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RESEARCH ARTICLE

Reconceptualising the Internal Effect of EU Law in Horizontal Disputes

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Abstract

Examining the role of direct effect and consistent interpretation in the context of horizontal relationships—contractual or otherwise—this article argues that understanding of EU law's internal effect must be reconsidered when relationships are purely horizontal. It seeks to capture, frame, and conceptualise that effect by setting out three scenarios in which no national provision is disapplied and in which the breach of EU law arises solely from the conduct of a private party. It reflects on the CJEU's role in redefining core principles of the EU legal order, and calls for less argumentative minimalism and more explicit and fully developed legal reasoning where such principles are at stake.

Keywords: horizontal direct effect; primacy; contracts; consistent interpretation; disapplication; CJEU; argumentative minimalism

I. Scope, structure, and purpose of the analysis

This article addresses the relevance, or irrelevance, of direct effect[1] and consistent interpretation[2] in disputes involving two or more private parties, in connection either with the enforcement of contractual clauses that are incompatible with EU law, or with conduct by one or more private parties[3] in

[1]For a broader account of direct effect see, amongst recent contributions, R Schütze, 'Direct Effects and Indirect Effects of Union Law' in R Schütze and T Tridimas, *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press, 2018), 265–99; M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law*, 3rd ed (Oxford University Press, 2020), 154–89; B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2021), 187–227; D Gallo, *Direct Effect in EU Law* (Oxford University Press, 2025). See also the contributions in A Tizzano, J Kokott, S Prechal (Organising Committee), *50ème anniversaire de l'arrêt Van Gend en Loos: 1963–2013: Actes du colloque, Luxembourg, 13 mai 2013* (Conference, 13 May 2013, available at: https://curia.europa.eu/jcms/jcms/P_95693/en/.

[2]See, *ex multis*, G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397; L Daniele, 'Vingt-cinq ans d'interprétation conforme: un principe encore en quête de définition?' (2008) 4 *Revue des Affaires Européennes* 705; JH Jans and M Verhoeven, 'Europeanisation via Consistent Interpretation and Direct Effect' in JH Jans et al (eds), *Europeanisation of Public Law*, 2nd ed (Europa Law, 2015), 71–132; D Simon, 'La panacée de l'interprétation conforme: injection homéopathique ou thérapie palliative?' in MT D'Alessio et al (eds), *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Bruylant, 2013), 279–300; S Drake, 'Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *European Law Review* 329.

[3]R Schütze, *European Union Law*, 4th ed (Oxford University Press, 2025), 168, distinguishes between the question of whether a rule can be invoked horizontally, given its effects in domestic proceedings, and 'the question of whether it also outlaws private party actions'.

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breach of EU law. In the latter case, the behaviour of the private party is independent of any unlawfulness of the contract, where such a contract exists. The article therefore aims to examine the role played by direct effect and consistent interpretation in the context of horizontal relationships. The focus is on the internal effect of EU law in relation to inter-individual relationships[4] and disputes,[5] whether contractual or otherwise.[6]

The analysis covers both disputes arising within a contractual relationship, including those concerning claims for nullity or annulment of the contract, as well as damages for its non-compliance, and disputes related to remedies grounded in the lack of a legal basis for a transfer of assets, such as repayment of undue payments and unjust enrichment, as well as damages claims brought in the frame of non-contractual liability.

Accordingly, the article does not seek to revisit the much-debated issue in the literature regarding the advantages and disadvantages associated with the prohibition of the horizontal direct effect of directives,[7] or the stratagems developed by the Court of Justice of the European Union (CJEU) to overcome it,[8] beginning with the combined application of the Charter of Fundamental Rights and directives.[9] Nor does the article specifically focus on the nature and operation of the (above-mentioned) various private law remedies available to one private party against another for violations of EU law,[10] such as nullity, annulment, damages, repayment of undue payments, and unjust enrichment.[11] Instead, it seeks to shed light on, and offer a different understanding of, the role of direct effect,

[4]For an overview of the relationship between EU law and private law, see, *ex multis*, A Hartkamp, 'The Concept of (Direct and Indirect) Horizontal Effect of EU Law: The Terminology of European Law Scholars and of Private Law Scholars Compared' in U Bernitz et al (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International, 2013), 189–97.

[5]In the literature, from the perspective of fundamental rights, most notably of the EU Charter, see, amongst recent contributions, E Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle?' (2020) 22 *Cambridge Yearbook of European Legal Studies* 208; K Lenaerts, 'The Horizontal Application of the Charter' (2020) 4 *Quaderni costituzionali* 633; S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) 66 *Revista de Derecho Comunitario Europeo* 407; R Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG' (2021) 58 *Common Market Law Review* 1173; F Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea* (Giappichelli, 2022), 168–72.

[6]From the standpoint of internal market rules, including in relation to contractual relationships, see, amongst recent contributions, B Van Leeuwen, 'Market Access, the New Approach and Private Law' (2019) 27 *European Review of Private Law* 269; C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 8th ed (Oxford University Press, 2025), 78–80, 243–44, 556.

[7]See *MH Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, C-152/84, EU:C:1985:345, para 48 and *Paola Faccini Dori v Recreb Srl*, C-91/92, EU:C:1994:45, para 20.

[8]On these techniques and for a critique, see, amongst recent contributions, L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions' (2019) 38 *Yearbook of European Law* 18; M Bobek, 'Why Is It Better to Treat Every Provision of EU Directives as Having Horizontal Direct Effect?' (2023) 39 *International Journal of Comparative Labour Law and Industrial Relations* 211; D Gallo, *Direct Effect* (n 1), 199–244.

[9]As known, this expedient has been employed since *Werner Mangold v Rüdiger Helm*, C-144/04, EU:C:2005:420, as for general principles, implicitly since *Seda Kücükdeveci v Swedex GmbH & Co. KG*, C-555/07, EU:C:2009:429, and explicitly since *Association de médiation sociale v Union locale des syndicats CGT and Others (AMS)*, C-176/12, EU:C:2013:491, as far as the EU Charter is concerned. See, amongst recent contributions, E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 *European Law Journal* 657, 674–75; E Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer' (2019) 12 *Review of European Administrative Law* 185, 205; L Cecchetti, 'Unravelling Horizontal Direct Effect in EU Law: The Case of the Fundamental Right to Paid Annual Leave between "Myth" and "Practice"' (2024) 42 *Yearbook of European Law* 42.

