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A Hybrid Methodology for the EU Principle of Consistent Interpretation

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Main document

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ABSTRACT

This article examines the legal methodology that courts have to employ when they construe domestic law in accordance with European Union directives. It demonstrates that the CJEU has set up autonomous "European methodological rules". These rules apply together with national legal methods. The relationship between both regimes can be described with the concepts of overlapping, intervention and Europeanisation from the inside. The article thus holds that the doctrine of consistent interpretation possesses a hybrid methodology. The reanalysis of the CJEU's case law offers answers to some unresolved questions. The article shows how consistent interpretation affects national principles of interpretation. It demonstrates the extent to which domestic judges are required to depart from traditional methods of construction and to what extent European methodological rules broaden the limits of the judicial function as accepted under national law. The contra legem limit is defined and some of its misinterpretations in legal scholarship are highlighted.

1. INTRODUCTION

The duty of judges to interpret domestic law in accordance with EU directives has stepped out of the shadow of direct effect and supremacy into the limelight of European Union law. What started as a tool that remedies the absence of a directly effective provision in a directive[1] is now considered by the Court of Justice of the European Union (CJEU) as the first port of call to

[1] *Von Colson and Kamann v Land Nordrhein-Westfalen (Case 14/83) [1984] E.C.R. 1891; [1986] 2 C.M.L.R. 430* at [21]-[27]; *Harz v Deutsche Tradax GmbH (Case 79/83) [1984] E.C.R. 1921* at [21]-[27].

ensure the effectiveness of a directive and to resolve inconsistencies between national legislation and a directive.[2] Yet, consistent interpretation still presents unresolved interpretative challenges: How does it affect domestic principles of statutory interpretation? Does it require judges to depart from traditional principles of construction and if so, to what extent? Does it extend the limits of the judicial function as accepted under national law? What are its interpretative limits? Case law of domestic courts is regularly preoccupied with these question. The current literature on the methodology of consistent interpretation can roughly be grouped into two strands. Some academics argue that a judge is required to construe domestic legislation within the scope of a directive solely on the basis of national legal standards.[3] Other scholars claim that the EU legal duty of consistent interpretation affects and limits, to a certain extent, domestic rules of construction.[4] Yet, these scholars do not explain how, exactly to what extent, and why this happens.[5]

This article answers these open questions. It takes the fragments of a European methodological standard for consistent interpretation from the case law of the CJEU and puts them into a coherent framework labelled European methodological rules. These rules interact

[2] *Dominguez v Centre informatique du Centre Ouest Atlantique (C-282/10) EU:C:2012:33; [2012] 2 C.M.L.R. 14* at [23] and [32]; *Amia SpA (in liquidation) v Provincia Regionale di Palermo (C-97/11) EU:C:2012:306; [2012] 3 C.M.L.R. 16* at [30]-[32]; *Spedition Welter GmbH v Avanssur SA (C-306/12) EU:C:2013:650; [2014] R.T.R. 5* at [27]-[28].

[3] *C.-W. Canaris, "Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in H. Koziol and P. Rummel (eds.), Festschrift für Franz Bydlinski (Vienna: Springer, 2002), p.103 at pp.57, 61 and 91*; *C. Herresthal, Rechtsfortbildung im europarechtlichen Bezugsrahmen (Munich: C.H. Beck, 2006), pp.54-55 and 63*; *M. Weber, Grenzen EU-rechtskonformer Auslegung und Rechtsfortbildung (Baden-Baden: Nomos, 2010), pp.106, 126, 213, 215*.

[4] A.I.L. Campbell, "National legislation and EC directives: Judicial co-operation and national autonomy" (1992) 43 Northern Ireland Law Quarterly 330, 343; M. Klamert, "Judicial implementation of directives and anticipatory indirect effect: connecting the dots" (2006) 43 C.M.L. Rev. 1251, 1257; *S. Prechal, Directives in EC law, 2nd ed. (Oxford: OUP, 2005), pp.199, 209*.

[5] For a noteworthy exception (in German) see *W.-H. Roth and C. Jopen, "§ 13 Die richtlinienkonforme Auslegung" in K. Riesenhuber (ed.), Europäische Methodenlehre, 3rd ed. (Munich: De Gruyter, 2015), § 13 at [25]-[37]*.

with national rules of statutory construction resulting in a hybrid methodology. The article resolves the seeming paradox that the CJEU can refer to domestic standards and at the same time intervene in the methodology of consistent interpretation by stipulating European methodological rules. The article also refers to judgments of English[6] and German courts to assess whether Member States' courts apply and accept European methodological rules.

The remainder of the article will be structured as follows. Part two discusses the principle of equivalence and its shortcomings to guarantee the effectiveness of directives. The third part revisits the CJEU's case law on consistent interpretation and outlines European methodological rules. Part four examines the meaning of the *contra legem* limit of consistent interpretation and resolves some misunderstandings about it. The fifth part provides a theoretical framework for the relationship between European methodological rules and national principles of statutory construction. Based on this relationship, part six submits that the principle of consistent interpretation has a hybrid methodology. The article concludes with a summary.

2. PRINCIPLE OF EQUIVALENCE

It is settled case law since the CJEU's Grand Chamber judgment in *Pfeiffer* that domestic courts can apply their "interpretative methods recognised by national law" when they interpret domestic law in conformity with a directive.[7] Yet, *Pfeiffer* did not leave national rules of construction untouched. The German Law at issue was adopted in order to transpose the

[6] The term „English courts" will be used to refer to the courts of England and Wales and the term "English law" will be used to refer to the legal system governing England and Wales. The effect of the EU legal duty of consistent interpretation on English law as described in this article remains the same as long as the European Communities Act 1972 is in force and the UK is a member of the EU.

[7] *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (C-397-403/01) [2004] E.C.R. I-8835; [2005] 1 C.M.L.R. 44* at [116].

Working Time Directive 93/104. S. 3 of the German Law on working time restricted weekly working time to 48 hours on average. By way of derogation from s. 3, a collective agreement could extend working time beyond 10 hours per day, where working time regularly includes significant periods of duty time (s. 7(1)(i) of the German Law on working time). When the case was referred to the CJEU, it held that national legislation which authorises weekly working time in excess of 48 hours by means of a collective agreement, including periods of duty time, is incompatible with art. 6(2) of the Working Time Directive.[8] Thus, s. 3 of the German Law on working time read on its own complied with EU law, whereas s. 7(1)(i) did not.[9] Regarding the duty of consistent interpretation, the CJEU held that

> "if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive."[10]

In effect, the CJEU asked the referring German court to look for and apply a national rule of construction which restricts the scope of s. 7(1)(i) so that s. 3 of the German Law on working time applies to the case at issue.

[8] *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [94]-[95] and [100]-[101].

[9] See Opinion of A.G. Colomer in *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [21], [39], [45].

[10] *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [116]. See also *Mono Car Styling SA v Dervis Odemis (C-12/08) [2009] E.C.R. I-6653; [2009] 3 C.M.L.R. 47* at [62].

What the CJEU also demands in this part of its ruling is that a national court must not fall short of applying the same range of interpretative rules for consistent interpretation that is available to the court when it construes purely domestic law (principle of equivalence).[11] The principle of equivalence refers back to national legal methods. It rests on the principle that cases affected by EU law must not be treated less favourably than similar domestic cases without an EU law element. It is submitted that what the Court expressed in rather cryptic terms in *Pfeiffer* goes even beyond the principle of equivalence. Paragraph 116 of the ruling cited above can be read in the following way: if the application of methods of interpretation recognised by national law leads to a possible directive-consistent meaning of the legislation, e.g. a restriction of the scope of s. 7(1)(i) of the German law on working time, the domestic court must apply these methods and choose the directive-consistent meaning. Choosing this meaning becomes an obligation under the EU legal duty of consistent interpretation if this is necessary to reach the result sought by the directive.[12] This reading of *Pfeiffer* privileges EU law and goes beyond the non-discrimination rationale inherent in the principle of equivalence. It implies a priority rule which will be discussed in the next part of this article. *Pfeiffer* clarified that a national court is required to fully exhaust its methodological latitude and to use every interpretative tool available in order to identify a directive-consistent meaning.[13] It must do "whatever lies within its jurisdiction".[14] This also means that a court must not fall short of the

[11] *S. Perner, EU-Richtlinien und Privatrecht (Vienna: Manz, 2012), p.82*; J. Schürnbrand, "Die Grenzen richtlinienkonformer Rechtsfortbildung im Privatrecht" (2007) JuristenZeitung 910, 912-913.

