Commission with a view to overcoming those difficulties.¹⁹³ (para. 51)

Deutsche Lufthansa (Case C-284/12) EU:C:2013:755 (State aid procedure)

The application of the European Union rules on State aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU.¹⁹⁴ Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional. (para. 41)

Where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure. (para. 42)

To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure. (para. 43)

¹⁹² Nevertheless, the national court, when determining the exact amounts of aid to be recovered and where the Commission, in its decision declaring an aid scheme unlawful and incompatible with the internal market, has not identified the individual recipients of the aid in question or determined the precise amounts to be repaid, may conclude, without calling into question the validity of the Commission's decision or the obligation to repay the aid in question, that the amount of aid to be repaid is equal to zero where that follows from the calculations made on the basis of all the relevant information of which it has been made aware. (Case C-69/13 Mediaset ECLI:EU:C:2014:71, para. 40)

¹⁹³ See also judgments in *Commission v Germany*, EU:C:1989:46, para. 9; *Commission v Italy*, EU:C:2012:182, paras. 41 and 42; and *Commission v Greece*, C-263/12, EU:C:2013:673, para. 32

¹⁹⁴ See also judgment in *Mediaset*, EU:C:2014:71, para. 29; *Case C-527/12 Commission v Germany* ECLI:EU:C:2014:2193, para. 56

Where they entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, national courts may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling. (para. 44)

Commission v Greece (Market in Feed Grain) (Case C-35/88) [1990] ECR I-3125 (State aid procedure)

Under Article 4(3) TEU, in State aid procedures before both the Commission and the Court of Justice the Member States must not prevent the Commission from acquainting itself with the complex relationship between the Member State concerned and the economic operator in question and they must cooperate with the Commission by providing information on the functioning of the economic operator concerned and on the legal and administrative arrangements governing the operation of the market in question. (paras. 39-40)

Such lack of cooperation is regarded as ever more serious when it persists in proceedings before the Court of Justice. (para. 41)

Germany v Commission (Case C-344/01) [2004] ECR I-2081 (procedure for the breach of a CAP COM)

Under Article 4(3) TEU, in connection with the apportionment of the burden of proving an infringement of EU law (here, rules on CAP COMs) by the Member States, both the Commission and the Member States must participate actively and must cooperate in good faith in determining whether or not the EU rules in question have been infringed. (para. 80)

The correct application of the rules on the apportionment of the burden of proof entails, in principle, compliance with Article 4(3) TEU. (para. 81)

Ten Kate Holding (Case C-511/03) [2005] ECR I-8979 (direct procedures before EU Courts)

In case of an obligation in national law for the Member State concerned to bring an action for annulment or failure to act for the benefit of one of its citizens, Article 4(3) TEU could be breached when the Member State fails to retrain a degree of discretion as to the appropriateness of bringing an action, thereby giving rise to a risk that the Union might be inundated with actions, some of which would be patently unfounded, thus jeopardising the proper functioning of the Court of Justice. (para. 31)

5.7 Infringement procedures

5.7.1 The general principle

Under Article 4(3) TEU, the Member States are obliged to facilitate the achievement of the Commission's tasks which consist, in particular, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.¹⁹⁵ In other words, the Member States must not through their acts or omissions impede the achievement of the Commission's task regulated under law and cannot refuse to assist the Commission in the achievement of that task.¹⁹⁶

5.7.2 Cooperation and information obligations

Under Article 4(3) TEU, the Member States are required to cooperate in good faith with the enquiries of the Commission and to provide the Commission with all the information requested for that purpose.¹⁹⁷

In infringement procedures, where it is incumbent upon the Commission to prove the alleged failure of a Member State to fulfil its Treaty obligations and where the Commission, which does not have investigative powers of its own in the matter, is largely reliant on the information provided by any complainants, private or public bodies active in the Member State concerned and that Member State itself,¹⁹⁸ once the Commission has adduced 'sufficient evidence of certain matters', the Member State concerned, which is then required to challenge in substance and in detail the information produced¹⁹⁹ and the consequences flowing therefrom, must conduct through its national authorities the necessary on-the-spot investigations, in a spirit of genuine cooperation and mindful of each Member State's duty to facilitate the general task of the Commission.²⁰⁰

¹⁹⁵ para. 12, *Commission v Greece (List D)* (Case C-65/91) [1992] ECR I-5245; para. 30, *Commission v Greece (Olive Oil)* (Case 272/86) [1988] ECR 4875; para. 60, *Commission v Greece (Credit Terms)* (Case 192/84) [1985] ECR 3967; para. 27, *Commission v Italy (Waste Management)* (Case C-135/05) [2007] ECR I-3475; Para. 42, *Case C-494/01 Commission v Ireland* [2005] ECR I-3331; para. 7, *Commission v Netherlands (Bathing Water)* (Case 96/81) [1982] ECR 1791 and para. 7, *Commission v Netherlands (Drinking Water)* (Case 97/81) [1982] ECR 1819; *Commission v Belgium*, Case C-421/12 [ECLI:EU:C:2014:2064], para. 33.

¹⁹⁶ para. 14, *Commission v Belgium* (Case C-374/89) [1991] ECR I-367

¹⁹⁷ Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, paragraph 24; para. 93, *Commission v Germany (TIR Carnets)* (Case C-105/02) [2006] ECR I-9659; para. 25, *Commission v Greece (Case 240/86)* [1988] ECR 1835; para. 19, *Commission v Greece (Credit Terms)* (Case 192/84) [1985] ECR 3967; para. 24, *Commission v Luxembourg (Patent Agents)* (Case C-478/01) [2003] ECR I-2351; *Case 192/84 Commission v Greece [1985] ECR 3967, paragraph 19, and Case C-375/92 Commission v Spain [1994] ECR I-923, paragraphs 24 to 26*

¹⁹⁸ When it is a question of checking that the national provisions intended to ensure effective implementation of directives are applied correctly in practice.

¹⁹⁹ Case C-365/97 *Commission v Italy ('San Rocco')* [1999] ECR I-7773, paras. 84 to 86; C-189/11 *Commission v Spain* ECLI:EU:C:2013:587 para 81.

²⁰⁰ Paras. 43-46 *Case C-494/01 Commission v Ireland* [2005] ECR I-3331; paras. 26, 28, 30 and 31, *Commission v Italy (Waste Management)* (Case C-135/05) [2007] ECR I-3475; C-301/10 *Judgment ECLI:EU:C:2012:633 18/10/2012 Commission v United Kingdom*, para. 71

That obligation (of cooperation with the Commission for the purposes of the investigation) rests on the Member States throughout the entire infringement procedure.²⁰¹

Commission v Netherlands (Bathing Water) (Case 96/81) [1982] ECR 1791 and Commission v Netherlands (Drinking Water) (Case 97/81) [1982] ECR 1819²⁰²

The provisions placed in directives imposing the obligation of on the Member States to provide information on their implementation to the Commission is a specific expression of the general obligation of cooperation. (para. 7)

The information which the Member States are obliged to supply must be clear and precise, it must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by EU law (here, a directive). In the absence of such information, the Commission is not in a position to ascertain whether the Member State has effective and completely complied with its obligations (here, implemented with the directive). The breach of the obligation of cooperation can, therefore, be established on grounds of either providing not information at all or providing insufficiently clear and precise information. (para. 8)

Commission v Greece (Olive Oil) (Case 272/86) [1988] ECR 4875

The Member States must provide the information requested (repeatedly) by the Commission and must not delay excessively the transmission of such information. (paras. 28-29).