[10]On the effects associated with the recognition of horizontal direct effect, from the perspective of the erosion of national sovereignty, see J Van der Valt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter, 2014).

[11]On private/contract law and horizontality, see H Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies on How Not to "Constitutionalize" Private Law' (2004) 18 *European Review of Private Law* 661; M Safjan and K Mikłaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law' (2010) 18 *European Review of Private Law* 475; A Hartkamp et al (eds), *The Influence of EU Law on National Private Law* (Kluwer, 2013); A Hartkamp, *European Law and National Private Law* (Intersentia, 2016); R van Leuken, *Private Law and the Internal Market* (Intersentia, 2017).

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consistent interpretation, and disapplication in purely horizontal situations, that is, in the absence of any breach of EU law by the national legislature.

Within this framework, the opening sections of the article aim to outline certain core features of direct effect and disapplication, in order to subsequently examine the question of the internal effect of EU law in the context of horizontal relationships. Section II examines the relationship between primacy, direct effect, and the duty to disapply. Section III dwells on the meaning and scope of disapplication. Sections IV and V highlight the defining features of direct effect, particularly as regards the justiciability of EU provisions, in comparison with consistent interpretation and State liability, taking into account its main manifestations in the interplay between the EU legal order and domestic legal systems. Against this background, Section VI argues that the understanding of the principle of direct effect must be reconsidered when relationships are purely horizontal, in particular in light of the role played—especially in contractual disputes, but not only—by the remedy of disapplication. In this vein, it identifies the possible situations arising in horizontal relationships in which a private party invokes EU law against another private party before a national court. Section VII seeks to capture, frame, and conceptualise the internal effect of EU law by setting out three scenarios in which no national provision is disapplied and in which the breach of EU law arises solely from the conduct of a private party, within both contractual and non-contractual disputes. Finally, Section VIII offers concluding observations on the internal effect of EU law in horizontal relationships and on the function of the CJEU in systematising, defining, and redefining core principles of the EU legal order, such as direct effect and consistent interpretation.

II. The duty of disapplication is always rooted in primacy and direct effect

A first observation on direct effect, central to the analysis developed in Sections VI–VIII, is that both *Simmenthal*[12] (implicitly) and *Popławski II*[13] (explicitly) reveal that the duty of disapplication, as the most far-reaching expression of the prescriptive force of EU law, is always rooted in primacy *and* direct effect.[14] Accordingly, such an obligation—rather than the mere discretion[15]—to set aside domestic provisions is not a consequence of primacy alone. As a matter of fact, primacy has a broader scope than direct effect,[16] since it defines the entire EU legal order insofar as it is legally binding,[17]

[12] See *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, EU:C:1978:49.

[13] See *Criminal proceedings against Daniel Adam Popławski*, C-573/17, EU:C:2019:530.

[14] *Contra*, see, *ex multis*, D Simon, *La directive européenne* (Pedone, 1997), 95–96; M Wathelet, 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de justice' in M Hoskins and W Robinson (eds), *A True European: Essays for Judge David Edward* (Oxford University Press, 2004), 367–90; M Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931. For recent accounts, see D Miasik and M Szwarc, 'Primacy and Direct Effect—Still Together: Popławski II' (2021) 58 *Common Market Law Review* 571; M Dougan, 'The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and towards a Remedy of Nullity?' (2022) 59 *Common Market Law Review* 1301; I Anrò and J Alberti, 'Riflessioni sull'effetto diretto, sul primato e sulla disapplicazione del diritto nazionale' in M Graziadei et al (eds), *Il diritto europeo e il giudice nazionale* (SSM, 2023), 51–85; F Nicola, C Fasone, and D Gallo, 'Comparing the Effects of US Unconstitutionality and EU's Preliminary Interpretative Rulings: Disapplication, Resistance and Coordination Procedures' in D Gallo and L Cecchetti (eds), 'The Preliminary Ruling Procedure, Today: Revisiting Article 267 TFEU's Constitutional Backbone' Special Issue (2023) 15 *European Journal of Legal Studies* 147.

[15] The discretion to disapply, on the basis of national law, even in the absence of direct effect, has by now become a constant feature of the case law; see, *ex multis, David Smith v Patrick Meade and Others*, C-122/17, EU:C:2018:631, para 49; *Popławski*, EU:C:2019:530, para 68; *Thelen Technopark Berlin GmbH v MN*, C-261/20, EU:C:2022:33, para 33; *Commission v Spain*, C-278/20, EU:C:2022:503, para 131; *KL v X sp. z o.o.*, C-715/20, EU:C:2024:139, para 74; *Gabel Industria Tessile*, C-316/22, EU:C:2024:301, para 23.

[16] *Contra*, see R Schütze, *European Union Law* (n 3), 158–67 and 235, who argues that direct effect, which relates to the invocability of EU provisions, is wider than primacy, the latter being inherently linked to disapplication.

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whereas direct effect may or may not be present: as is well known, many EU provisions have direct effect, but not all do. Why, then, is disapplication rooted in direct effect, in addition to primacy? The CJEU, which tends to display self-restraint and argumentative minimalism when addressing the content and scope of key principles of EU law, does not provide a clear answer.[18] Two main reasons may nevertheless be identified.[19]

The first is of a higher, constitutional nature: direct effect ensures that the EU principle of conferral and the related principle of subsidiarity are not called into question by a generalised, unrestrained use of the principle of primacy. Justifying disapplication on the basis of only the primacy principle is likely to undermine the logic implied in the relationship between the EU legal order and domestic legal systems. It would entail a blank proxy to the EU capable of undermining the fertile relationship between EU law and domestic legal systems, as well as the mutual cooperation between EU institutions and Member States' authorities. Moreover, direct effect continues to be an essential doctrine capable of shaping, in its interaction with primacy, in proto-federalist terms, a legal order that, however, albeit juridically mature and unique in its kind, is not a federal union. In this sense, direct effect acts as a filter and trigger for ensuring the enforcement of EU law through the remedy of disapplication.[20]

The second reason, which is more operational and relevant for the purposes of the present analysis, is that, generally—though not always[21]—by virtue of direct effect, the EU provision replaces the national rule that is disapplied. Accordingly, direct effect constitutes a precondition for the duty to disapply, because normally only an EU provision that is sufficiently unconditional—that is, a fully formed rule, thanks to the (more or less creative) interpretative intervention of the CJEU in refining its contours—can govern the dispute at hand in place of the domestic provision. In this way, legal gaps are avoided and the risk of a void in law and in protection is averted, with a view to safeguarding the principles of legal certainty and legitimate expectations.