[12] Cf. S. Prechal, "Case note on Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al., judgment of the Court (Grand Chamber) of 5 October 2004" (2005) 42 C.M.L. Rev. 1445, 1458.

[13] See also *BP Europa v Hauptzollamt Hamburg-Stadt (C-64/15) EU:C:2016:62* at [41] ("[...] when national courts apply domestic law, they are bound to interpret it, *to the fullest extent possible*, in the light of the wording and the purpose of the directive concerned [...]" – italics added).

[14] *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [118].

outer limits of conventional rules of statutory interpretation recognised in the domestic legal system when it construes legislation in accordance with a directive. If a court can restrict or extend the scope of an enactment against or beyond its wording under national law (judicial law-making), the court is bound to use those methods if it is necessary to meet the requirements of the directive.

The principle of equivalence cannot prevent that different legal methodologies for consistent interpretation in different Member States threaten the full effectiveness and uniform application of directives in the Union. What is possible as a matter of construction in one legal system may not be possible in another one.[15] This may be the reason why the CJEU does not restrict its case law on the methodology of consistent interpretation to a reference to national legal standards.

3. EUROPEAN METHODOLOGICAL RULES

Even though the CJEU does not make the case for a common European methodology for the interpretation of harmonised domestic legislation,[16] the Court has developed European methodological rules which interact with national principles of statutory construction.[17] These

[15] Prechal, "Case note" (2005) 42 C.M.L. Rev. 1445, 1459; S. Vogenauer, "Eine gemeineuropäische Methodenlehre des Rechts – Plädoyer und Programm" (2005) Zeitschrift für Europäisches Privatrecht 234, 238, 242-243, 259 footnote 117. For a detailed discussion see M. Brenncke, "Europäisierung der Methodik richtlinienkonformer Rechtsfindung" (2015) 50 Europarecht 440, 443-444.

[16] In favour of such a legal methodology: Vogenauer, "Eine gemeineuropäische Methodenlehre des Rechts" (2005) Zeitschrift für Europäisches Privatrecht 234, 242-243, 259-260, 262. Against such a legal methodology: Brenncke, "Europäisierung der Methodik richtlinienkonformer Rechtsfindung" (2015) 50 Europarecht 440, 445.

[17] For scholars recognising a trend towards a Europeanisation of consistent interpretation see Brenncke, "Europäisierung der Methodik richtlinienkonformer Rechtsfindung" (2015) 50 Europarecht 440, 446-451; O. Mörsdorf, "Unmittelbare Anwendung von EG-Richtlinien zwischen Privaten in der Rechtsprechung des EuGH" (2009) 44 Europarecht, 219, 230; *Roth and Jopen, "§ 13 Die richtlinienkonforme Auslegung" in Europäische Methodenlehre (2015), § 13 at [26], [28], [45]*.

rules set an EU-wide standard, but they do not provide for a complete methodological order. Outside their limited scope, national principles apply and govern the methodology of consistent interpretation. The European methodological rules are committed to the full effectiveness of directives and to improving the uniform application of directives in the EU.

A. Interpretative priority of the directive-consistent meaning

The CJEU has required in Chamber and Grand Chamber rulings that a domestic court must favour the interpretation of the national legislation which is the most consistent with the result sought by the directive in order to thereby achieve an outcome compatible with the provisions of the directive. The Court has applied this methodological rule to legislation pre-dating or post-dating an applicable directive.[18] What the CJEU requires is in effect that the interpretative result (meaning) which complies with a directive must be given priority over all other possible but inconsistent meanings. The reasoning of the CJEU does not indicate that the priority rule itself influences how a judge arrives at possible meanings of an enactment. Whether or not an enactment is capable of bearing more than one meaning is not governed by this rule, but by other principles of statutory construction, in particular, the interpretative criteria. Nor does the priority rule influence how a judge weighs conflicting interpretative criteria recognised by domestic law. It does not give precedence to a specific interpretative criterion and does not exclude a weighing of the interpretative criteria, but requires a judge to choose a possible

[18] *Océano Grupo Editorial v Rocío Murciano Quintero (C-240/98) [2000] I-4941; [2002] 1 C.M.L.R. 43* at [32]; *Adeneler v Ellinikos Organismos Galaktos (C-212/04) [2006] E.C.R. I-6057; [2006] 3 C.M.L.R. 30* at [124]; *Magoora v Dyrektor Izby Skarbowej w Krakowie (C-414/07) [2008] E.C.R. I-10921; [2011] B.V.C. 325* at [43]-[44]; *CoNISMa v Regione Marche (C-305/08) [2009] I-12129* at [50]. See also Opinion of A.G. Mengozzi in *Mono Car Styling (C-12/08) [2009] E.C.R. I-6653* at [107].

interpretative result that complies with the directive.[19] It is immaterial if other potentially weightier arguments lead to another possible meaning of the enactment which infringes the directive. It is implicit in the CJEU's reasoning that the interpretative priority rule only applies once a statutory provision is at all open to interpretation and can be given more than one possible meaning, one of which fulfils the requirements of a directive. Therefore, the priority rule is limited to a selection rule between different possible meanings of an enactment.

The CJEU does not refer back to domestic principles of construction in order to justify the interpretative priority rule. Instead, it prescribes this methodological rule to courts in the Member States. It is therefore immaterial whether and under which circumstances such a priority rule also exists in national law. The German Federal Constitutional Court has accepted the European origin of this rule.[20] English courts also give interpretative priority to a directive-consistent meaning of an enactment but they have not yet explicitly clarified whether this is due to a national or European priority rule.[21]

B. **Presumption of compliance**

A second European methodological rule is the presumption that the domestic legislature intended to transpose the directive fully and correctly into national law (presumption of compliance). The national court must "presume" that the Member State "had the intention of

[19] For a different view see *T. Henninger, Europäisches Privatrecht und Methode (Tübingen: Mohr Siebeck, 2009), p.312* and *Roth and Jopen, "§ 13 Die richtlinienkonforme Auslegung" in Europäische Methodenlehre (2015), § 13 at [26]* (precedence to an interpretative criterion).

[20] Bundesverfassungsgericht [Federal Constitutional Court], judgment of 26 September 2011, (2012) Neue Juristische Wochenschrift 669 at [46].

[21] See, e.g. *Alderson v Secretary of State for Trade and Industry* [2003] EWCA Civ. 1767 at [27] (Lord Phillips MR).

fulfilling entirely the obligations arising from the directive concerned".[22] Again, the CJEU prescribes this methodological rule to Member States' courts irrespective of whether or not such a presumption also exists under domestic rules of construction. English[23] and German[24] courts have already applied the European presumption of compliance. Contrary to the interpretative priority rule, the presumption of compliance influences how a judge arrives at possible meanings of an enactment and bears upon the range of possible meanings. It interacts with other (national) principles of statutory construction like the historical and purposive approach.[25] In effect, the presumption of compliance works as a dynamic reference to the objectives of the applicable directive as construed by the CJEU. It prevents conflicts in Europe's multi-level system by aligning the intention of the domestic legislature with the intention of the European legislature.

(i) Scope of application

The CJEU has so far required national courts to employ the presumption of compliance in two situations. On the one hand, the Grand Chamber in *Pfeiffer* demonstrates that the presumption applies to the interpretation of legislation which is specifically enacted for the purpose of

[22] *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [112]. See also *Wagner Miret v Fondo de Garantía Salarial (C-334/92) [1993] E.C.R. I-6911; [1995] 2 C.M.L.R. 49* at [20].