Such lack of cooperation is regarded as ever more serious when it persists in proceedings before the Court of Justice and when the use of the Court of Justice's powers is necessary for the Member State concerned to admit the existence of national practice violating EU law (but to still fail to produce any documentary evidence). (paras. 29-31)

This entails that under Article 4(3) TEU the Member States must avoid preventing the Court of Justice from accomplishing task entrusted to it by the Treaties, namely ensuring that in the interpretation and application of the Treaty the law is observed, as otherwise its conduct will constitute a 'serious impediment to the administration of justice'. (para. 31)

Commission v Greece (Credit Terms) (Case 192/84) [1985] ECR 3967

In case of an obligation in national law for the Member State concerned to bring an action for It will qualify as acting in bad faith when the misunderstandings between the Commission and the Member State concerned were caused by the latter not providing sufficient information. (para. 19)

²⁰¹ para. 32, Commission v Italy (Waste Management) (Case C-135/05) [2007] ECR I-3475

²⁰² See also, para. 34, C-421/12 Judgment ECLI:EU:C:2014:2064 10/07/2014
Commission v Belgium.

Commission v Greece (List D) (Case C-65/91) [1992] ECR I-5245

The Member States must not prevent the Commission from discovering practices followed in the Member States and checking whether those practices complied with EU law (for instance, by denying the existence of certain national measures which existed and were applied, or by claiming that national measures served a particular purpose which purpose was not corroborated by any evidence). In such case, the 'attitude' adopted by the Member State concerned and its refusal to collaborate with the Commission could lead to finding a breach of Article 4(3) TEU. (paras. 12-17)

Commission v Greece (Case 240/86) [1988] ECR 1835

In case the Member State concerned encounters genuine difficulties in assisting the Commission's enquiries, it should inform the Commission of that fact within a reasonable period (it is acting in bad faith when there is a deliberate failure to respond to the Commission's queries and the Member State claims negligible difficulties in cooperating with the Commission). (paras. 25-28)

Commission v Belgium (Case C-374/89) [1991] ECR I-367

It is a breach of Article 4(3) TEU when the Member State responds only to the direct threat of the Commission bringing the case to the Court of Justice and continuing the infringement once the case was removed from the Court of Justice's register (acting in bad faith). (para. 15)

Commission v Greece (Credit Terms) (Case 192/84) [1985] ECR 3967

The obligations of the Member States in infringement procedures are, however, limited by the Commission's obligation to specify the acts or omissions which, in its opinion, constitute the infringement. When the Commission fails to meet that obligation, the Member States are released from their duty of cooperation (as they are unable to respond to the Commission's requests for information) (here, the suspected infringement did not exist). (para. 20)

Commission v Germany (Case C-135/01) EU:C:2003:171

Under Article 4(3) TEU, conjointly with the rights of the defence of the Member State concerned, the Commission is not obliged in the course of the pre-litigation procedure to define the terms of the directive concerned and by not doing so it does not engender any uncertainty as to the extent of the obligations of the Member States and it does not prevent them from putting an end to the infringement. (para. 23)

The Commission is not empowered to determine conclusively through its formal acts in infringement procedures the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with EU law. (para. 24)

Commission v Germany (Case C-591/13) EU:C:2015:230

Article 4(3) TEU does not require the Commission to bring an action for failure to fulfil obligations before the Court of Justice and the rules laid down in Article 258 TFEU must be applied without any obligation on the Commission to act within a specific period, subject to situations in which the excessive duration of the pre-litigation procedure is liable to make it more difficult for the Member State concerned to refute the Commission's arguments and is thus liable to infringe the rights of the defence.²⁰³ (para. 14)

Commission v Poland (Case C-29/14) EU:C:2015:379

Referring to national measures which were supposed to implement a directive for the first time at the stage of the defence in infringement procedures cannot be reconciled with the duty of sincere cooperation. (para. 32)

The information concerning the transposition of a directive which the Member States are obliged to provide to the Commission must be clear and precise, and it must unequivocally indicate the legislative, regulatory and administrative measures by which the Member State considers that it has fulfilled the various obligations imposed on it by the directive. In the absence of such information, the Commission is not in a position to determine whether the Member State has genuinely and fully implemented the directive. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 258 TFEU in order to establish that failure to fulfil the obligation.²⁰⁴ (para. 33)

This, however, is alone insufficient to establish the failure to fulfil EU obligations by the Member State concerned when the infringement action concerns not the failure to fulfil the obligation to provide information but the failure to fulfil the obligation to transpose a directive by that Member State.²⁰⁵ (para. 34)

The national measures invoked in such circumstances by the Member State concerned must be taken into account by the Court of Justice when ruling on the infringement.²⁰⁶ (para. 35)

5.8 National court procedures

Imm. Zwartveld (Case C-2/88) [1990] ECR I-3365

Under Article 4(3) TEU, which holds particular relevance in relations

²⁰³ Commission v Lithuania, C 350/08, EU:C:2010:642, paragraphs 33 and 34

²⁰⁴ para. 27, Commission v Italy, C 456/03, EU:C:2005:388; para. 8, Case 96/81 Commission v Netherlands [1982] ECR 1791

²⁰⁵ See also C-151/12 Commission v Spain ECLI:EU:C:2013:690, para. 49

²⁰⁶ Commission v Poland, C 478/13, EU:C:2014:2253, paragraph 34

between the EU institutions and the judicial authorities of the Member States, that are responsible for ensuring that EU law is applied and respected in the national legal system, the privileges and immunities of the Union are not regarded as having an absolute character, rather as having a 'functional, and therefore relative, character', which does not permit the EU institutions to neglect the duty of sincere cooperation with the national authorities, especially, national judicial authorities. (paras. 18-21)

When a national court is hearing proceedings on the infringement of EU rules and it seeks information concerning the existence of the facts constituting those infringements, it is incumbent upon every EU institution to give its active assistance to such national legal proceedings 'by producing documents to the national court and authorizing its officials to give evidence to national proceedings. This applies, in particular, to the Commission which is entrusted with the task of ensuring that provisions of EU law are applied. (para. 22)

For the Court of Justice, this means that it must have the power to review, at the request of a national judicial authority and by means of a legal procedure appropriate to the objective pursued by that authority, whether the duty of sincere cooperation incumbent on the EU institutions has been complied with (here, whether reliance on the EU's privileges and immunities so as to refuse cooperation with the national authorities was justified. (paras. 23-24)

The EU institution concerned (here, the Commission) when requested to provide information by national judicial authorities must provide that information, unless refusal to provide such information is justified by imperative reasons relating to the need to avoid any interference with the functioning and independence of the Union. (para. 25)

The EU institution concerned (here, the Commission) must also authorise its officials to be examined as witnesses before national judicial authorities with regard to their findings during the inspections carried out, unless it presents to the Court imperative reasons relating to the need to safeguard the interests of the Union which justify its refusal of authorisation. (para. 26)

Marra (Joined cases C-200/07 and C-201/07) [2008] ECR I-7929

The above principle concerning national judicial authorities laid down in *Imm. Zwartveld* applies in an action for damages brought against a Member of Parliament in respect of opinions he has expressed. (para. 41) The European Parliament and the national judicial authorities must cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol on the privileges and immunities of the Union. (para. 42)²⁰⁷

Where an action has been brought against a Member of the European Parliament before a national court and that court is informed that a procedure for defence of the privileges and immunities of that Member has been initiated, that court must stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible. (para. 43) Once the national court has established that the conditions for the

²⁰⁷ See also *Patriciello* Case C-163/10 (ECLI:EU:C:2011:543), para. 40

absolute immunity are met, the court is bound to respect that immunity, as is the Parliament. Such immunity cannot be waived by the Parliament and as a result, that court is bound to dismiss the action brought against the Member concerned. (para. 44)