III. The scope of the remedy of disapplication

A second observation, likewise functional to the subsequent arguments concerning the role of direct effect in horizontal relationships, is that disapplication concerns national law, that is, one or more provisions that are in conflict with directly effective EU law. *Stricto sensu*, it does not entail the disapplication of judicial practices, even when developed by supreme courts—for example the Court of Cassation or the Council of State of a Member State—or of administrative practices, such as regulatory acts issued by Member States' central banks. In such cases, notwithstanding certain ambiguities in the case law of the CJEU,[22] the applicable tool is that of consistent interpretation, and the *contra legem* limit does not apply, as the conflict is resolved on a purely interpretative level. In these situations, domestic law is interpreted in the light of EU law and, in doing so, the inconsistent internal practice is disregarded.

[17] As stated in *Salvatore Grimaldi v Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646, para 19, in respect to non-binding acts, including recommendations pursuant to Article 288(5) TFEU, the domestic authorities 'are bound to take those [acts] into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law'.

[18] On this point, see Section VIII.

[19] See D Gallo, *Direct Effect* (n 1), 123–24.

[20] This is a further reason why direct effect is not an 'infant disease', as had been observed by P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *European Law Review* 155.

[21] See Section IV.

[22] See, recently, *Petlichev*, C-56/25, EU:C:2026:87, para 48, whereby the CJEU explicitly refers to changing national case law, rather than to disapplying it.

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IV. The subjective-substitutive and objective-exclusionary manifestations of direct effect and the role of disapplication

A third observation is that direct effect—both vertical and horizontal—is normally characterised by the conferral, also implicitly,[23] of a right upon an individual and by the substitution of national law by the directly effective EU provision. This is the subjective-substitutive dimension of direct effect, that is, the so-called direct effect as a 'sword'.[24] Aside from this form, there exists an objective-exclusionary manifestation of direct effect, that is, the so-called direct effect as a 'shield',[25] whereby a directly effective EU provision entails the (selective) disapplication of national law, without either immediately conferring an individual right or replacing the domestic rule in governing the case at hand.[26] Examples include: (i) new technical rules introduced into a national legal system, in force but not notified to the Commission, and therefore unenforceable against private parties who have complied with the previous technical rules, which had been duly notified but are no longer in force internally; and (ii) derogations, contrary to EU law, from rules that are themselves consistent with EU law within domestic legal systems.[27] In these situations, there is no substitution, since what applies is national law purged of its components incompatible with EU law, namely, respectively, the non-notified new technical rules and the derogations.

As noted in the literature, direct effect thus takes these two forms—the subjective-substitutive and the objective-exclusionary—which share a common element: disapplication, associated in the former case with substitution and in the latter dissociated from it.[28] An exception is constituted by regulations and decisions adopted under Article 288 of the Treaty on the Functioning of the European Union (TFEU), as these are directly applicable acts, that is, acts which apply from the moment they enter into force regardless of whether a corresponding provision exists in national law, and thus without necessarily requiring the disapplication of domestic law.

[23] Since *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1.

[24] In these terms B de Witte, 'The Continuous Significance of Van Gend en Loos' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), 9–15, 12. See, in the vast case law, *Salgoil*, 13/68, EU:C:1968:54, 612; *H Ferwerda BV*, 265/78, EU:C:1980:66, para 10; *Comitato di coordinamento per la difesa della Cava*, C-236/92, EU:C:1994:60, para 14.

[25] De Witte, 'The Continuous Significance', 12. Amongst Advocates General, on the subjective-substitutive/objective-exclusionary dichotomy, see the opinion of AG van Gerven in *Marshall II*, C-271/91, EU:C:1993:30; the opinion of AG Jacobs in *Vaneetveld v Le Foyer SA*, C-316/93, EU:C:1994:32; the opinion of AG Lenz in *Faccini Dori v Recreb Srl*, C-91/92, EU:C:1994:45; the opinion of AG Léger in *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, C-287/98, EU:C:2000:3; the opinion of AG Saggio in *Océano Grupo Editorial*, joined cases C-240/98 to C-244/98, EU:C:1999:620; the opinion of AG Alber in *Renato Collino and Luisella Chiappero v Telecom Italia SpA*, C-343/98, EU:C:2000:23; the opinion of AG Colomer in *Pfeiffer*, joined cases C-397/01 to C-403/01, EU:C:2003:245; the opinion of AG Bot in *Seda Kücükdeveci v Swedex GmbH & Co. KG*, C-555/07, EU:C:2009:429; the opinion of AG Bobek in *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya*, C-384/17, EU:C:2018:494; the opinion of AG Sánchez-Bordona in *Openbaar Ministerie v Daniel Adam Popławski*, C-573/17, EU:C:2018:957; the opinion of AG Bobek in *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-205/20, EU:C:2021:759. In the literature, on the 'objectification of direct effect', see S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047; S Prechal, *Directives in EC Law*, 2nd ed (Oxford University Press, 2005), 231–37. See also L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions' (2019) 38 *Yearbook of European Law* 18–72.

[26] Indeed, advocating for a broad understanding of direct effect has evident practical implications since it expands the scope of intervention of a doctrine of EU law as key as it is direct effect.

[27] See, extensively, S Prechal, 'Does Direct Effect Still Matter?' (n 25). In the case law, see, *inter alia*, respectively, *Criminal Proceedings against Rafael Ruiz Bernáldez*, C-129/94, EU:C:1996:143, paras 23–25 and *Airbnb Ireland UC*, C-390/18, EU:C:2019:1112, paras 88–100.

[28] But see the reflections in Section VI.

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The foregoing applies to vertical disputes, as well as to horizontal disputes whereby the breach of EU law by a private party originates in the national legal order. Instead, the role of disapplication, or its absence, in *purely* horizontal disputes, is examined in Sections VI–VII.

V. Direct effect's added value and the extent of justiciability

A fourth observation concerns the defining features of direct effect vis-à-vis other doctrines of EU law, notably consistent interpretation and the State liability remedy developed in *Francovich*.[29] Direct effect does not simply mean that an EU provision may be invoked by a natural/legal person, since invocability also occurs where an individual, in either a vertical or a horizontal relationship, relies on an EU provision and asks the court to interpret national law in conformity with that provision, or, in a vertical relationship, seeks damages from the State for failure to comply with it. Direct effect, rather, entails justiciability.