[23] *British Gas Trading Ltd. v Lock* [2016] EWCA Civ 983 at [107] (Sir Colin Rimer, with whom Gloster LJ and Sir Terence Etherton MR agreed); *Bear Scotland v Fulton* [2015] I.C.R. 221 (Employment Appeal Tribunal) at [46], [64] (Langstaff J).

[24] Bundesarbeitsgericht [Federal Labour Court], judgment of 24 March 2009, (2009) Europäische Zeitschrift für Wirtschaftsrecht 465 at [58]-[59] – *Schultz-Hoff*; Bundesgerichtshof [Federal Court of Justice], judgment of 7 May 2014, (2014) Neue Juristische Wochenschrift 2646 at [23] – *Lebensversicherung II*.

[25] See Bundesgerichtshof [Federal Court of Justice], judgment of 7 May 2014, (2014) Neue Juristische Wochenschrift 2646 at [23] – *Lebensversicherung II* for the statement that the EU presumption of compliance needs to be taken into account when determining the purpose of an implementing provision.

transposing a directive into domestic law.[26] On the other hand, the presumption applies to the interpretation of legislation pre-dating a directive if the Member State does not consider it necessary to amend its law in order to bring it into line with the applicable directive because it (mistakenly) considers the pre-existing legislation to already satisfy the requirements of the directive concerned, which was the case in the CJEU's Fifth Chamber ruling in *Wagner Miret*.[27] The key significance of the presumption is that a court must assume that the national legislature intended to comply *entirely* with the requirements of the directive.[28] The main case of the application of the presumption thus occurs when the legislature transposes a directive into domestic law without clarifying that specific substantive objectives in the implementing act comply with the directive. Since it must be assumed that the legislature intended to implement the directive entirely, a court which interprets a specific statutory provision of the implementing act must assume that the legislature had the intention to *only* enact consistent objectives.

Despite some scholarly opinion to the contrary,[29] the presumption is not universal and does only apply to a certain range of cases. So far, the CJEU has only relied on the presumption in cases where there was an actual indication of legislative intent to comply with the requirements of the directive with regard to the legislation under construction. For implementing legislation in particular, the presumption can be linked with the actual intention

[26] *Pfeiffer (C-397-403/01) [2004] E.C.R. I-8835* at [112].

[27] *Wagner Miret (C-334/92) [1993] E.C.R. I-6911* at [4], [5], [21]. Note that in para. 21 of the judgment in its English version, the words "a national court" should be read as meaning "a Member State". This reading is supported by the authentic Spanish version as well as the French and German language versions.

[28] See, e.g., *British Gas Trading Ltd. v Lock* [2016] EWCA Civ 983 at [107] (Sir Colin Rimer, with whom Gloster LJ and Sir Terence Etherton MR agreed).

[29] *N. Baldauf, Richtlinienverstoß und Verschiebung der Contra-legem-Grenze im Privatrechtsverhältnis (Tübingen: Mohr Siebeck, 2013), pp.91, 99*.

of the enacting legislature to transpose the directive into domestic law. Authorial intent did not form the base of the presumption in *Wagner Miret*. Instead, the CJEU seems to have relied on the view of a subsequent national legislature that the provisions already in force met the requirements of the directive. Yet, the grounds of the judgment in *Wagner Miret* are not clear in this respect, which is regrettable as this issue touches on sensitive methodological and constitutional debates in the Member States about the correct object of statutory interpretation and in particular about whether the notion of legislative intent must be understood in a historical or contemporary sense.

This article distinguishes between (a) situations where there is no indication of legislative intent to comply with the directive with regard to the legislation under construction and the presumption does not apply and (b) situations where such intent is present and the presumption applies, but the presumption may be rebutted. Based on this distinction, the following three situations fall outside the current scope of the presumption. First, it does not apply if the legislature inadvertently did not transpose the directive into domestic law at all, so that no intention to comply is discernible. Second, the presumption does not apply if the legislature deliberately refuses to implement the directive into national law. Third, a domestic court is not obliged to apply the presumption for the interpretation of pre-existing national legislation if the legislature neither amended the pre-existing legislation in order to implement the directive nor considered the pre-existing legislation to already satisfy the requirements of the directive.[30] This is the case even if the legislature implemented the directive elsewhere in

[30] Such were the cases in Bundesarbeitsgericht [Federal Labour Court], judgment of 17 November 2009, (2010) Neue Zeitschrift für Arbeitsrecht 1020 at [26]-[27], [30], [46] – *Urlaubsentgelt* and Bundesgerichtshof [Federal Court of Justice], judgment of 16 May 2013, (2013) Neue Juristische Wochenschrift 2674 at [36], [40], [42]-[43]. Neither the Bundesarbeitsgericht nor the Bundesgerichtshof applied the presumption of compliance. In both cases, the German courts argued that the national law could not be interpreted in conformity with the directive concerned since such an interpretation would have surpassed the *contra legem* limit.

the national law. This reading of the case law is supported by the CJEU's Grand Chamber decision in *Kücükdeveci*. The main proceedings involved the interpretation of s. 622(2) of the German Civil Code. The provision preceded the applicable Directive 2000/78/EC as it originated in a German law of 1926. The Court of Justice did not raise the presumption of compliance in *Kücükdeveci* even though Directive 2000/78/EC was transposed into German law by the General Law on Equal Treatment. It accepted the construction of the German Court that s. 622(2), having regard to its clear wording and its objectives as pursued by the enacting legislature, is incapable of an interpretation in conformity with Directive 2000/78/EC.[31]

(ii) Rebuttal of the presumption

The question of whether or not the presumption applies must be differentiated from the rebuttal of the presumption.[32] The presumption can be negated by evidence to the contrary, for example, by showing that the national legislature intended to depart from specific provisions of the directive. Hence, the presumption is rebutted if the legislature implements the directive in general but deliberately decides to keep or enact an inconsistent specific objective. How, then, must the legislature express such an intention? Does this intention have to be plain from the wording of the enactment or does it suffice if this intention can be discerned using the whole body of interpretative criteria recognised by domestic law? In other words, can the presumption only be rebutted by express words or also by implication? In the absence of CJEU case law on the matter, this question is governed by national legal methods.[33] It is submitted here that the presumption of compliance can only be rebutted if a national court reaches an outer limit of

[31] *Kücükdeveci v Swedex (C-555/07) [2010] E.C.R. I-365; [2010] 2 C.M.L.R. 33* at [16], [34]-[35], [49].

[32] It is implicit in the CJEU's case law that the presumption is rebuttable. See *Wagner Miret (C-334/92) [1993] E.C.R. I-6911* at [20], [22].

[33] This is an example of the hybrid conception of the methodology of consistent interpretation.

consistent interpretation which bars the directive-consistent meaning. That means that the ultimate answer to the question of how the presumption of compliance can be refuted is to be found in the *contra legem* limit of consistent interpretation, which will be explored in the next part of this article.

A case in support of this argument is *Impact* where the CJEU referred quite extensively to *Pfeiffer* but did not raise the presumption of compliance. Ireland transposed Directive 1999/70/EC belatedly into national law and the question arose whether the domestic court was under an obligation, by virtue of the EU legal duty of consistent interpretation, to give the relevant implementing provision a retrospective effect to the date by which the directive should have been transposed. That would have resulted in the imposition of a civil liability on Ireland, in its capacity as an employer, for acts or omissions which occurred at a time when that directive ought to have been transposed by Ireland. The domestic enactment in question (s. 6 Protection of Employees (Fixed-Term Work) Act 2003) was specifically enacted for the purpose of transposing Directive 1999/70/EC. Its wording did not expressly preclude an interpretation with a retrospective effect. Under Irish rules of statutory construction, however, a strong presumption exists which precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary. The Grand Chamber of the CJEU held that unless the domestic court found such an indication, the EU legal duty of consistent interpretation does not require the court to apply the domestic provision retrospectively because such an obligation would require the court to infringe the *contra legem* limit.[34]

[34] *Impact v Minister for Agriculture and Food and others (C-268/06) [2008] E.C.R. I-2483; [2008] 2 C.M.L.R. 47* at [102]-[103].