Inspecteur van de Belastingdienst v X (Case C-429/07) [2009] ECR I-4833

The above principle concerning national judicial authorities laid down in *Imm. Zwartveld* also applies under Regulation 1/2003/EC on the enforcement of EU competition law which has special provisions dedicated to the cooperation between the Commission, the national competition authorities and national courts. (paras. 20-21)

In this particular context, the national courts, on the one hand, and the Commission and the Union Courts, on the other, act on the basis of the role assigned to them by the Treaty. (para. 22)

In case of detailed rules of cooperation laid down in EU legislation, the cooperation obligation of EU and national authorities will be governed by those rules.²⁰⁸ (paras. 23-39)

Lidl Italia (Case C-303/04) [2005] ECR I-7865

When there are specific obligations of cooperation laid down in detail in EU legislation, Article 4(3) TEU will apply together with them. (para. 17)

Franex NV (Case C-275/00) [2002] ECR I-10943

Under Article 4(3) TEU, when a national court requires information that only the EU institutions can provide (here, the Commission), the EU institution concerned when requested to do so by the national court must provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Union or to safeguard its interests. (para. 49)

The national court, however, does not have jurisdiction to order, with respect to one of the institutions of the EU, 'proceedings for an expert report'. (para. 48)

5.9 Competition enforcement procedures

Tele 2 Polska (Case C-375/09) EU:C:2011:270 (national competition authorities)

²⁰⁸ Article 15(3) of Regulation No 1/2003 must be interpreted as meaning that it permits the Commission to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles 101 and 102 TFEU.

In order to ensure the coherent application of the competition rules in the Member States, a cooperation mechanism between the Commission and the national competition authorities was set up by Regulation 1/2003/EC, as part of the general principle of sincere cooperation. (para. 26)

Empowerment of national competition authorities to take decisions stating that there has been no breach of Article 102 TFEU would call into question the system of cooperation established by the Regulation and would undermine the power of the Commission. (para. 27)

Such a 'negative' decision on the merits would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of EU law. (para. 28)

The Commission alone is empowered to make a finding that there has been no breach of Article 102 TFEU, even if that article is applied in a procedure undertaken by a national competition authority. (para. 29)

Delimitis (Case C-234/89) [1991] ECR I-935 (national courts)

It is always open to a national court, within the limits laid down in national procedural law and in EU law, to seek information from the Commission on the state of any procedure which the Commission may have set in motion and as to the likelihood of its giving an official ruling on an anti-competitive conduct. (para. 53)

National courts may contact the Commission where the concrete application of Articles 101 and 102 TFEU raises particular difficulties in order to obtain the economic and legal information which the Commission can supply to it. (para. 53)

Under Article 4(3) TEU, the Commission is bound to cooperate with the judicial authorities of the Member States that are responsible for ensuring that EU law is applied and respected in the national legal system. (para. 53).

The national court may in any event stay the proceedings and make a reference for a preliminary ruling to the Court of Justice. (para. 54)

Masterfoods (Case C-344/98) [2000] ECR I-11369 (national courts)

In the application of EU competition law, the national courts, on the one hand, and the Commission and the Union Courts, on the other, are bound by an obligation of sincere cooperation and each act on the basis of the role assigned to them by the Treaty. (para. 56)

In particular, when the outcome of the dispute before the national court depends on the validity of the Commission decision, the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Union Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

(para. 57)

If a national court stays proceedings, it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment. (para. 58)

Otis (Case C-199/11) EU:C:2012:684 (the right of access to justice)

An application of the EU competition rules – even in actions for damages for loss sustained as a result of conduct found in breach of Article 101 TFEU – is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the EU Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. (para. 52)

It is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid. (para. 53)

The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts. (para. 54)

That rule does not mean, however, that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in Article 47 of the Charter. (para. 55)

Indeed, EU law provides for a system of judicial review of Commission decisions relating to proceedings under Article 101 TFEU which affords all the safeguards required by Article 47 of the Charter. (para. 56)

The review carried out by the Court of Justice against Commission decisions in competition matters provides effective judicial protection. (paras. 57-63)

Case C-94/00 Roquette Frères [2002] ECR I-90110 (national courts)

(Hoechst, paras 33-35)

In case Member State administrative and judicial authorities cooperate with the Commission in the enforcement of EU competition law, the conditions of that cooperation are laid down, on the one hand, in EU legislation (here, Regulation 17 (now Regulation 1/2003/EC)), and on the other, in national law. The Member States enjoy considerable discretion in this regard and the Commission needs to respect the national legal requirements and guarantees, especially, when it proceeds under coercive powers (not with the cooperation of the undertaking concerned. (para. 34)

The Member States, when cooperating in the enforcement of EU competition law with the Commission must observe the twofold obligation that it is ensured that Commission's action is effective and that the various general principles of EU law are respected. (para. 35)

For this latter purpose, the competent national body is entrusted with jurisdiction to consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation. (para. 36)

The Commission is for its part obliged to make sure that the national body in question has all that it needs to perform that supervisory task and to ensure that, in the implementation of the coercive measures, the national rules are respected. (para. 37)

The national court acting in the judicial review of coercive instruments applied to assist the Commission

- may not substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the EU judicature. (para. 39)
- which must concern itself only with the coercive measures applied for, may not go beyond an examination, as required by EU law, to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation. Such an examination exhausts the jurisdiction of that court as regards the review of the justification of the coercive measures applied for in pursuance of a request by the Commission for assistance. (para. 40)
- must take into account the particular context in which its jurisdiction has been invoked and the range of guarantees enforced under EU law against coercive investigatory measures by the Commission. (paras. 41-51)
- is, however, not prevented or absolved from performing its obligation to ensure, in the specific circumstances of each individual case, that the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered (under national or ECHR law). (para. 52)

The information obligations of the Commission to establish that the coercive measures are not arbitrary

- involve the Commission providing that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned. (paras. 54-61)
- having regard to the effectiveness of competition investigations, cannot involve the Commission revealing the identity of its sources of information, or enabling that identity to be deduced. (paras. 62-65)
- having regard to the effectiveness of competition investigations, cannot involve the Commission physically transmitting excessive amount of factual information and evidence held in its file. (para. 66)

The information obligations of the Commission to establish that the coercive measures are not disproportionate

- involve the Commission providing provide the competent national court with the explanations needed by that court to satisfy itself that, if the Commission were unable to obtain, as a precautionary measure, the requisite assistance in order to overcome any opposition on the part of the undertaking, it would be impossible, or very difficult, to establish the facts amounting to the infringement. (paras. 71-75)
- involve the Commission informing that court of the essential features of the suspected infringement, so as to enable it to assess their

seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned. (paras 76-81)

- do not require the Commission that the information communicated precisely defines the relevant market, sets out the exact legal nature of the presumed infringements or indicates the period during which those infringements were committed. (para. 82)
- involve the Commission indicating as precisely as possible the evidence sought and the matters to which the investigation must relate, as well as the powers conferred on the Community investigators. (para. 83)
- do not require the Commission to limit its investigation to requesting the production of documents or files which it is able to identify precisely in advance as that would, in effect, render nugatory its right of access to such documents or files. (para. 84)

The obligations of the competent national court and the Commission when the information communicated proves to be insufficient include the prohibition on the national court to simply dismiss the application brought before it, collaboration between the national court and the Commission with a view to overcoming the problems arising, and cooperating in the implementation of the investigation decision ordered by the Commission. (paras. 90-91)

The national court must, in particular, inform as rapidly as possible the Commission, or the national authority which has brought the latter's request before it, of the difficulties encountered, where necessary by asking for the additional information needed to enable it to carry out the review which it is to undertake. In such circumstances, that court must pay particular heed to the need for coordination, expedition and discretion needing to be fulfilled in order to ensure the effectiveness of parallel investigations. (para. 92)