The justiciability of a right has a greater intensity than the mere invocability of a provision, and this added layer of protection, from the perspective of the EU legal order, is concretely reflected in disapplication, where direct effect is used to remedy a clash between EU provisions sufficiently complete (to govern a given situation) and national law. Such a conflict can be resolved only through the disapplication of the conflicting national provision. This does not mean that, whenever an individual invokes an EU provision having direct effect, they necessarily seek the disapplication of national law. Even a directly effective EU provision may be relied upon to obtain consistent interpretation—as frequently occurs—or to claim damages where the harm has been caused by a State's breach of that provision. For these purposes, the EU provision need not necessarily be clear, precise, and (above all) unconditional,[30] but must be adequately determinate to serve as an interpretative benchmark or to confer individual rights capable of grounding a claim for damages. In short, in vertical relationships, the obligation to disapply national law always results from the combined operation of primacy and direct effect. The converse is also true. Where a private party relies on the direct effect of an EU provision—as opposed to consistent interpretation or State liability—such reliance, operating in conjunction with primacy, is aimed at securing the disapplication of conflicting national law.

In vertical relationships, where EU law is invoked, it is irrelevant whether it has direct effect or not if the applicant seeks something other than disapplication, namely, consistent interpretation, compensation for damages, or a declaration of unconstitutionality, where the latter mechanism of constitutional review, whether centralised[31] or decentralised,[32] is available.[33] Thus, full justiciability leading to disapplication, in vertical relationships, must be distinguished from the 'mere' invocability of an EU provision.

These reflections hold true also for those horizontal relationships in which the conduct of a private party, or even one or more contractual clauses, in breach of EU law depends on national law, since in such cases disapplication serves to resolve *ab origine* the antinomy. By contrast, this does not apply to horizontal relationships in which the conflict with EU law results solely from private autonomy, and not from the domestic legal order. Understanding the type of invocability at stake in such cases requires placing them in context and examining the possible forms of reliance on EU law by private

[29] *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90, EU:C:1991:428.

[30] On the ability of unconditionality to absorb both clarity and precision, see D Gallo, *Direct Effect* (n 1), 92–96.

[31] Eg, in Italy.

[32] Eg, in Sweden.

[33] Eg, in the Netherlands. For a comparative analysis, see M De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart, 2014).

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parties against other private parties, as discussed in the following sections, most notably in Section VI.C and Section VII.D.2.

VI. Possible forms of invocation of EU law in horizontal disputes

A. Consistent interpretation

The first situation, which in practice is more frequent than others,[34] arises where a private party invokes a provision of EU law—whether or not it has direct effect—against another private party before a court of a Member State. This occurs where the former asks the court to interpret national law, including (but not necessarily limited to) the law governing contracts, in conformity with EU law, most notably with the provision that is decisive for the individual in order to safeguard his/her subjective right and obtain redress from the other party.[35] As is well known, the court may, of its own motion, resort to this interpretative technique, irrespective of whether the parties have raised such claims.

B. Direct effect and the disapplication of national laws

The second situation arises where an individual invokes a provision of EU law having direct effect against another individual in order to obtain the disapplication of national law, including rules governing contractual relationships. Likewise, as in the first case (Section VI.A), disapplication may be carried out by the court of its own motion. In this situation, the national law subject to the duty of disapplication constitutes the (even partial) cause of the conduct of the defendant that is unlawful under EU law. It may occur, more specifically, that the national legislature has imposed on a private party—for example an employer—or that domestic law has been interpreted by the court as requiring, the inclusion of one or more clauses in a contract (individual or collective) signed by the claimant, which are in breach of the EU provision mobilised by the latter.

According to a first scenario (i), the dispute concerns the incompatibility of both national law and the contract with EU law. A clear example is *Max Planck*: the infringement of EU law stems from a provision of national law—specifically, a rule contained in German legislation providing for the automatic loss of untaken paid leave—whose content is incorporated into a contract between private parties.[36]

[34]Following the establishment of the duty of consistent interpretation in the case law of the CJEU, subsequent to the recognition of direct effect, it is natural that this interpretative remedy—by far less disruptive than disapplication resulting from primacy and direct effect—has progressively assumed an increasingly central and primary role before national courts. Although there is no proper hierarchical order in the exercise of one or the other remedy, the national court will be led first to use consistent interpretation and only thereafter (*Maribel Dominguez*, C-282/10, EU:C:2012:33, para 23; *Amia SpA*, C-97/11, EU:C:2012:306, para 2) disapplication (see, *ex multis*, V Bouhier, 'La généralisation du caractère préalable de l'obligation d'interprétation conforme' (2012) 2 *Revue des affaires européennes* 433). In the literature, in fact, the complementary relationship between direct effect and consistent interpretation is frequently highlighted (L Daniele, *Vingt-cinq ans d'interprétation conforme* (n 2)). A proof of such complementarity is *NE*, whereby it was affirmed that 'the principle of primacy places the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law under a duty, *where it is unable to interpret national legislation in compliance with the requirements of EU law*, to give full effect to the requirements of that law in the dispute before it, *if necessary disapplying of its own motion any national legislation or practice*' (*NE*, C-205/20, EU:C:2022:168, para 29).

[35]See *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, C-4/83, EU:C:1984:153; with respect to contractual disputes, see *Lexitor sp. z o.o. v Spółdzielcza Kasa Oszczędnościowo—Kredytowa im. Franciszka Stefczyka, Santander Consumer Bank S.A., mBank S.A.*, C-383/18, EU:C:2019:702 and *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, C-55/18, EU:C:2019:402.

[36]See *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874; see also *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, C-414/16, EU:C:2018:257 and *Torsten Hein v Albert Holzkamm GmbH & Co*, C-385/17, EU:C:2018:1018.