(iii) Inadvertent inconsistencies with EU law

The European presumption of compliance can have far-reaching consequences in the event that the legislative history of an implementing act contains inadvertent inconsistencies with EU law. This can occur if (a) a specific objective of an enactment is expressed in the legislative history but contradicts the directive's requirements as subsequently interpreted by the CJEU and (b) there is no indication that the legislature realised the inconsistency. The Member State has thus erred with regard to the correct construction of the directive's requirements. This scenario has exasperated German courts[35] and has also featured in the Court of Appeal of England and Wales.[36] Whether or not the presumption of compliance is rebutted in this scenario would *prima facie* be determined by national law. Yet, the answer to this question is provided by EU law as the following discussion shows.

The decisive case is *Björnekulla*. The main proceedings concerned the interpretation of art. 25 of the Swedish Trade Marks Law 1960:644 which provides that a trade mark may be revoked if it no longer has a distinctive character. The provision had been amended in order to implement Directive 89/104/EEC. The question arose about which classes of persons are relevant in determining whether a trade mark has lost its distinctive character. The Swedish Svea Court of Appeal argued that the relevant classes of persons are those who deal commercially with the product if the Swedish Trade Marks Law is construed on the basis of the *travaux préparatoires*.[37] Since the Svea Court of Appeal was uncertain whether such an interpretation is consistent with the underlying directive, it referred to the CJEU the question

[35] Bundesgerichtshof [Federal Court of Justice], judgment of 26 November 2008, (2009) Neue Juristische Wochenschrift 427 at [25] – *Quelle II*; Bundesgerichtshof [Federal Court of Justice], judgment of 21 December 2011, (2012) Neue Juristische Wochenschrift 1073 at [33]-[36] – *Weber II*; Bundesgerichtshof [Federal Court of Justice], judgment of 7 May 2014, (2014) Neue Juristische Wochenschrift 2646 at [23], [26] – *Lebensversicherung II*.

[36] *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708 at [50]-[52] (Etherton LJ).

[37] *Björnekulla Fruktindustrier v Procordia Food (C-371/02) [2004] E.C.R. I-5791; [2005] 3 C.M.L.R. 16* at [10].

of the correct meaning of art. 12(2)(a) of Directive 89/104/EEC. The CJEU held that the relevant classes of persons are not restricted to those who deal with that product commercially but also comprise consumers and end users.[38] The Svea Court of Appeal's interpretation was thus incompatible with the requirements of the applicable directive. However, the wording of art. 25 of the Swedish Trade Marks Law was not clear and the provision was thus open to other possible constructions.[39] Regarding consistent interpretation, the Sixth Chamber of the CJEU stipulated that a national court has to construe domestic law in conformity with an applicable directive "notwithstanding any contrary interpretation which may arise from the travaux préparatoires for the national rule".[40]

Assuming that the Swedish law could have been given another (consistent) meaning according to national legal methods, the reasoning of the Sixth Chamber in *Björnekulla* illustrates the European interpretative priority rule. The reasoning of the CJEU can also be used to elucidate the European presumption of compliance: possible inconsistent meanings of an enactment which may arise from the *travaux préparatoires* generally do not rebut the presumption that the legislature intended to enact only consistent objectives. Hence, the presumption of compliance itself contains an element of priority: the presumed general intention of the legislature to fully implement the directive prevails over a specific but inadvertently inconsistent objective of a particular enactment which is expressed in the *travaux préparatoires*. Resolving the contradiction between the general and the specific intention is not left to national rules of construction or to the discretion of the domestic court, but prescribed by EU law. To note, this has not yet been confirmed by a Grand Chamber judgment.[41]

[38] *Björnekulla (C-371/02) [2004] E.C.R. I-5791* at [25]-[26].

[39] Cf. *Björnekulla (C-371/02) [2004] E.C.R. I-5791* at [10].

[40] *Björnekulla (C-371/02) [2004] E.C.R. I-5791* at [13].

[41] The system of chambers at the Court of Justice has the potential to lead to divergent lines of case law within the CJEU; see *P. de Sousa, The European fundamental freedoms: A contextual approach (Oxford: OUP, 2015), p.42*. See also M. Malecki,

The priority element of the presumption of compliance can have a significant impact on national legal methodology. Let us assume that in some Member State specific objectives of an enactment expressed in the legislative history cannot be overridden by a (presumed) general intention of the legislature without breaching the *contra legem* limit. Specific legislative intent is given priority over general intentions of the legislature according to national legal methodology.[42] It follows that a specific objective which inadvertently contradicts a directive-consistent meaning would rebut the presumption of compliance if the presumption were without the priority element. This would lead to the result that the inconsistent meaning is the only possible meaning of the enactment. In such a case, the interpretative priority rule would not apply. If the presumption of compliance contains the priority element, however, the presumption is not rebutted and a consistent interpretation remains possible. In this example, the presumption of compliance intervenes in national legal methods and provides for a constitutionally significant shift of the *contra legem* limit in the Member State.

What remains open is the demarcation line between an inadvertent inconsistency with EU law and a deliberate intention to contradict or refuse to implement a certain provision of a directive. As the EU presumption of compliance currently stands, Member State legal methodologies determine where this line is to be drawn. This distinction was not discussed in *Björnekulla* since the *travaux préparatoires* in that case did not suggest that the Swedish

"Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers" (2012) 19 Journal of European Public Policy 59, 61, 63, who found evidence of systemic variation of outcomes attributable to chamber composition.

[42] In Germany and in Austria for example, some scholars assert that if the specific objective of a particular enactment as expressed in the legislative history of the statute contradicts the legislature's general intention to transpose the directive into national law, the former prevails over the latter under German/Austrian legal methodology; see, e.g. P. Bydlinski, "Richtlinienkonforme "gesetzesübersteigende" Rechtsfindung und ihre Grenzen – eine methodische Vergewisserung anlässlich 20 Jahre EU-Mitgliedschaft" (2015) 137 Juristische Blätter 2, 8; M. Franzen, "„Heininger" und die Folgen: ein Lehrstück zum Gemeinschaftsprivatrecht", (2003) JuristenZeitung 321, 324, 328.

legislature specifically intended to contradict the directive. Therefore, the CJEU's reasoning in *Björnekulla* leaves open the possibility that the enactment as interpreted in its context, which includes the *travaux préparatoires*, can only be given one meaning which does not comply with the directive since the legislature deliberately intended to depart from certain requirements of the directive. In this case, the *contra legem* limit of consistent interpretation is reached and the presumption of compliance is rebutted.

4. THE CONTRA LEGEM LIMIT

The European duty of consistent interpretation does not oblige[43] a judge to construe national legislation *contra legem*.[44] The *contra legem* limit has a functional meaning. It enshrines the principle that a judge is bound by statute. It provides, it is submitted, that a barrier exists which separates permissible judicial interpretation from impermissible judicial legislation which lies outside of a court's jurisdiction.[45] A *contra legem* construction surpasses the outer limits of the judicial function. The *contra legem* limit has a constitutional dimension and presupposes a separation of powers between the judiciary and the legislature.

[43] See, e.g. *Impact (C-268/06) [2008] E.C.R. I-2483* at [103] ("[...] Community law [...] cannot be interpreted *as requiring* the referring court [...] to interpret national law *contra legem." – italics added).*

[44] *Adeneler (C-212/04) [2006] E.C.R. I-6057* at [110]; *Impact (C-268/06) [2008] E.C.R. I-2483* at [100]; *Mono Car Styling (C-12/08) [2009] E.C.R. I-6653* at [61]; *Angelidaki v Organismos Nomarkhiaki Aftodiikisi Rethimnis (C-378-380/07) [2009] E.C.R. I-3071; [2009] 3 C.M.L.R. 15* at [199].