The Commission must, in particular, provide, with the minimum of delay, any additional information thus requested by the competent national court. (para. 93)

The national court must wait for the clarifications of the Commission or for the Commission to take practical steps in response to its request. Only when these are not provided may it refuse to grant the assistance sought where it cannot be concluded, in the light of the information available to that court, that the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of those measures. (para. 94)

As to the manner in which the requisite information can be brought to the knowledge of the competent national court, it must not follow from the statement of reasons of the investigation decision only but should also emanate from other sources. There is no requirement of a particular form for the information communicated. Since the purpose is to enable that court to carry out the review which it is required to undertake, such information may be contained either in the investigation decision itself or in the request made to the national authorities, or indeed in an answer - even given orally - to a question put by that court. (paras. 95-98)

Walt Wilhelm (Case 14/68) [1969] ECR 1 (parallel procedures)

When (prior to Article 1/2003/EC) competition infringements are subject to parallel procedures before the Commission and before national

competition authorities and national authorities proceed under national law, this parallel application of national competition law can only be allowed in so far as it does not prejudice the uniform application of EU competition rules and of the full effect of the measures adopted in implementation of those rules (para 4)

Any other solution (i.e., denying supremacy from EU competition law) would be incompatible with the objectives of the Treaties and the character of its rules on competition. (para. 5)

It would be contrary to the autonomy of EU law, integrated into the legal systems of the Member States and which must be applied by their courts, to allow the Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures as, otherwise, the functioning of the EU system may be impeded and the achievement of the aims of the Treaty would be placed in peril. (para. 6)

Conflicts between national and EU competition rules must be resolved by applying the principle that EU law takes precedence. (para. 6)

5.10 EAGGF clearance procedures

Italy v Commission (Clearance of EAGGF Accounts) (Case 14/88) [1989] ECR 36777

Under Article 4(3) TEU, Member State authorities must ensure that the objective of the relevant EU measure (here, Union aid scheme) is achieved so as to ensure the correct implementation of EU law in the interest of the traders concerned: they are required, in particular, to effect payments within a brief period which accords with the objectives laid down in the EU measure in question (here, the objective of start-up aid) on conditions that the period stipulated by the Union (here, the Commission) is reasonable and not arbitrary. (para. 20)

In determining whether the payment period stipulated was reasonable and not arbitrary, account must be taken of whether its duration is sufficiently long to enable the Member State concerned to obtain the information necessary for calculating the amount of payment to be granted to a specific organisation without altering the nature of the payment as determined in the relevant EU measure.²⁰⁹ (para. 22)

The fact that fact-finding investigations were carried out by the Commission and subsequent verifications were made by the national authorities on the basis of the results of those investigations could be of relevance provided that there is a causal link between the delays noted in the payment and the conduct of those investigations (the delays were not attributable to the Commission's involvement). (paras. 24-25)

The general principle also applies in this context that Member State may not plead provisions, practices or circumstances existing in its internal legal system (here, the budgetary unavailability of funds) in order to justify

²⁰⁹ Here the financial data were available at least one year before the payment was to be made leaving sufficient time for the Member State to carry out the various administrative steps prior to payment, para. 23.

a failure to comply with obligations and time-limits resulting from EU rules. (para. 26)

Greece v Commission (Clearance of EAGGF Accounts) (Case C-50/94) [1996] ECR I-3331

In case a Member State pleads that it was absolutely impossible to implement and comply with EU law (here, a Commission decision), under Article 4(3) TEU the Member State concerned must submit the problems linked with such implementation in good time to the appropriate institutional for consideration and they must work together in good faith with a view of overcoming the difficulties which fully observing the Treaty provisions. (para. 39.)

This obligation is violated when the difficulties are not notified to the Commission until after the expiry of the prescribed period, it is not argued with evidence what difficulties occurred, and no justification is submitted as to the failure to meet EU obligations. (paras. 40-41)

5.11 The EU's own resources

Commission v Germany (TIR Carnets) (Case C-105/02) [2006] ECR I-9659

(Case C-10/00 Commission v Italy, paragraphs 89 to 91)

Under Article 4(3) TEU, the Member States are required to take, in genuine cooperation with the Commission, the measures needed to ensure the application of EU law relating to the establishment of possible own resources, and where the Commission is largely dependent on the information provided by the Member State concerned, that Member State is required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether and, as the case may be, to what extent the amounts concerned relate to the Union' own resources. (para. 94)

Akerberg Fransson (Case C-617/10) EU:C:2013:105

As it follows, first, from the relevant EU legislation (Directive 2006/112/EC) and, second, from Article 4(3) TEU, 'every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion.'²¹⁰ (para. 25)

In addition, under Article 325 TFEU the Member States are obliged 'to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures' and they are obliged, in particular, 'to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.' (para. 26)

²¹⁰ See also judgments in *Commission v Italy*, C-132/06, EU:C:2008:412, paras. 37 and 46; and *C-144/14 Cabinet Medical Veterinar Tomoiagă Andrei* ECLI:EU:C:2015:452, para. 25

Belvedere Costruzioni (Case C-500/10) EU:C:2012:186

In light of their obligation to ensure effective collection of European Union resources (*Akerberg Fransson*, para. 25), Member States are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due. (para. 20)

However, this obligation cannot run counter to compliance with the principle that judgment should be given within a reasonable time, which, under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be observed by the Member States when they implement European Union law, and must also be observed under Article 6(1) of the ECHR. (para 23.)²¹¹

5.12 External relations

Commission v Germany (Inland Waterways) (Case C-433/03) [2005] ECR I-6985 (united external representation of the EU)

(Case 804/79 Commission v United Kingdom [1981] ECR I-1045, para. 28; Commission v Luxembourg (Inland Waterways) (Case C-266/03) [2005] ECR I-4805, paras. 59-60)

Concerning the negotiation, ratification and implementation of bilateral agreements when a replacing multilateral agreement is being negotiated by the EU, the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the EU marks the start of a concerted EU action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the EU institutions in order to facilitate the achievement of the EU tasks and to ensure the coherence and consistency of the action and its international representation. (para. 66)

The Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted EU action. (para. 65)

The failure to cooperate or consult by the Member State concerned with the Commission after a Council Decision is adopted regarding the adoption of a multilateral agreement on behalf of the EU and proceeding to conclude the bilateral agreement jeopardises the implementation of the

²¹¹Therefore, Article 4(3) TEU in conjunction with Article 288(3) TFEU do not preclude (for instance) the application in VAT matters of an exceptional provision of national law, which provides for the automatic conclusion of proceedings pending before the tax court of third instance where those proceedings originate in an application brought at first instance more than 10 years, and in practice more than 14 years, before the date of the entry into force of that provision and the tax authorities have been unsuccessful at first and second instance, the consequence of that automatic conclusion being that the decision of the court of second instance becomes final and binding and the debt claimed by the tax authorities is extinguished (*Belvedere Costruzioni*, para. 28)

Council Decision and, consequently, the accomplishment of the Union's task and the attainment of the objectives of the Treaty.²¹² (paras. 67-69)

The undertaking by the Member State concerned to denounce the bilateral agreements as soon as a multilateral agreement has been concluded on behalf of the Union is irrelevant as because it is to take place after the negotiation and conclusion of that agreement it has no practical effect in terms of facilitating the multilateral negotiations conducted by the Commission. (para. 72)

Commission v Luxembourg (Inland Waterways) (Case C-266/03) [2005] ECR I-4805 (united external representation of the EU)

Under Article 4(3) TEU, the duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries. (para. 58)

It is a breach of Article 4(3) when parallel to the Union negotiating a multilateral agreement in the same area with the same States the Member States negotiate, conclude, ratify and bring into force bilateral agreements without cooperating or consulting with the Commission. (para. 66)

Commission v Ireland (MOX Plant) (Case C-459/03) [2006] ECR I-4635 (mixed agreements)

In case of mixed agreements, the Member States and the EU institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence. (para. 175)

5.13 Distinct cooperation obligations

Commission v United Kingdom (Case C-40/92) [1994] ECR I-989 (under a common policy framework)

Under Article 4(3) TEU, the Member States are obliged to notify proposals for the changes made to national marketing schemes derogating from a CAP common organisation of the market. (paras. 33-35)

Spasic (C-129/14 PPU) EU:C:2014:586 (under a common policy framework)

In the application *in concreto* of the execution condition laid down in Article 54²¹³ of the Convention Implementing the Schengen Agreement

²¹² In this respect it is irrelevant that the bilateral agreements were signed before the adoption of the Council Decision as they were ratified and implemented after that date, para. 71.