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In a second scenario (ii), the dispute relates to the unlawfulness of national law under EU law and it does not, strictly speaking, concern the breach of EU law embodied in a contract. Rather, it pertains to the effects arising upstream from the unlawful nature of a domestic provision, which then produce concrete downstream consequences within contractual relationships. A clear illustration is *Cresco Investigation*: the breach of EU law stems from the Austrian legal system, which grants Good Friday as a paid public holiday only to workers belonging to certain Protestant churches. This rule lies at the origin of the employer's discriminatory conduct, without there being any specific contractual clause incorporating the national provision.[37]

C. *Breach of EU law resulting solely from private autonomy*

The third situation arises where an individual invokes a provision of EU law against another individual in the context of a dispute that does not originate from the total or partial incompatibility of one or more provisions of national law with EU law, but rather 'only' from the incompatibility of the conduct of the defendant private party with EU law. This is typically the case in areas such as anti-trust law or digital markets law, the latter being regulated by various EU regulations.[38] Such incompatibility often, though not necessarily, takes the form of the inclusion of one or more contractual clauses contrary to EU law. Therefore, national law, including contract law, does not, as such, display any incompatibility with the EU legal order and is not at the origin of the private party's conduct, which is instead contrary to that legal order.

The examination of this purely horizontal situation requires revisiting and further developing the points made in Section IV: the two manifestations of direct effect identified there—the subjective-substitutive and the objective-exclusionary—are the result of judicial and doctrinal elaboration centred on vertical direct effect, rather than on horizontal direct effect, including direct effect in contractual disputes. These two manifestations of direct effect, therefore, do not raise particular difficulties where the disputes at issue are between individuals/companies and the State. They are not problematic even in the context of horizontal disputes relating to a contract in which the clause contrary to EU law has been introduced by a private party as a result of obligations imposed by national law. In such cases, the disapplication of domestic law, in turn, has an impact on the contract, which has been partially or wholly designed on the basis of domestic provisions that are in violation of EU law. The same reasoning applies *mutatis mutandis* to conducts by private parties grounded in national law and not resulting from contractual clauses.

What is of interest here is something different: three scenarios can be identified where private conduct—once it falls within the scope of EU law—is undertaken and/or contractual clauses are introduced, autonomously by one private party, producing harmful effects for another private party. The latter then brings proceedings before a court, invoking the incompatibility of such conduct, not of domestic provisions, with EU law.

Under the first scenario (i), the dispute revolves around the non-conformity of the contract—which may be individual or, in the case of employment relationships, either individual or collective—with EU law, and the corresponding remedies available under private law. Illustrations are provided by

[37] See *Cresco Investigation GmbH v Markus Achatzi*, C-193/17, EU:C:2019:43; see also *Pensions-Sicherungs-Verein VVaG v Günther Bauer*, C-168/18, EU:C:2019:1128; *WD v job-medium GmbH*, C-233/20, EU:C:2021:960; *XP and AR*, joined cases C-518/20 and C-727/20, EU:C:2022:707; *LB v TO*, C-120/21, EU:C:2022:718.

[38] See, *inter alia*, Regulation (EU) 2022/1925 (Digital Markets Act) [2022] OJ L265/1, Article 34; Regulation (EU) 2022/2065 (Digital Services Act) [2022] OJ L277/1, Articles 32, 53, and 79; Regulation (EU) 2024/1689 (Artificial Intelligence Act) [2024] OJ L, 2024/1689, Articles 61 and 85. See also Regulation (EU) 2016/679 (General Data Protection Regulation) [2016] OJ L119/1, Article 82.

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Defrenne II[39] and *Courage*[40]: in both cases, liability may give rise, respectively, to damages (*Defrenne II*), for pay discrimination between men and women permitted under a collective agreement, or to both damages and the nullity of the contract (*Courage*), owing to the presence of contractual clauses capable of restricting a reseller's freedom and distorting market prices in breach of Article 101 TFEU. Under this first scenario national law does exist—for instance where it serves to implement EU directives— and is not *per se* at odds with EU law but it has been wrongfully interpreted by the private party as allowing clauses which, upon closer scrutiny, are unlawful under EU law.

More specifically, as regards *Defrenne II*, from which the CJEU derives the horizontal direct effect of treaty provisions and on which it has consistently relied in subsequent case law, the Court frames the ruling, albeit not entirely straightforwardly, in terms of the horizontal direct effect of then Article 119 of the Treaty Establishing the European Economic Community (TEEC), now Article 157 TFEU. For over 40 years, this case has been used in textbooks and lectures to dissect the functioning of horizontal direct effect. The Court takes for granted that the internal effect is direct, without explaining why. Advocate General Trabucchi, for his part, emphasises the role of direct effect in the procedure and has no doubt that Article 119 TEEC entailed direct effect in such a dispute. In the case, there is no national provision imposing the discrimination or inducing the private party to discriminate. How, then, should situations such as *Defrenne II* be framed from a legal standpoint, where disapplication of national legislation does not come into play because there is no domestic rule contrary to EU law, even though the contract itself is? A similar issue arises in many labour law disputes concerning Directive 2003/88/EC on working time[41] and the right to paid annual leave: contractual clauses, typically collective in nature, exist which are contrary to EU law, without being imposed by the domestic legal order.[42]

The second scenario (ii) relates to disputes that concern not a breach of EU law caused by specific contractual clauses but rather the effects arising upstream from a violation of EU law caused by the conduct of a private party, which may subsequently materialise downstream within contractual relationships. National law exists, but it has been interpreted by the private party as allowing a conduct which is, in fact, incompatible with EU law. This is the case, for example, where EU directives are transposed into domestic law—particularly in the field of labour law—without individual or collective agreements implementing them in a manner contrary to EU law, the breach instead originating from private conduct, that is, outside the context of unlawful contractual clauses. A clear illustration is the so-called Islamic headscarf saga, namely a series of CJEU judgments concerning the application of Directive 2000/78/EC on equal treatment in employment and occupation,[43] in which the Court found that bans on the wearing of the Islamic headscarf in the workplace, introduced by employers not on the basis of contractual arrangements, were not contrary to EU law.[44]

The *Achbita* case is illustrative of instances where neither national law nor the contract—whether individual or collective—comes into play. The CJEU does not engage at all with the question whether the national law and the contract might be incompatible with EU law, since the object of its analysis is 'solely' the conduct of the employer, that in *Achbita* and in most of the subsequent related case law was

[39] See *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)*, C-43/75, EU:C:1976:56.

[40] See *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465.

[41] Directive 2003/88/EC (Working Time Directive) [2003] OJ L299/9.

[42] See, amongst others, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, joined cases C-609/17 and C-610/17, EU:C:2019:981 and *DS v Koch Personaldienstleistungen GmbH*, C-514/20, EU:C:2022:19.

[43] Council Directive 2000/78/EC [2000] OJ L303/16.