[45] Cf. Opinion of A.G. Bot in *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen (C-441/14) ECLI:EU:C:2015:776* at [76]-[77]; Campbell, "National legislation and EC directives" (1992) 43 Northern Ireland Law Quarterly 330, 347; *Conway, The limits of legal reasoning and the European Court of Justice (2012), p.14.*

A. **National and European limits of interpretation**

The existence of the *contra legem* limit alone does not reveal where the boundary actually lies, i.e. under which circumstances interpretation crosses the threshold to judicial legislation. English and German courts have amplified this limit with certain interpretative rules such as that a consistent interpretation cannot depart from a fundamental feature of the legislation.[46] After *Marleasing*,[47] confusion arose about whether at all, and if so, to what extent the duty of consistent interpretation can be restricted by national methods of interpretation.[48] In later case law, the CJEU has recognised that a consistent interpretation of domestic legislation can fail due to limits imposed by national legal methodology.[49] One example is *Impact* where rules of construction established in Irish law, in particular the presumption against retrospective application of legislation, determined the *contra legem* limit.[50] Since national courts can principally apply their domestic principles of construction when they interpret domestic law in accordance with EU directives, the outer limits of consistent interpretation are principally

[46] *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at [89]-[90] (Arden LJ); *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 at [38] (Sir Andrew Morritt, C); *Vidal-Hall v Google Inc.* [2015] EWCA Civ 311 at [90] (Lord Dyson MR and Sharp LJ, with whom McFarlane LJ agreed). With regard to "conventional" judicial law-making in Germany see Bundesverfassungsgericht [Federal Constitutional Court], judgment of 19 March 2013, (2013) Neue Juristische Wochenschrift 1058 at [66]; Bundesgerichtshof [Federal Court of Justice], judgment of 16 May 2013, (2013) Neue Juristische Wochenschrift 2674 at [27].

[47] *Marleasing v La Comercial Internacional de Alimentación (C-106/89) [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305* at [9], [13].

[48] For an overview of the discussion see Campbell, "National legislation and EC directives" (1992) 43 Northern Ireland Law Quarterly 330, 346-352; *Prechal, Directives in EC law (2005), pp.197-199*.

[49] *QDQ Media v Alejandro Omedas Lecha (C-235/03) [2005] E.C.R. I-1937; [2005] 1 C.M.L.R. 55* at [14]-[15]; *Impact (C-268/06) [2008] E.C.R. I-2483* at [95]-[104]; *Association de médiation sociale v Union locale des syndicats CGT (C-176/12) EU:C:2014:2; [2014] 2 C.M.L.R. 41* at [39]-[41].

[50] *Impact (C-268/06) [2008] E.C.R. I-2483* at [102]-[103].

determined by national (constitutional) law. Criticism[51] that the CJEU has not yet further defined the *contra legem* limit is therefore unwarranted. Furthermore, it is incorrect to say that the *contra legem* limit as expressed by the CJEU implies that a provision cannot be given a meaning which (a) "clearly deviates from an initial (literal) reading of the provision[s] concerned"[52] or (b) contradicts its "ordinary" meaning[53]. Such an understanding of the *contra legem* limit would infringe the principle of equivalence if judicial law-making, that is to say, the interpretation of a provision which goes beyond or against its wording, is possible and within the bounds of the judicial function of a Member State. If national legal methodology recognises that legislation can be construed against its ordinary meaning under specific circumstances, the *contra legem* limit does not bite if these circumstances are met.

The *contra legem* limit is principally but not fully determined by domestic law.[54] National autonomy is confined by European methodological rules. The presumption of compliance in particular has the ability to influence, to "stretch" or to shift the *contra legem* limit.[55] A hypothetical example of a shifting of the *contra legem* limit was given in the previous part of this article. European methodological rules thus have the potential to carry judges beyond the judicial function as accepted under their domestic legal order and to intervene in

[51] See, e.g. C. Franklin, "Limits to the limits of the principle of consistent interpretation? Commentary on the Court's decision in Spedition Welter" (2015) 40 E.L. Rev. 910, 923.

[52] *Prechal, Directives in EC law (2005), p.207*.

[53] *D. Chalmers and G. Davies and G. Monti, European Union Law, 3rd ed. (Cambridge: CUP, 2014), p.320*.

[54] For the view that the *contra legem* limit is *solely* determined by national law see *Canaris, "Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in Festschrift für Franz Bydlinski (2002), p.47 at p.91*; M. Klamert, "Richtlinienkonforme Auslegung und unmittelbare Wirkung von EG-Richtlinien in der Rechtsprechung der österreichischen Höchstgerichte" (2008) 130 Juristische Blätter 158, 160; *cf. Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at [81] (Arden LJ).

[55] Cf. *Prechal, Directives in EC law (2005), p.209* who asserts that the EU legal duty of consistent interpretation may imply for national courts the obligation to stretch the limits of their judicial function.

the national separation of powers between the legislature and the judiciary. A stretching of the *contra legem* limit has occurred in Germany.[56] Under German law, the *contra legem* limit of (consistent) interpretation is surpassed when a court contravenes the wording of an enactment *and* the clearly identifiable intention of the legislature (the so-called 'double criterion').[57] The legislative history of an implementing act, which is a permissible aid to statutory interpretation in Germany, can contain specific objectives of an enactment. If these objectives are inadvertently inconsistent with EU law, applying the presumption of compliance entails that an intention of the legislature to depart from the directive's requirements will regularly not be clearly discernible. Relying on the presumption does not modify the double criterion; it does not shift the *contra legem* limit. However, it affects the double criterion as the element relating to the *clearly* identifiable intention of the legislature will regularly be absent. Applying the presumption of compliance thus significantly stretches the *contra legem* limit and de facto increases the power of the judiciary to find a consistent meaning.

The relationship between national rules of construction and European methodological rules with regard to the *contra legem* limit is overlooked by scholars who assert that unambiguous

[56] For a more critical view and the claim that the European presumption of compliance leads to a de facto and inadmissible shift of the national *contra legem* limit in Germany, see Schürnbrand, "Die Grenzen richtlinienkonformer Rechtsfortbildung im Privatrecht" (2007) JuristenZeitung 910, 912, 916-917.

[57] Bundesverfassungsgericht [Federal Constitutional Court], judgment of 11 July 2012, (2012) Neue Juristische Wochenschrift 3081 at [75] – *Delisting*; Bundesgerichtshof [Federal Court of Justice], judgment of 16 August 2006, (2006) Neue Juristische Wochenschrift 3200 at [15]; Bundesarbeitsgericht [Federal Labour Court], judgment of 24 January 2006, (2006) Neue Zeitschrift für Arbeitsrecht 862 at [43]; Bundesarbeitsgericht [Federal Labour Court], judgment of 24 September 2009, (2010) Neue Juristische Wochenschrift 557 at [38].

statutory words do not bar the EU legal duty of consistent interpretation[58] or who contend[59] that the clear and unambiguous wording of a provision functions as an absolute boundary. Either view confuses European requirements and limits of interpretation by virtue of domestic law. The CJEU has not yet decided whether clear and unambiguous statutory language of national legislation marks or does not mark the *contra legem* limit by virtue of European law. This question is decided by domestic law and national methodologies can differ between Member States. It is thus possible that the duty of consistent interpretation is applied differently.

B. Exception to the contra legem limit for copy-out legislation?

A recent CJEU ruling which merits further discussion is the Second Chamber judgment in the case of *Spedition Welter*.[60] This judgment has tempted scholars to assert that the CJEU has extended the scope of the EU duty of consistent interpretation for copy-out legislation by requiring that such legislation must be interpreted in conformity with the applicable directive as construed by the CJEU regardless of whether it might be possible to do so or not under national law.[61] The CJEU allegedly interfered with the *contra legem* limit. Copy-out legislation refers to national implementing legislation which adopts the same wording as that of the directive. The question that arose in the main proceedings was whether art. 21(5) of the Sixth Motor Insurance Directive 2009/103 has to be construed as empowering a claims representative

[58] Klamert, "Judicial implementation of directives and anticipatory indirect effect" (2006) 43 C.M.L. Rev. 1251, 1257.