²¹³ Article 54 CISA on the application of the *ne bis in idem* principle provides: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it

(CISA) in a given case, the national courts may — on the basis of Article 4(3) TEU and the legal instruments of European Union secondary legislation in the area of criminal law referred to by the Commission — contact each other and initiate consultations in order to verify whether the Member State which imposed the first sentence really intends to execute the penalties imposed. (para. 73)

5.14 Obligation to compensate

Kellinghusen (Joined cases C-36/97 and C-37/97) [1998] ECR I-6337

Under Article 4(3) TEU, when supported with concrete legal obligations, the Council is obliged to enact measures which enable compensating the loss of income caused by the reduction of institutional prices following the reform of the CAP (thus ensuring the uniform application of EU law and the equal treatment of the traders affected). (paras. 31-32)

5.15 Preliminary ruling procedures (not based on Article 4(3) TEU)²¹⁴

CILFIT (Case 283/81) [1982] ECR 3415 (national courts and the Court of Justice)

The obligation to make a reference for a preliminary ruling to the CJEU is based on cooperation between national courts, which are responsible for the application of EU law, and the CJEU. That cooperation is established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States. The scope of the obligation to refer must be assessed – in view of the objective of preventing the occurrence within the EU of divergences in judicial decisions on questions of EU law – by reference to the powers of the national courts, on the one hand, and those of the CJEU, on the other (they both need to make their direct contribution to achieve the objective within their respective areas of jurisdiction). (para. 7)

Valente v. Fazenda Public (Case C-393/98) [2001] ECR I-1327

The fact that the Commission has ended its infringement proceedings against a Member State concerning a piece of legislation has no effect on the obligation upon a court of last instance of that Member State to refer to the Court of Justice, pursuant to Article 267(3) TFEU, a question of EU law in relation to the legislation concerned. (para. 19)

Diageo Brands (case C-681/13) EU:C:2015:471

has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’

²¹⁴The claim based on Article 4(3) TEU regarding the duty of cooperation of national courts in preliminary ruling procedures was rejected on the ground based on the facts of the case that national courts of first instance are not obliged to make a reference to the Court of Justice, paras. 57-58, 681/13 Judgment ECLI:EU:C:2015:471 16/07/2015 Diageo Brands.

The system established by Article 267 TFEU institutes direct cooperation between the Court of Justice and the national courts by means of a procedure completely independent of any initiative by the parties. The system of references for a preliminary ruling is thus based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary.²¹⁵ (para. 59)

Schmidberger (Case C-112/00) [2003] ECR I-5659 (national courts and the Court of Justice)

The preliminary ruling procedure is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate.²¹⁶ (para. 30)

In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling.²¹⁷ (para. 31)

However, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court. (para. 32)

The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions. (para. 32)

Zaizoune (Case C-38/14) EU:C:2015:260

In the context of the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts need in order to decide the actions pending before them, even if those provisions are not

²¹⁵ See also judgment in *Kelly*, Case C-104/10 [EU:C:2011:506] paras. 62 and 63.

²¹⁶ *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 31

²¹⁷ *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41

expressly indicated in the questions referred to the Court of Justice by those courts.²¹⁸ It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decisions to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute. (paras. 25 and 26).²¹⁹

5.16 The working conditions of the EU institutions

France v European Parliament (Joined cases 358/85 and 51/86) [1988] ECR 4821

Under Article 4(3) TEU, the Member States and the EU institutions are subjected to reciprocal obligations of bona fide cooperation which requires both sides involved to honour their obligations to secure adequate working conditions for the EU institutions. (para. 34)

On the one hand, the EU institution concerned (here, the Parliament), in exercising its power to determine its own internal organisation, must have regard to the powers of the Member States to establish the seat of the EU institutions, and on the other, the Member States, when taking these decisions, must respect the aforesaid power of the EU institution concerned and to ensure that their decisions do not stand in the way of the proper functioning of that institution. (para. 35)

Luxembourg v European Parliament (Seat and Working Place of the Parliament)(Case 230/81) [1983] ECR 255

(Para. 29 *Luxembourg v European Parliament (Joined cases C-213/88 and C-39/89)* [1991] ECR I-5643)

When the Member States make (provisional) decisions as to the functioning of the EU institutions, they are obliged under Article 4(3) TEU to have regard of the power of the EU institutions to determine their internal organisation and they must ensure that their decisions do not impede the due functioning the institution in question. (para. 37)

In a similar vein, when in such circumstances the EU institution concerned makes decisions as to its own international organisation in order to ensure the due functioning and conduct of its proceedings, it must have regard to the power of the Member States to determine the seat of the institutions and to the provisional decisions taken in the meantime. (para. 38)

²¹⁸ On the other hand, where a matter is regulated in a harmonised manner at European Union level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure (see Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32, and Case C-132/08 *Lidl Magyarország* [2009] ECR I-3841, paragraphs 42 and 46). Therefore, in cases where the question(s) submitted by the national court extend to EU law provisions other than those of the harmonising measure, the Court may have to reformulate the questions referred to it. (See for instance case C-26/11 *Belgische Petroleum Unie and Others* ECLI:EU:C:2013:44, para. 21)

²¹⁹ See also judgment in *eco cosmetics and Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, paras. 32 and 33.

Aayhan and Others v Parliament, F-65/07, EU:F:2009:43

Under Article 4(3) TEU, it is incumbent on the institutions to ensure as far as possible consistency between their own internal policy and their legislative action at EU level, in particular as addressed to Member States. Thus, institutions must take into account, in their conduct as employers, legislative provisions laying down in particular minimum requirements designed to improve the living and working conditions of workers in the Member States through the approximation of national laws and practices and, in particular, the EU legislature's intention to make stable employment a prime objective as regards labour relations within the European Union. (paras. 118 and 119)

6. Institutional cooperation between the EU institutions

6.1 Legislative procedures

Parliament v Council (Case C-65/93) [1995] ECR I-643

The inter-institutional dialogue, on which the legislative procedure (here, consultation procedure) is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between the Member States and the EU institutions.²²⁰ (para. 23)

In particular, in the legislative procedure the EU institutions must take each other's position fully into account, which could mean that the Parliament organises its work so as to give its opinion on the legislative proposal having regard to the request of the Council for a rapid adoption of that measure. Adjourning parliamentary debates on that legislative proposal without valid reasons and ignoring the urgency of the situation and the need to adopt the measure in question constitutes a violation of the duty of sincere cooperation. (paras. 24-26)

6.2 External relations

Commission v Council (Nuclear Safety Convention) (Case C-29/99) [2002] ECR I-11221