[44] See the saga on the Islamic headscarf, amongst which *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, EU:C:2017:203; *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, C-188/15, EU:C:2017:204; *IX v WABE eV and MH Müller Handels GmbH v MJ*, joined cases C-804/18 and C-341/19, EU:C:2021:594. See also *QH v Varhoven kasatsionen sad na Republika Bulgaria and CV v Iccrea Banca SpA*, joined cases C-762/18 and C-37/19, EU:C:2020:504.

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held admissible under EU law. National law and contract are also irrelevant in *Bougnaoui*,[45] where the Court, on the contrary, held that it is inadmissible to consider, 'as a genuine and determining occupational requirement', 'the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf'.

The only exception to the irrelevance of national law in respect to the internal transposition of Directive 2000/78/EC on equal treatment, is the *LF* ruling,[46] where the Court not only denied that a provision of an undertaking's terms of employment which prohibits workers from manifesting their religious or philosophical beliefs constituted a form of direct discrimination but also asserted in paragraph 61 that 'Article 1 of Directive 2000/78 must be interpreted as precluding provisions of national legislation, which are intended to ensure the transposition of that directive into national law and which are construed as meaning that religious belief and philosophical belief constitute two separate grounds of discrimination, from being taken into account as "provisions which are more favourable to the protection of the principle of equal treatment than those laid down in [that directive]" for the purposes of Article 8(1) thereof'. In this vein, such a case should fall under the second scenario in Section VI.B since at stake is a piece of domestic law contrary to EU law.

A line of reasoning similar to the Islamic headscarf saga described above, with the exception of the *LF* case, applies in *QH v Varhoven kasatsionen sad na Republika Bulgaria and CV v Iccrea Banca SpA*, concerning the right to paid annual leave under Article 31(2) of the Charter. In that case, the Court held, first, that 'Article 7(1) of Directive 2003/88/EC … must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment …, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer'. Second, the Court affirmed that Article 7(2) of Directive 2003/88 must be interpreted as precluding 'national case-law by virtue of which, in the event of termination of the employment relationship after the worker concerned has been unlawfully dismissed then reinstated in his or her employment … that worker is not entitled to financial compensation in lieu of paid annual leave not taken during the period between the date of the unlawful dismissal and that of his or her reinstatement in his or her employment'.[47] There is therefore no disapplication of national law, or any incompatibility between contractual clauses and EU law.

Under the third scenario (iii), the dispute concerns not a breach of EU law entailed by contractual clauses but rather the effects stemming upstream from a violation of EU law committed by the conduct of a private party, which may later be reflected in contractual relationships. Illustrations are provided by *Viking*[48] and *Manfredi*[49]: in both cases, *like in the second scenario (ii)*, the actions brought by the claimants are not based on a breach of contract but instead seek, respectively, the withdrawal of strike action initiated by trade unions (*Viking*) and compensation for harm caused by the payment of excessively high premiums linked to a cartel among insurance companies (*Manfredi*). However, in such cases, *unlike in scenario (ii)*, national law does not exist, as these are not violations relating to EU directives, that is, to acts requiring transposition into domestic law. More specifically, in *Manfredi*, while the CJEU foregrounds the *effet utile* of EU law, it appears to merge this line of reasoning with its

[45] See *Bougnaoui*, EU:C:2017:204, para 41.

[46] See *LF*, C-344/20, EU:C:2022:774. I am grateful to one of the two anonymous reviewers for drawing my attention to this point.

[47] See *QH v Varhoven kasatsionen sad na Republika Bulgaria and CV v Iccrea Banca SpA*, joined cases C-762/18 and C-37/19, EU:C:2020:504, paras 81 and 89.

[48] See *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Viking)*, C-438/05, EU:C:2007:772.

[49] See *Vincenzo Manfredi (C-295/04) v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito (C-296/04) v Fondiaria Sai SpA, and Nicolò Tricarico (C-297/04), Pasqualina Murgolo (C-298/04) v Assitalia SpA*, joined cases C-295/04 to C-298/04, EU:C:2006:461.

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repeated emphasis—at three distinct points[50]—on the directly effective nature of Article 101 TFEU. In *Viking*, although no explicit reference to horizontal direct effect is made in the Court's reasoning, it is clear that this is what is at issue where the Court states that Article 43 TEEC, now Article 49 TFEU, 'is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions'.[51]

Beyond competition law and labour law, one may also consider the digital sector: for example an app developer bringing an action against a gatekeeper, such as Google, by invoking Regulation (EU) 2022/1925, on the ground that the gatekeeper prevents fair access to its platform. In this context as well, a breach of EU law arises in the absence of incompatible national provisions, but rather because the conduct of a private entity infringes EU law.

In the three scenarios outlined here, on what basis is the EU provision invoked? What type of invocability is at stake? Is it a form of justiciability linked to direct effect, yet lacking its most defining feature, namely, the disapplication of national law?

VII. The internal effect of EU law in purely horizontal situations, absent any conflict between legal orders

Anticipating what will be discussed and argued next, cases of the *Defrenne II/Courage* and *Achbita/Bougnaoui/QH v Varhoven and CV v Iccrea Banca SpA* types appear, upon closer inspection, to fall within the scope not of direct effect but rather of consistent interpretation, whereas situations of the *Viking/Manfredi* type do appear to fall within direct effect, albeit in the form of a third manifestation, distinct from the 'classical' ones identified in Section IV, that is, subjective-substitutive and objective-exclusionary. But let us proceed step by step: what are the possible ways of legally framing these scenarios?

A. First option: the silence of the domestic legislator as a breach of EU law

First option: the silence of the national legal order could be regarded as a breach of EU law, capable of justifying, in *Defrenne II, Courage, Achbita/Bougnaoui/QH v Varhoven and CV v Iccrea Banca SpA*, and *Manfredi*, a claim for damages (*Defrenne II, Manfredi*, and *QH v Varhoven and CV v Iccrea Banca SpA*) and a claim for reinstatement (*Achbita/Bougnaoui*). However, an objection arises: it is difficult, if not impossible, to infer from such silences any inconsistency with EU law, just as it is difficult, if not impossible, to do so whenever the legal order of a Member State does not expressly address the relationship between EU law and national law in a given field. This is confirmed, as regards all the cases mentioned earlier, by the fact that the existence of such a supposed breach is in no way at issue in either judgment.