[59] Opinion of A.G. Bot in *Dansk Industri (C-441/14) ECLI:EU:C:2015:776* at [68]; *R. Schütze, European Union Law (Cambridge: CUP, 2015), p.400*; cf. J. Stuyck and P. Wytinck, "Comment on Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA" (1991) 28 C.M.L. Rev. 205, 212.

[60] *Spedition Welter (C-306/12) EU:C:2013:650.*

[61] Franklin, "Limits to the limits of the principle of consistent interpretation?" (2015) 40 E.L. Rev. 910; *Roth and Jopen, "§ 13 Die richtlinienkonforme Auslegung" in Europäische Methodenlehre (2015), § 13 at [34]*.

of an insurance undertaking to accept service of judicial documents. The CJEU affirmed that question in *Spedition Welter*. S. 7b(2) of the German Law on the supervision of insurance transposed art. 21(5) of Directive 2009/103 and reproduced that provision virtually word for word. According to the CJEU, the domestic court is thus *required*, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, to construe national law in a way that is compatible with the interpretation given to the directive by the CJEU.[62] Advocate General Cruz Villalón asserted that if a domestic transposing provision uses the same form of words as the Union provision, "it is obvious" that the national provision "must be interpreted in the same way" as the Union provision.[63] Yet, the Advocate General did not oblige the referring German court to adopt the same, i.e. European, principles of construction that the CJEU employs when it construes directives. Instead, the Advocate General declared that the referring court must undertake the interpretation of its domestic law in conformity with art. 21(5) of Directive 2009/103 by applying interpretative methods recognised by its legal order. It appeared to the Advocate General that the German law was open to a consistent interpretation according to German methods of statutory construction.[64]

The very strong emphasis on the duty of consistent interpretation both in the Opinion of the Advocate General and the judgment of the Court can be explained with the circumstances of the case. Even though the referring German court leaned towards the interpretation of art. 21(5) of Directive 2009/103 which was later adopted by the CJEU, the German court did not examine whether the implementing provision, s. 7b(2) of the German Law on the supervision

[62] *Spedition Welter (C-306/12) EU:C:2013:650* at [32].

[63] Opinion of A.G. Cruz Villalón in *Spedition Welter GmbH v Avanssur SA (C-306/12) ECLI:EU:C:2013:359* at [37]-[38].

[64] Opinion of A.G. Cruz Villalón in *Spedition Welter GmbH v Avanssur SA (C-306/12) ECLI:EU:C:2013:359* at [39]-[42], particularly at [40].

of insurance, was itself open to a consistent interpretation. It did not mention this provision at all in its judgment. Instead, it asserted in a rather cursory fashion that the wording of ss. 170 et seq. of the German Code of Civil Procedure leaves no scope for a consistent interpretation that empowers a claims representative of an insurance undertaking to accept service of judicial documents.[65] Advocate General Cruz Villalón argued specifically against this reading of ss. 170 et seq. in his Opinion in *Spedition Welter* and the view that these provisions could stand in the way of a consistent interpretation of s. 7b(2) of the German Law on the supervision of insurance.[66] Furthermore, the German court did not consider the possibility of judicial law-making in its ruling even though judicial law-making is a recognised technique of (consistent) statutory interpretation in Germany. In sum, the quality of the court's reasoning was simply inadequate.

It appears from these circumstances of the individual case that both the Advocate General and the CJEU intended to issue a warning to national courts that they must take seriously their obligation under the EU duty of consistent interpretation to fully exhaust their interpretative latitude and go to the outer limits of what is possible as a matter of statutory interpretation in order to find a directive-consistent meaning. Reading *Spedition Welter* in its context shows that the CJEU did not demand that copy-out legislation must be interpreted in conformity with the applicable directive as construed by the CJEU regardless of whether it might be possible to do so or not under national law. The CJEU did not require a *contra legem* interpretation of the German law. *Spedition Welter* leaves open the possibility that copy-out legislation is not amenable to a consistent interpretation in a specific case because a national

[65] Landgericht [Regional Court] Saarbrücken, (2012) Neue Juristische Online Zeitschrift 1765 at [14].

[66] When the case returned to the German court, the Landgericht Saarbrücken simply accepted that, in accordance with the guidance given by the CJEU, s. 7b(2) of the German Law on the supervision of insurance could be interpreted in conformity with art. 21(5) of Directive 2009/103. It did not even hint at a consistent interpretation of ss. 170 et seq. of the German Code of Civil Procedure. See Landgericht [Regional Court] Saarbrücken, (2015) Beck online Rechtsprechung 12283.

court reaches the *contra legem* limit of interpretation. Needless to say, the CJEU did not promote a common European methodology for the interpretation of copy-out legislation.

Whether or not the warning issued to national courts will have its intended effect or indeed backfire is a more difficult question to answer. In the past, significantly gentler tones have been sufficient in order to nudge the German Federal Court of Justice to make interpretative U-turns. *Heininger* and *Quelle* are examples in point. In both cases, the referring German Federal Court of Justice felt unable to ascribe to the national law a meaning which, as it appeared after the decision of the CJEU, complied with the applicable directive. In neither case did the CJEU suggest to the national court that or how the national law is amenable to a consistent interpretation. Yet, when both cases returned to the German Federal Court of Justice, it reached a directive-compliant reading using national methods of interpretation.[67] These two examples indicate that national courts leaning on the *contra legem* limit at the stage of referral should not be the prime concern of the CJEU.[68] The main concern should be courts which do not refer because they (a) claim that the national law cannot be interpreted in conformity with the alleged meaning of a directive as suggested by one of the parties to the proceedings because such an interpretation would be *contra legem* and (b) at the same time assert, and rightly so for proceedings exclusively between private parties, that the provision of the directive at issue does

[67] For *Heininger* see: Bundesgerichtshof [Federal Court of Justice], (2000) Neue Juristische Wochenschrift 521, 521-522 – *Heininger I*; *Heininger v Bayerische Hypo- und Vereinsbank AG (C-481/99) [2001] E.C.R. I-9945; [2003] 2 C.M.L.R. 42*; Bundesgerichtshof [Federal Court of Justice], (2002) Neue Juristische Wochenschrift 1881, 1882-1883 – *Heininger II*. For *Quelle* see: Bundesgerichtshof [Federal Court of Justice], (2006) Neue Juristische Wochenschrift 3200 at [10], [12] – *Quelle I*; *Quelle AG v Bundesvreband der Verbraucherzentralen und Verbraucherverbände (C-404/06) [2008] E.C.R. I-2685; [2008] 2 C.M.L.R. 49*; Bundesgerichtshof [Federal Court of Justice], (2009) Neue Juristische Wochenschrift 427 at [22]-[35] – *Quelle II*.

[68] For a recent example of an allegedly incorrect reliance on the *contra legem* limit by a national court see *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen (C-441/14) ECLI:EU:C:2016:278; [2016] I.R.L.R. 552* and in particular Opinion of A.G. Bot in *Dansk Industri (C-441/14) ECLI:EU:C:2015:776* at [53]-[73].

not have direct effect. In this scenario, the correct interpretation of the directive will often do not have any bearing on the decision of the dispute, which is why German courts in the past have declined to refer to the CJEU even though they admitted that they were unsure about the correct interpretation of the directive.[69] It goes without saying that a refusal of national courts to cooperate with the CJEU by dodging the preliminary reference procedure seriously threatens the uniform interpretation and application of directives in the Member States. Whether the CJEU's perceived interference with the exclusive competence of the national court to interpret national law and its hard-line approach to consistent interpretation in *Spedition Welter* will convince those courts to refer seems rather questionable.

5. RELATIONSHIP BETWEEN EUROPEAN METHODOLOGICAL RULES AND NATIONAL LEGAL METHODOLOGIES

The fact that the CJEU refers to national rules of construction for the principle of consistent interpretation but at the same time has developed European methodological rules appears to be contradictory at first glance. This paradox can be resolved, however, as the following explanation of the relationship between national legal methods and European methodological rules shows. The following concepts (overlapping, intervention and Europeanisation from the inside) describe different layers of this relationship. These concepts are not mutually exclusive categories but can coexist in a domestic legal order as they can apply at the level of specific interpretative rules.