In the context of the procedure for the EU (here, Euratom) to conclude or accede to an international agreement, Article 4(3) TEU requires that the Council approving decision must enable the Commission to comply with international law (here the conditions of accession laid down by an international convention). In this case, the Council was required, under EU law, to attach a complete declaration of competences to its decision so as to enable the Commission complete the accession process according to the requirements of the international agreement in question (an incomplete accession decision by the Council would be in breach of the obligations laid down in the international convention from the moment they enter into force). (paras. 67-71)

6.3 Under Article 13(2) TEU

Parliament v Council (Case C-48/14) EU:C:2015:91

The duty of mutual sincere cooperation between the EU institutions under Article 13(2) TEU is exercised within the limits of the powers conferred by the Treaties on each institution and that obligation does not change those powers. (paras. 57-58)

Council v Commission (Case 409/13) EU:C:2015:217

²²⁰ Para. 16, *Greece v Council* (Case 204/86) [1988] ECR 5323 (budgetary procedure); *Case 34/76 Council v European Parliament* ((1986)) ECR 2155 (budgetary procedure)

Under Article 13(2) TEU, each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It provides, in addition, that the EU institutions are to practice mutual sincere cooperation. (paras. 64-65)

Article 13(2) TEU applies in the context of the Commission withdrawing a proposal for legislation. However, regard must be had to the legislative initiative accorded to the Commission by Articles 7(2) TEU and 289 TFEU under which it is for the Commission to decide whether or not to submit a proposal for a legislative act, except in the situation where it would be obliged under EU law to submit such a proposal. By virtue of that power, if a proposal for a legislative act is submitted it is also for the Commission, which, in accordance with Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end, to determine the subject-matter, objective and content of that proposal. (paras. 98-70)

It follows from Article 17(2) TEU in conjunction with Articles 289 TFEU and 293 TFEU that the Commission's power under the ordinary legislative procedure does not come down to submitting a proposal and, subsequently, promoting contact and seeking to reconcile the positions of the Parliament and the Council. Just as it is, as a rule, for the Commission to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject-matter, objective and content, the Commission has the power, as long as the Council has not acted, to alter its proposal or even, if need be, withdraw it. The power of withdrawal cannot, however, confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance. If the Commission, after submitting a proposal under the ordinary legislative procedure, decides to withdraw that proposal, it must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments. (paras. 74-76)

Where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*, the Commission is entitled to withdraw it. It may, however, do so only after having due regard, in the spirit of sincere cooperation which, pursuant to Article 13(2) TEU, must govern relations between EU institutions in the context of the ordinary legislative procedure, to the concerns of the Parliament and the Council underlying their intention to amend that proposal. (para. 83)

That principle of sincere cooperation requires the Commission to act in due time after the cause for withdrawal becomes apparent, to attempt to reconcile the respective positions of the institutions concerned (to propose a compromise solution), and not to use the power of withdrawal in belatedly or in bad faith. (paras. 98-106)

Commission v Council (Case C-425/13) EU:C:2015:483 (Article 13(2) TEU and external relations)

The duty of mutual sincere cooperation between the EU institutions under

Article 13(2) TEU applies in the context of the Council regulating under Article 218 TFEU the reporting and consulting obligations of the Commission in the process negotiating international agreements with third States. That cooperation is of particular importance for EU action at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions. (paras. 61-64)

Under Article 13(2) TEU, each EU institution is to act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions. (para. 69)

Article 218(4) TFEU empowers the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission, as such rules meet the objective of ensuring proper cooperation at the internal level. It must, however, be examined whether those rules are liable to deny the negotiator the power which it is granted in Article 17(1) TEU to the Commission. (paras. 78-79)

It is contrary to Article 218(4) TFEU and to the obligation laid down by Article 13(2) TEU to act within the limits of powers for negotiating positions established by the Council or a special committee to be binding on the negotiator. (paras. 56-88)

7. Cooperation between the Member States (at the administrative level)

EU-Wood-Trading (Case C-277/02) [2004] ECR I-11957

Conflicts of positions and divergences in the assessment of different competent authorities located in different Member States, when those situations are inherent in the system established by the EU regulation in question (e.g., it confers simultaneously on all the competent authorities the responsibility of ensuring that the provisions of the regulation are met), are not contrary to the principle of cooperation under Article 4(3) TEU and cannot be raised in order to require a different interpretation of the EU regulation in question. (para. 48)

Fitzwilliam Executive Search (Case C-202/97) [2000] ECR I-883

(paras. 46-48, Gregorio My (Case C-293/03) [2004] ECR I-12013)²²¹

Under Article 4(3) TEU, the competent authorities of the Member States are required to carry out a proper assessment of the facts relevant for the application of the relevant rules and, consequently, to guarantee the correctness of the information passed on the competent authorities of other Member States (here, in the form of an E 101 certificate in case of posted workers). (para. 51)²²²

It also entails that the competent authorities of the receiving Member States must not consider themselves as not bound by the information passed on (here, the E 101 certificate) and must make the persons concerned subject to the legal provisions of the receiving Member State. (para. 52)

An opposite result would undermine the basic principles of the applicable EU measure and would result in the persons concerned being subjected, in violation of the requirement of legal certainty, contradicting demands from the competent authorities of the different Member States. (para. 54)

The principle of sincere cooperation also entails that the competent authority of the issuing Member State reconsiders its assessment and withdraws the information passed on (here, the E 101 certificate) in case the competent authorities of the receiving Member State express doubts as to the correctness of the facts assessed and, consequently, of the information passed on, in particular because the information does not correspond with the requirements laid down in the applicable EU measure. (para. 56)

Furthermore, the competent authorities must attempt to reach an agreement on how the particular facts of a specific case should be assessed and whether the information passed on complies with the applicable EU measure. If this does not lead to a result, they should resort

²²¹ A similar problem addressed concerning the refusal by a Member State to take into account, for the purposes of entitlement to an early retirement pension under its own scheme, periods of employment under the Community pension scheme.

²²² See also: Banks and Others Case C-178/97 [ECLI:EU:C:2000:169], para 38

to the available reconciliatory procedure, if such procedure is made available in the applicable EU measure. (para. 57)

In case the reconciliatory procedure is closed unsuccessfully, besides the person concerned using the legal remedies available in the Member State concerned, the Member State at issue may 'at least' bring infringement procedures against the other Member State. (para. 58)

Idryma Koinonikon Asfaliseon (IKA) v Vasilios Ioannidis (Case C-326/00) [2003] ECR I-1703

Under Article 4(3) TEU, read together with the applicable provisions of EU law regulating cooperation between the administrative authorities of the Member States, the competent authorities of the place of stay and the place of residence jointly assume the task of applying the relevant provisions of EU legislation and cooperate in order to ensure that those provisions are applied correctly and, consequently, that the rights conferred on individuals by the EU measures in question are fully respected. (para. 51)

In particular, this entails that the competent authorities in the different Member States ascertain, if necessary by asking each other for information, whether their respective decisions are well-founded under the applicable EU measures. In case they come to a different conclusion they must inform each other and then reconsider whether their decision was indeed well-founded or should be modified. (para. 52)

Beuttenmüller (Case C-102/02) [2004] ECR I-5405

It can follow from the EU legislation at issue laying down a framework for mutual recognition (preamble of Directive 2005/36/EC).