B. Second option: the merger of disapplication with contractual invalidity

Second option: it could be claimed, in situations such as *Defrenne II*—that is, where unfair contractual clauses are at issue—that disapplication of national law does in fact occur, and thus direct effect is present, on the ground that the contract is disapplied insofar as it is void, as Advocate General Trabucchi suggested in his opinion.[52] The objection is the following: it does not seem possible to maintain that a contract is void and, at the same time, that it must be disapplied. In other words, the disapplication of a contractual provision is not a remedy recognised in Belgian private law, or in any

[50] *Manfredi*, EU:C:2006:461, paras 62, 71, and 77.

[51] *Viking*, EU:C:2007:772, para 66.

[52] Opinion of AG Trabucchi in *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)*, C-43/75, EU:C:1976:39, para 7.

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other national legal system, and it certainly cannot operate in conjunction with a declaration of invalidity, since the latter implies that the contract produces no legal effects, whereas disapplication entails that the contract exists but is not applied. Invalidity and disapplication are logically and practically at odds.

C. Third option: the equation of contract and national law

Third option: it may be advocated, in situations such as *Defrenne II*, that disapplication directed at the contract in fact also concerns the domestic law, since in most national legal systems—if not all—it is well established that the contract has the force of law between the parties.[53] It may also be contended that, where collective agreements exist, they are invariably underpinned by a national provision that provides their legal basis and refers to them. This line of reasoning gives rise to the following objection: even assuming that the idea of the contract as having the force of law, not 'simply' its binding nature,[54] is inherent in most, if not all, Member States' legal systems, including those, such as Irish law, rooted in the common law tradition, as well as those of Central and Eastern European countries,[55] the proposition that a contract may be void under national law yet disapplied under EU law would infringe the principle of equivalence as a limit to Member States' procedural autonomy since the remedy associated with EU law (disapplication) would be less extensive, far-reaching, and complete than that flowing from the violation of national law (invalidity). In any event, conflating the remedy of disapplication of a legal rule with that of disapplication of a contract—as product of private autonomy—appears to be an oversimplification that is difficult to accept.

D. A tentative solution

1. Consistent interpretation as an alternative to direct effect

A further solution appears to be viable and varies depending on the nature of the purely horizontal situations at issue. Situations of the type described under Section VI.C (first scenario) such as *Defrenne II* and *Courage*—where it is the contract that violates EU law, rather than the national legal order—may, despite what the CJEU has maintained for decades and what is commonly taught, be better understood—indeed, perhaps ought to be understood—as falling within the scope of consistent interpretation rather than direct effect. From the present author's perspective, the national court interprets domestic law, including legislation implementing EU law—typically directives—in the light of EU law principles and provisions. In so doing, the domestic judge clarifies the content of the national legal order and relies on the tools provided by it, in accordance with the principle of procedural autonomy, in order to ensure compliance with EU law. In this way, the judge may decline to apply certain contractual clauses and find the resulting private conduct to be unlawful, and accordingly proceed to safeguard the subjective legal position of the party affected by the breach of EU law. In particular, the incompatibility of contractual clauses is achieved, in many legal systems, by reference to constitutional provisions protecting the prerogatives of one or more private parties to a horizontal dispute and ensuring conformity with EU law,[56] taking into account the provisions of the national civil code relating to public policy or conflict with mandatory rules.[57]

Accordingly, what Advocate General Trabucchi states in his opinion in *Defrenne II* is understandable insofar as he refers to the nullity of the contract—a nullity grounded in the principles of equivalence and effectiveness. It is less convincing, however, where, after expressly referring to

[53] See, *inter alia*, Article 1372 of the Italian civil code and Article 1103 of the French civil code.

[54] See, *inter alia*, section 241 of the German civil code.

[55] In the literature, see, for a comparative analysis on contracts law of EU Member States, R Schulze and F Zoll, *European Contract Law* (Nomos, 2024); M Stürner, *European Contract Law* (Intersentia, 2025).

[56] Eg, as regards similar cases to *Defrenne II*, the equality between men and women.

[57] Eg, in Italy, through Article 1343 ('*ordine pubblico*') and Article 1418 of the civil code ('*norma imperativa*').

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nullity, he goes on to characterise disapplication as an effect of horizontal direct effect. Upon closer inspection, neither disapplication nor direct effect appears to come into play. Rather, the principles of primacy and consistent interpretation seem better suited to governing situations such as *Defrenne II*. The argument based on the incompatibility of a contract with public policy and/or mandatory rules is conceptually distinct from an argument centred on the role of direct effect. This is confirmed by the case law on directives—not on the Charter—such as *Marleasing*[58] and *Océano*,[59] where the CJEU employs consistent interpretation rather than horizontal direct effect, precisely because directives are not addressed to individuals. These cases demonstrate that consistent interpretation is workable, and indeed the appropriate remedy, in horizontal situations where national law is not, as such, incompatible with EU law. In other words, what has been done with regard to directives should likewise be done in situations falling within Section VI.C (first scenario) in relation to other sources of EU law.

A similar approach may/should be adopted in situations under Section VI.C (second scenario) such as *Achbita/Bougnaoui/QH v Varhoven and CV v Iccrea Banca SpA* and *Manfredi*, where a private conduct—not a contract—is contrary to EU law, unlike in *Defrenne II/Courage*, but where, as in *Defrenne II/Courage*, national law exists and must be interpreted consistently with the EU legal order. In other words, where a private party adopts conduct incompatible with EU law for reasons other than the inclusion of unlawful contractual clauses, and does so on the basis of a distorted interpretation and application of existing national law, the domestic court, rather than disapplying that law, must interpret it in conformity with EU law. In such cases, there is no direct effect and no disapplication, as is moreover evidenced by the lack of any reference to that doctrine or to that remedy in the case law of the CJEU.

2. Integrative direct effect

Situations under Section VI.C (third scenario), such as *Viking* and *Manfredi*, where it is the conduct of a private party that infringes EU law, in the absence of both national rules and any contract contrary to the EU legal order, may be understood as falling within a further form of direct effect, which could be described as 'integrative direct effect', whereby the EU provision supplements the national legal order. The concept of integration, as it is used here, does not refer to the capacity of the doctrine of direct effect to ensure or enhance the effectiveness of EU law. Rather, it refers to its capacity to fill a gap in the national legal order. In such cases, national law is not incompatible with EU law simply because it does not exist, that is, it contains no rules governing the situation at issue. Direct effect therefore complements the national legal order by filling that gap, rather than by displacing conflicting national provisions. In these contexts an interpretation of national law in conformity with EU law cannot be undertaken precisely because no relevant national rule exists.