[69] See, e.g. Bundesarbeitsgericht [Federal Labour Court], judgment of 17 November 2009, (2010) Neue Zeitschrift für Arbeitsrecht 1020 at [16], [26]-[27] – *Urlaubsentgelt*; Bundesgerichtshof [Federal Court of Justice], judgment of 16 May 2013, (2013) Neue Juristische Wochenschrift 2674 at [36], [39]-[43], [44]-[51]; German Oberlandesgericht [Higher Regional Court] München, (2014) Neue Juristische Online Zeitschrift 204, 207.

A. **Overlapping**

If judges achieve the result sought by the directive by using their national principles of statutory construction, they secure the full effectiveness of the directive and, therefore, do not need to use European methodological rules. This is supported by the wording of art. 288(3) of the Treaty on the Functioning of the European Union (TFEU) which grants national authorities "the choice of form and methods". National and European rules can overlap. Overlapping includes the situation where the substance of a European methodological rule is fully part of national principles of construction. In other words, a twin exists in domestic law. Two variants of this twin can be distinguished. Either it is already part of national legal methodology or it enters the domestic legal order due to a deliberate process of change. The latter case warrants elaboration.

Even though Member States are not required to integrate European methodological rules into their legal system such that the former are mirrored in national law, the European rules are not opposed to such an internalisation based on domestic law. This internalisation is primarily the task of the national judiciary. It is advantageous for two reasons. First, the scope of possible conflicts and inconsistencies between national and European rules of interpretation is reduced. Second, judges in Member States may be more likely to accept and correctly apply a methodological standard if it is rooted in the domestic legal system. Internalising a European rule creates a twin in domestic law and justifies the interpretative standard by virtue of Member State law. This process does not affect the autonomous status of the EU rules or the jurisdiction of the CJEU to pronounce on any question involving the interpretative obligations arising under the EU duty of consistent interpretation. As with other cases of overlapping, European and national methodological rules still exist side-by-side but they are drawing nearer to each other.

If the substance of a European methodological rule is part of national principles of construction, the relationship between domestic law and EU rules can be described as follows.

Even though there is an agreement about the content of the interpretative standard in the Union, some Member States may derive it from domestic law, whereas others may derive it from EU law. Different claims exist in the Union with regard to the same methodological content, which can either be attributed to the European legal order or the domestic legal order. These rival claims can coexist. They are not irreconcilable as they do not make competing claims over the legal basis of the same legal rule, but over the legal bases of different rules with the same content. Either domestic law claims legitimacy over a *national* principle of construction; or European law claims legitimacy over a *European* methodological rule.[70] The overlapping of European and national rules for the EU legal duty of consistent interpretation can be described as legal pluralism that exists within the *European* legal duty of consistent interpretation.[71] Legal pluralism is understood here as referring to the coexistence of legal orders or single rules, which are rooted in different sources of legitimacy, in the same social field.[72]

Examples of overlapping can be found in English and German judgments. English courts apply a presumption that Parliament intends to give effect to the UK's international

[70] We are not here concerned with the competing constitutional claims that the ultimate authority for the applicability of the *European* legal duty of consistent interpretation and European methodological rules in the Member States lies (a) in the European legal order or (b) in national constitutions. On the plurality of ultimate authority claims in the EU see, e.g. *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, 2nd ed. (Oxford: OUP, 2011), p.323 at pp.350-357.*

[71] For the distinction between pluralism *within* a legal order and *between* legal orders see J. Bacquero Cruz in M. Avelj and J. Komárek, "Four visions of constitutional pluralism (symposium transcript)" (2008) 2 European Journal of Legal Studies 323, 330.

[72] *M. Siems, Comparative Law (Cambridge: CUP, 2014), p.107*. For an introduction to legal pluralism see J. Griffiths, "What is legal pluralism?" (1986) 24 Journal of Legal Pluralism, 1-56; specifically with regard to the methods of legal reasoning in Europe and a European pluralist methodology J. Husa, "The method is dead, long live the methods – European polynomia and pluralist methodology" (2011) 5 Legisprudence 249-271.

obligations fully and consistently.[73] It is apparent from this formulation of the English presumption that a considerable overlap exists with the EU presumption of compliance. Within the parameters of the overlap, an English court can apply the English presumption (that is to say, conventional principles of construction) when interpreting legislation in conformity with an applicable directive without having recourse to the EU methodological rule. In Germany, the Federal Court of Justice gave priority to the presumed general intention of the legislature to fully transpose Directive 1999/44/EC into domestic law over an inadvertently inconsistent objective of a particular enactment, which was expressed in the implementing statute's legislative history.[74] The court used national legal methodology to achieve this result and did not refer to the EU presumption of compliance.

B. **Intervention**

European methodological rules can intervene in national legal methodologies. A court must apply the European rules if they permit a consistent interpretation of legislation and if the court cannot reach the result sought by the directive by applying domestic standards alone. In this scenario, the European rules increase the scope for interpretation available to a judge. These rules do not simply add a separate and standalone layer to the interpretative process. The EU presumption of compliance interacts with the historical and purposive approach to statutory interpretation. Therefore, national principles of construction may need to adapt to the presumption rule in order to guarantee its effective operation. This adaptation is itself required

[73] *Garland v British Rail Engineering Ltd* [1983] 2 A.C. 751 (House of Lords), 771 (Lord Diplock); *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at [122] (Lord Dyson), at [201] (Lord Mance); *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [239] (Lord Kerr).

[74] Bundesgerichtshof [Federal Court of Justice], judgment of 21 December 2011, (2012) Neue Juristische Wochenschrift 1073 at [34] – *Weber II*.

by EU law as domestic law must be interpreted in accordance with primary EU law (EU methodological rules). If an adaptation is necessary but proves impossible, the national standard must be disapplied. Just as the supremacy of the EU legal duty of consistent interpretation renders inapplicable a national prohibition of consistent interpretation, national principles of construction which contradict European methodological rules are disapplied in case of conflict.

Through the processes of intervention and overlapping (in the form of internalisation), European methodological rules impact on the coevolution of networked legal systems.[75] They advance the convergence of national principles of construction which are applied to consistent interpretation. This occurrence may further increase the convergence of national legal methodologies as applied in purely domestic scenarios if the interpretative tools available for consistent construction spill over to national legal methods employed outside the European context.[76]

It is worth asking the question whether the adaptation of national principles of construction to the EU presumption of compliance was overlooked by the Court of Appeal of England and Wales in *Football Association Premier League Ltd v QC Leisure*. Even though the case fell within the ambit of the European presumption of compliance as described in this article, the court did not apply this presumption. In that case, the legislative history of the

[75] Cf. for this effect of the EU legal duty of consistent interpretation M. Amstutz, "In-between worlds: *Marleasing* and the emergence of interlegality in legal reasoning" (2005) 11 E.L.J. 766, 768-769.

[76] *A. Johnston, "'Spillovers' from EU law into national law: (un)intended consequences for private law relationships" in D. Leczykiewicz and S. Weatherill (eds.), The involvement of EU law in private law relationships (Oxford: OUP, 2013), p.357 at pp.385-387* describes "spillover effects" of the EU legal duty of consistent interpretation to English national legal methods. In contrast, *T. Hervey and N. Sheldon, "Judicial method of English courts and tribunals in EU law cases: a case study in employment law" in U. Neergaard and R. Nielsen and L.M. Roseberry (eds.), European Legal Method – Paradoxes and Revitalisation (Copenhagen: DJØF Publishing, 2011), p.327 at p.375* cannot discern such spillover effects.