8. External relations

8.1 The general principle

The principle of loyalty is of general application and does not depend either on whether the Union competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.²²³

8.2 Exclusive (internal) competences

ILO Convention 170 (Opinion 2/91) [1993] ECR I-1061

The exclusive competences of the Union received support from Article 4(3) TEU when the Court held that exclusive competences for the EU may not only arise where EU rules have been promulgated for the attainment of the objectives of the Treaty within the framework of a common policy, but also in all the areas corresponding to the objectives of the Treaty where the Member States must act according to the principle of loyalty. (paras. 9-10)

Basically, the EU's tasks and the objectives of the Treaty would also be compromised if the Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope. (para. 11)

Commission v Netherlands (Bilateral Air Transport Agreement) (Case C-523/04) [2007] ECR I-3267

(paras. 110-112, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; paras. 106-108, Case C-468/98 *Commission v Sweden* [2002] ECR I-9575, paras. 111-113, Case C-469/98 *Commission v Finland* [2002] ECR I-9627, paras. 124-126, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, paras. 116-118, Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741, paras. 124-126, Case C-475/98 *Commission v Austria* [2002] ECR I-9797, and paras. 135-137, Case C-476/98 *Commission v Germany* [2002] ECR I-9855)

The Union's tasks and the objectives of the Treaties would be compromised if Member States were able to enter into international commitments containing provisions capable of affecting rules adopted by the Union or of altering their scope. (para. 75)

Under Article 4(3) TEU, the Member States are prevented from entering into or maintaining into force bilateral international commitments with third States when the area is regulated by the EU in its exclusive internal

²²³ *Commission v Germany (Inland Waterway)* (Case C-433/03) [2005] ECR I-6985 (Para. 64)

Case C-266/03 *Commission v Luxembourg*, paragraph 58 Para. 71, *Commission v Sweden (PFOS)* (Case C-246/07) [2005] ECR I-6985; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 64

competence. (para. 76)

8.3 Procedural rules

Commission v Council (Case C-28/12) EU:C:2015:282 (mixed agreements)

Although where it is apparent that the subject-matter of an agreement falls partly within the competence of the European Union and partly within that of the Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into, that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU. (paras. 54-55)

8.4 Abstention obligations and pre-empting Member State action

Commission v Council (ERTA) (Case 22/70) [1971] ECR 263

In connection with the use implied powers to assume competence to conclude an international agreement, the Member States are excluded from exercising concurrent powers as 'any steps take outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law.' (para. 31)

Article 4(3) TEU, when read together with another Treaty provision identifying the establishment of a common (internal) policy as an objective of the EU, prevents – to the extent to which EU rules are promulgated for the attainment of the objectives of the Treaties – the Member States to assume obligations – outside the framework of the Union institutions – which might affect those rules or alter their scope. (paras. 20-22)²²⁴

In the specific circumstances of the case, Article 4(3) TEU was also raised as confirming that the Member States acted, and continued to act, in the interest and on behalf of the Union (para. 79-90).

Matteucci (Case 235/87) [1988] ECR 5589

Under Article 4(3) TEU, in case the application of EU law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement between a Member State and a third State, even where the agreement falls outside the field of application of the Treaty, the Member States are under a duty to facilitate the application of EU law and, to that, to assist every other Member State which is under an obligation under EU law. (para. 19)

²²⁴ Commission v Denmark (Open Skies) (Case C-467/98) [2002] ECR I-9519 (paras. 110-112) *Opinion 2/91, paragraph 11*

Commission v Council (Case C-114/12) EU:C:2014:2151 (summarizing the interpretation developed on the ERTA principle)

There is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules.²²⁵ (para. 68)

A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully.²²⁶ (para. 69)

The scope of common EU rules may be affected or altered by such commitments also where those commitments fall within an area which is already largely covered by such rules.²²⁷ (para. 70)

In addition, Member States may not enter into such commitments outside the framework of the EU institutions, even if there is no possible contradiction between those commitments and the common EU rules.²²⁸ (para. 71)

Even after the new competence rules of the Lisbon Treaty, which do not further restrict but define the scope of Union external action, since the European Union has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope. (paras. 72-74)

In accordance with the principle of conferral as laid down in Article 5(1) and (2) TEU, it is, for the purposes of such an analysis, for the party concerned to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely. (para. 75)

Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EU:C:2006:81) (limits of the application of the ERTA principle)

The EU does not have an exclusive competence under the AETR principle where, because both the EU provisions and those of an international convention laid down (only) minimum standards, there is nothing to prevent the full application of EU law by the Member States.²²⁹

²²⁵ *Commission v Denmark*, EU:C:2002:625, paragraph 82

²²⁶ Opinion 1/03, EU:C:2006:81, paragraph 126

²²⁷ Opinion 2/91, EU:C:1993:106, paragraph 25; judgment in *Commission v Denmark*, EU:C:2002:625, paragraph 82; and Opinion 1/03, EU:C:2006:81, paragraphs 120 and 126

²²⁸ Opinion 2/91, EU:C:1993:106, paragraphs 25 and 26; and the judgment in *Commission v Denmark*, EU:C:2002:625, paragraph 82

²²⁹ See also Opinion 2/91, para. 18

Similarly, the need for exclusive EU competence cannot be recognised because the reason that there is a chance that bilateral agreements would lead to distortions in the flow of services in the internal market.²³⁰ (para. 123)

8.5 United external representation in the EU

WTO (Opinion 1/94) [1994] ECR I-5267 (mixed agreements) (united external representation of the EU)

(para. 18, Cartagena Protocol on Biosafety (Opinion 2/00) [2001] ECR I-9713; Draft IAEA Convention (Ruling) 1/78 [1978] ECR 2151, paragraphs 34 to 36; para. 36, ILO Convention (Opinion 2/91) [1993] ECR I-1061)

Where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.

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Commission v Greece (IMO) (Case C-45/07) [2009] ECR I-701 (united external representation of the EU)

Under Article 4(3) TEU, the Member States are prevented from undermining the united external representation of the Union when acting under exclusive competences by adopting unilateral measures (here, setting in motion a procedure before the IMO Maritime Safety Committee with a national proposal). (paras. 19-23).

Under Article 4(3) TEU, the EU institutions, even when acting under exclusive competences, must endeavour to submit proposals from the Member States before the appropriate international forum (here, the IMO Maritime Safety Committee) and must allow debate on the subject without preventing such an exchange of views to developed on the sole ground that a proposal is of a national nature. (para. 25)

These two obligations cannot be weighed against (they will not undermine) each other when establishing the breach of Article 4(3) TEU. (para. 24)

In particular, any breach by the Commission of Article 4(3) TEU 'cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of

²³⁰ See also Opinion 1/94, paras. 78 and 79, and *Commission v Denmark*, paras. 85 and 86

that State's obligations' which may arise, among others, under Article 4(3). (para. 26).

A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of EU law (para. 26.)