Direct effect, therefore, in such cases, takes the form of the invocability of an EU provision and its justiciability at the domestic level—namely, its application by the national court—without this entailing any disapplication of national law. This leads to the conclusion that what was stated in Section V with regard to vertical direct effect—namely, that whenever disapplication occurs, direct effect is necessarily present, and that whenever the latter is invoked disapplication necessarily follows—does not hold true in the case of certain purely horizontal disputes governed by EU law in the absence of national provisions intended to regulate them. Direct effect without disapplication is therefore possible.

VIII. Conclusion: beyond the CJEU's argumentative minimalism

The categorisation and reconstruction advanced thus far have significant implications for the conceptualisation of direct effect and consistent interpretation as pivotal doctrines of EU law.

[58] Cf *Marleasing SA v La Comercial Internacional de Alimentacion SA*, C-106/89, EU:C:1990:395.

[59] Cf *Océano Grupo Editorial SA v Rocío Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú*, joined cases C-240/98 to C-244/98, EU:C:1999:620.

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First, in purely horizontal disputes such as those under the first and second scenarios described in Section VI.C—where the breach of EU law is the product of a contract or of a private conduct outside unlawful contractual clauses and where national law exists but is not, as such, contrary to EU law—it is consistent interpretation, rather than direct effect and disapplication, that plays a decisive role. This leads to a narrowing of the scope of direct effect and a corresponding expansion of the scope of consistent interpretation. Second, in purely horizontal disputes encompassed in the third scenario described in Section VI.C, where the breach of EU law stems from the conduct of a private party (outside a contract) and where no relevant national law exists, direct effect does come into play, but without its usual distinguishing feature, namely, disapplication. This gives rise to a further manifestation of direct effect, that is, integrative direct effect, which operates independently of the disapplication of national law.

A concrete takeaway emerges from the foregoing analysis. In the first and second scenarios under Section VI.C, whereby primacy and consistent interpretation operate, the somewhat artificial and outdated test based on clarity, precision, and unconditionality[60] has no real role to play. Moreover, requiring the party invoking EU law to demonstrate the unlawfulness of national law becomes both conceptually and practically unnecessary, if not counterproductive, since the domestic judge is called upon to interpret national law, not to disapply it.

In the third scenario under Section VI.C, whereby the breach is committed by a private party independently of any contractual relationship, and the matter governed by EU law is not regulated at the domestic level, recognising a form of 'integrative' direct effect—detached from disapplication—serves to reinforce the *effet utile* of direct effect. Such reinforcement broadens the scope of justiciability and, in doing so, enhances the effective judicial protection of rights derived from EU law in horizontal relationships.

Against this background, direct effect and consistent interpretation are naturally dynamic constructs, as are legal notions of jurisprudential origin through which ever-evolving social phenomena are legally framed.

Most notably, with respect to direct effect, this doctrine has evolved into a broader legal category than it was at the outset of the process of European legal integration.[61] Such a change of perspective should be understood, voiced, and systematised by the CJEU.[62] As a matter of fact, though several constitutive and recurring elements have consolidated over the decades, an *originalist* understanding of the *Van Gend & Loos* doctrine is misleading since it overlooks the transformation that occurred in this domain and gave rise to its constant fulfilment, refinement, and partial reshaping. In this context, the jurisprudence of the CJEU does not provide sufficient legal certainty as to the content, scope, limits, and consequences of direct effect. It is often vague, imprecise, unpredictable, too minimalist, and, at times, inconsistent. This form of judicial self-restraint is as problematic as judicial activism. When at issue are fundamental principles from which other principles, rules of reason, and legal taxonomies are derived, judges should use their best efforts to understand legal notions and establish the relevant/applicable legal framework so as to fill gaps that may arise.[63] Similar criticism can be raised as regards consistent interpretation, the scope of which has been broadened by the CJEU to

[60] On the problems underpinning the test, and its usefulness and outdatedness, see S Prechal, 'Does Direct Effect Still Matter?' (n 25), 1063–64; S Prechal, *Directives in EC Law* (n 25), 252–53; P Pescatore, *The Doctrine of Direct Effect* (n 20), 177; D Gallo, *Direct Effect* (n 1), 87–92.

[61] See also D Gallo, 'Rethinking Direct Effect and Its Evolution: A Proposal' (2022) 1 *European Law Open* 576, 603–5 and D Gallo, *Direct Effect* (n 4), 287–93.

[62] On the constitutional role played by the CJEU in advancing European integration, as well as on the broader idea of an 'integration-through-law', see M Cappelletti et al (eds), *Integration through Law: Europe and the American Federal Experience* (De Gruyter, 1986). For a recent critical appraisal, see R Schütze, '"Integration-through-Law": Grand Theory, Revisionist History' (2025) 4 *European Law Open* 162.

[63] For some studies on the legal reasoning of the CJEU, between activism and minimalism, see J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford University Press, 1993); T Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 *European Law Review* 21; K Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative

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the point where the boundaries between (*contra legem*) consistent interpretation and disapplication have considerably blurred over the decades.[64]

In conclusion, the question of the shape taken by direct effect and consistent interpretation in horizontal disputes remains imbued with a considerable degree of unpredictability. It therefore falls to the CJEU to fully exercise its interpretative monopoly in order to clarify the relationship between these two doctrines of EU law, as well as their role in situations where national law is not *per se* in breach of EU law, that is, where such a breach arises entirely from private autonomy.[65]

Reflection' (2007) 41 *International Lawyer* 1011; G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2012); M Dawson et al (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2015).

[64]See, *inter alia*, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2012:33, para 44 and *Conley King v The Sash Window Workshop Ltd and Richard Dollar*, C-214/16, EU:C:2017:914, para 11. On the overlap between direct effect/disapplication and consistent interpretation, see Y Galmot and J-C Bonichot, 'La Cour de Justice des Communautés européennes et la transposition des directives en droit national' (1988) 1 *Revue française de droit administratif* 20–23; G De Búrca, 'Giving Effect to European Community Directives' (1992) 55 *Modern Law Review* 215, 223; A Arnull et al, *Wyatt and Dashwood's European Union Law*, 6th ed (Sweet & Maxwell, 2011), 239–44; G Tesauro, *Manuale di diritto dell'Unione europea*, vol I, 4th ed, edited by P De Pasquale and F Ferraro (Editoriale Scientifica, 2023), 279.

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