Commission v Sweden (PFOS) (Case C-246/07) [2005] ECR I-6985:

In case of mixed agreements, Article 4(3) TEU, based on the requirements of unity in the international representation of the Union and its Member States, and also of avoiding the weakening of their negotiating power to the other parties to the Convention concerned, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. (para. 73)

The Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Union action.²³¹ (para. 74)

The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation. (para. 75)

Concerning the submission of a proposal to determine the an annex of an international convention (here, the Stockholm Convention), Article 4(3) TEU requires the Member States, even where a formal Council decision has not been adopted but a common Union strategy was available (so there was no 'decision-making vacuum'),²³² not to dissociate themselves through unilateral action 'from a concerted common strategy in the Council. (paras. 76, 91) Also, such an action has consequences for the Union under international law (here, under the Convention in question concerning the prohibition of the Union and its Member States to exercise their rights under the Convention concurrently), namely that either the Union or the Member States will be prevented from exercising their competences in a situation where the allocation of competences between the Union and the Member States is not determined clearly. (paras. 92-102)

²³¹ Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, paragraph 28; *Commission v Luxembourg*, paragraph 59; and *Commission v Germany*, paragraph 65

²³² it does not appear to be indispensable that a common position take a specific form for it to exist and to be taken into consideration in an action for failure to fulfil the obligation of cooperation in good faith, provided that the content of that position can be established to the requisite legal standard, par. 77

8.6 Close cooperation in the implementation of international agreements

WTO (Opinion 1/94) [1994] ECR I-5267

'The duty to cooperate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross-retaliation measures established by the Dispute Settlement Understanding. Thus, in the absence of close cooperation, where a Member State, duly authorized within its sphere of competence to take cross-retaliation measures, considered that they would be ineffective if taken in the fields covered by GATS or TRIPs, it would not, under Community law, be empowered to retaliate in the area of trade in goods, since that is an area which on any view falls within the exclusive competence of the Community under Article 113 of the Treaty. Conversely, if the Community were given the right to retaliate in the sector of goods but found itself incapable of exercising that right, it would, in the absence of close cooperation, find itself unable, in law, to retaliate in the areas covered by GATS or TRIPs, those being within the competence of the Member States.' (para. 109)

Christian Dior and Assco Gerüste (Joined cases C-300/98 and C-392/98) [2000] ECR I-11307

(Paras. 32-35, Merck Genéricos (Case C-431/05) [2007] ECR I-7001)

The Member States and the EU institutions 'have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence'. (para. 36)

In case a provision of an international agreement 'should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law', the obligation of cooperation 'requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.' (para. 37 on Article 50 TRIPS)

It, however, follows from the position of the EU Court of Justice, that 'acting in cooperation with the courts and tribunals of the member States' only it is 'in a position to ensure such uniform interpretation.' (para. 38 extending its jurisdiction, as a result, to disputes beyond trade mark law) This latter was developed from para. 32, *Hermès International* (Case C-53/96) [1998] ECR I-3603 holding that 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.'

Commission v Ireland (MOX Plant) (Case C-459/03) [2006] ECR I-4635

Under Article 4(3) TEU, the Member States are prevented from instituting arbitral proceedings under an international agreement (here, the UNCLOS) on the basis of provisions which fall within the competence of

the Union, instead of bringing the case before the Court of Justice, and from bringing those proceedings unilaterally without having first informed and consulted the EU institutions.²³³ (paras. 171, 174-181)

The general duty of loyalty under Article 4(3) TEU has a specific expression in the obligation in ex Article 292 EC (now Article 344 TFEU) to have recourse to the EU judicial system and to respect the exclusive jurisdiction of the Court of Justice. (para. 169)

Under their obligation of close cooperation with the EU institutions in case of mixed agreements, when submitting a dispute to a judicial forum other than the Court of Justice which involves the risk that that judicial forum will rule on the scope of obligations imposed on the Member States pursuant to EU law, the Member States are obliged to inform and consult the competent EU institutions prior to resorting to dispute-settlement proceedings outside the EU framework. (paras. 175-179)

8.7 Treaties concluded prior to accession

Article 351(1) TFEU provides that the rights and obligations arising from agreements concluded by Member States prior to their membership of the Union ('prior agreements' or 'pre-accession agreements') "shall not be affected by the provisions of the Treaties". Article 351(1) TFEU thus acknowledges that the establishment of the [EU] cannot possibly run counter to Member States' obligations under international law.²³⁴

However, the respect for international law and the rights of non-member countries²³⁵ under 351(1) TFEU should not be understood to mean that Member States are entitled to give precedence to incompatible international obligations to the detriment of EU law.²³⁶ This is because the second paragraph of Article 351 provides that 'to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities'²³⁷

²³³ The infringement of Article 4(3) TEU was not established as the breach was not distinct from the failure to observe ex Article 292 EC, para. 171.

²³⁴ Panos Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2006) 301

²³⁵ "...the terms 'rights and obligations' in Article [351 TFEU] refer, as regards the 'rights', to the rights of third countries and, as regards the 'obligations', to the obligations of Member States..." (Commission v Ireland Case 10/61 [1962] ECR 1. This also means that Article 351(1) TEU does not authorise Member States to exercise rights under prior agreements in intra-EU relations. (Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, para. 40; Case C-147/03 *Commission v Austria* (ECLI:EU:C:2005:427), para. 73

²³⁶ Kristin Reuter, *Competence Creep via the Duty of Loyalty? Article 4 (3) TEU and its Changing Role in EU External Relations* (2013), p. 136

[http://cadmus.eui.eu/bitstream/handle/1814/28050/2013_Reuter.pdf?sequence=1&isAllowed](http://cadmus.eui.eu/bitstream/handle/1814/28050/2013_Reuter.pdf?sequence=1&isAllowed=y)

²³⁷

Powers of the EU institutions on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international-law

established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.’

Article 351(2) TFEU reflects upon the rationale of the principle of loyalty under Article 4(3) TEU. Whilst the latter provision refers to all appropriate measures necessary for the fulfilment of Member States’ Treaty obligations in general, Article 351(2) TFEU specifies this duty in the context of pre-accession agreements.²³⁸ Under Article 351(2), national courts, within the exercise of their jurisdiction, are also required to examine whether a possible incompatibility between EU law and a prior agreement (between a Member State and a non-member country) can be avoided by interpreting that agreement, to the extent possible and in compliance with international law, in such a way that it is consistent with EU law.²³⁹

Commission v Austria and Commission v Sweden (Joined cases C-205/06 and C-249/06) [2009] ECR I-1301

Under Article 351(2) TFEU, where necessary, the Member States are required to assist each other with a view to eliminating the incompatibilities of pre-existing treaties and EU law and they must adopt, where appropriate, a common attitude. In its competences, the Commission must take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude. (para. 44)

Case C-62/98 Commission v. Portugal (merchant shipping agreement with Angola) [2000] ECR I-5171 and Case C- 84/98 Commission v. Portugal (merchant shipping agreement with the FRY) [2000] ECR I-5215

Although, in the context of Article 351 TFEU, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-EU convention and the EE Treaties. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded. (para. 49)

8.8 International commitments and Member State obligations under EU law

Case C-308/06 Intertanko and Others [2008] ECR I-4057
Case C-537/11 Manzi and Compagnia Naviera Orchestra EU:C:2014:19

mechanism which makes that possible. (Commission v Austria and Commission v Sweden, para. 37)

²³⁸ p. 133, *ibid*

²³⁹ Budvar, Case C-216/01, ECLI:EU:C:2003:618, para. 169

The validity of a directive cannot be assessed in the light of an international agreement, if the EU is not a party to it, even though it binds the Member States. (*Intertanko and Others*, paras. 47 to 52).

This principle may not be circumvented by relying on the alleged infringement of the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) TEU. (*Manzi and Compagnia Naviera Orchestra*, para. 40)

Although the European Union is not bound by an international agreement, the fact that all its Member States are contracting parties to it is liable to have consequences for the interpretation of European Union law, in particular the provisions of secondary law which fall within the field of application of such an agreement. Therefore, in view of the customary principle of good faith, which forms part of general international law, and of Article 4(3) TEU, it is incumbent upon the Court to interpret those provisions taking account of the latter (*Intertanko and Others*, paras. 49 to 52; *Manzi and Compagnia Naviera Orchestra*, para. 40).

That case-law cannot be applied as compared with an international agreement to which only some Member States are contracting parties while others are not. To interpret the provisions of secondary law in the light of an obligation imposed by an international agreement which does not bind all the Member States would amount to extending the scope of that obligation to those Member States which are not contracting parties to such an agreement. Such an interpretation of secondary law would not be consistent with the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU. (*Manzi and Compagnia Naviera Orchestra*, paras. 46 to 49).