Copyright and Related Rights Regulations 2003, which were intended to implement the Information Society Directive, revealed two contradictory intentions of the government:[77] (a) the specific intention not to alter the ambit of s. 72(1) of the Copyright, Designs and Patents Act 1988 and to maintain to the fullest extent possible the existing exceptions to copyright infringement and (b) the general intention to fully implement the Information Society Directive with the 2003 Regulations. The Court of Appeal gave precedence to the former over the latter. The court also acknowledged that the government was mistaken as to the ambit of s. 72(1), i.e. that the specific intention of the government was inadvertently inconsistent with the Information Society Directive. The Court of Appeal's omission to apply the priority element of the EU presumption of compliance was not, however, material to the outcome of the case. That is because the court's supporting considerations exhibit an outer limit of consistent interpretation under English law, which rebuts the presumption: adopting the proposed consistent meaning would have resulted in making a policy choice which would have involved issues calling for legislative deliberation and which would have involved far-reaching practical repercussions which the court is not equipped to evaluate.[78]

C. **Europeanisation from the inside**

If a court intends to achieve the full effectiveness of directives through an interpretation of domestic law, it may consider extending the scope of permissible judicial reasoning for consistent interpretation beyond existing national principles of construction and beyond the requirements of European methodological rules. Whether or not this is possible is determined by Member State law; it is referred to here as a "Europeanisation from the inside". The notion of Europeanisation from the inside particularly captures the question of whether domestic

[77] *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708 at [50]-[52] (Etherton LJ).

[78] See *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708 at [55], [57] (Etherton LJ).

courts have gone further than required by the CJEU for consistent interpretation.[79] For instance, courts could decide to apply the European presumption of compliance to cases which lie outside CJEU case law on its scope of application, e.g. to legislation pre-dating an applicable directive even if the *Wagner Miret* exception is not met.[80] In the House of Lords, Lord Oliver has embraced a Europeanisation from the inside in *Pickstone* when he construed s. 1(2)(c) Equal Pay Act 1970 in conformity with the Equal Pay Directive by reading additional words into the provision. He said that "so to construe a provision which, on its face, is unambiguous involves a departure from a number of well-established rules of construction."[81]

The process of Europeanisation from the inside can also impact on the national separation of powers if a domestic court surpasses the existing limits of interpretation and thereby shifts the *contra legem* limit in favour of the judiciary specifically for consistent interpretation. Whether or not this widening of the judicial function is legitimate is for national constitutional law to decide. In Germany, for example, the Federal Constitutional Court has dismissed such a Europeanisation from the inside. It has clarified that the outer techniques and limits of consistent interpretation must not exceed those of conventional judicial law-making in a purely domestic context.[82]

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[79] Lord Mance, The interface between national and European law, (2013) 38 E.L. Rev. 437, 450 raises this question with regard to UK law.

[80] See Bundesarbeitsgericht [Federal Labour Court], judgment of 24 March 2009, (2009) Europäische Zeitschrift für Wirtschaftsrecht 465 at [58]-[59], [67] – *Schultz-Hoff*. In Bundesarbeitsgericht [Federal Labour Court], judgment of 17 November 2009, (2010) Neue Zeitschrift für Arbeitsrecht 1020 – *Urlaubsentgelt*, however, the Bundesarbeitsgericht did not apply the EU presumption of compliance in a similar scenario and thus seems to have departed from its earlier position in *Schultz-Hoff*.

[81] *Pickstone v Freemans Plc* [1989] AC 66 (House of Lords), 126 (Lord Oliver).

[82] Bundesverfassungsgericht [Federal Constitutional Court], judgment of 26 September 2011, (2012) Neue Juristische Wochenschrift 669 at [46].

6. CONSISTENT INTERPRETATION AS A HYBRID METHOD

As the relationship between national and European interpretative rules shows, the methodology for consistent interpretation integrates a top-down and a bottom-up approach.[83] This methodology is neither solely domestic nor European but bears elements of both legal orders. Therefore, the EU legal duty of consistent interpretation is, according to its methodological design, a hybrid legal instrument.[84] Hybridity here means "that the legal character of the respective rule is neither European nor national; it bears elements of both legal orders".[85] Although the doctrine of consistent interpretation includes European rules as binding signposts for domestic courts, the principles of construction in different Member States can deviate from each other within this relatively unified framework. This design of the doctrine also provides an example of a bounded *internal* European legal pluralism. The legal pluralism is bounded as it is restricted by EU methodological rules. In terms of (global) pluralism theory, diversity is restrained in order not to be overly disruptive to uniformity. It is possible to speak of "ordered pluralism".[86]

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[83] Cf. for the combination of a top-down and a bottom-up approach as an expression of the pluralistic conception of the European legal order *M.P. Maduro, "Contrapunctual law: Europe's constitutional pluralism in action" in N. Walker (ed.), Sovereignty in transition (Oxford: Hart, 2003), p.501 at p.522*.

[84] M. Hesselink, "A European legal method? On European private law and scientific method" (2009) 15 E.L.J. 20, 40, 42 claims that a hybrid method should apply to the interpretation of national law transposing EU directives, but he does not provide any further details about such a hybrid method. For criticism of hybrid conceptions of the EU legal duty of consistent interpretation see *Chalmers and Davies and Monti, European Union Law (2014), p.320*.

[85] *H. Micklitz, "Monistic ideology versus pluralistic reality: towards a normative design for European private law" in L. Niglia (ed.), Pluralism and European private law (Oxford: Hart, 2013), p.29 at p.47*. For an explanation of the concept of hybridisation of legal phenomena see *K. Tuori, "Transnational law: on legal hybrids and perspectivism" in M.P. Maduro and K. Tuori and S. Sankari (eds.), Transnational law: Rethinking European law and legal thinking (Cambridge: CUP, 2014), p.11 at pp.14-23*.

[86] For the concept of "ordered pluralism" see *M. Delmas-Marty, Ordering pluralism: a conceptual analysis for understanding the transnational legal world (Oxford: Bloomsbury Publishing, 2009), pp.13-14*.

The hybrid conception of the doctrine recognises, at least to a certain extent, the autonomy and diversity of national cultures as judges can still employ their specific legal culture (traditions of interpretation). It builds on the presumption that legal cultures in Member States are not static and may evolve[87] based on a European harmonisation programme but at the same time also accommodates sceptical voices[88] that suggest that legal cultures in Europe may not converge. This respect for diversity also manifests itself in the concept of overlapping. Accommodating the different domestic legal orders may also increase the effectiveness of EU law.[89] It is not a given that a hybrid methodology will underperform a completely unified European methodology for consistent interpretation on the scoreboard of the effectiveness of directives. A hybrid methodology reduces the chances of actual conflict between legal orders and arguably increases the acceptance of EU methodological rules within domestic legal orders. A hybrid methodology is a dynamic[90] compromise between the effectiveness of EU law on the one hand and national autonomy over the rules of interpretation of *domestic* law on the other hand. It is the result of a tension between uniformity and diversity which exists in other

[87] J. Hage, "Legal reasoning and legal integration" (2010) 10 M.J. 67, 95; *C. Lyons, "Perspectives on convergence within the theatre of European integration" in P. Beaumont and C. Lyons and N. Walker (eds.), Convergence and divergence in European public law (Oxford: Hart, 2002), p.79 at pp.84-85*.

[88] P. Legrand, "European legal systems are not converging" (1996) 45 I.C.L.Q. 52-81. See also C. Harlow, "Voices of difference in a plural community" (2002) 50 A.J.C.L. 339, 347-348; G. Teubner, "Legal irritants: Good faith in British law or how unifying law ends up in new divergencies" (1998) 61 M.L.R. 11, 12.

[89] For this effect of EU internal legal pluralism see *G.T. Davies, "Constitutional disagreement in Europe and the search for pluralism" in M. Avbelj and J. Komárek (eds.), Constitutional pluralism in the European Union and beyond (Oxford: Hart, 2012), p.269 at p.272*.

[90] P.S. Berman, "Global legal pluralism" (2007) 80 Southern California Law Review 1155, 1236 describes the reality of global legal pluralism as one where answers to the question whether pluralism should be honoured and occasions when it should be trumped are transient and never final.

areas of EU law as well[91] and which ultimately originates from the constitutional heart of the EU as a supranational institution "united in diversity"[92]. For some, such a hybrid methodology may represent the best theoretically available compromise.[93]

It is also possible to speak of a dialogue or a cooperative relationship between the CJEU and domestic courts regarding the methods of consistent interpretation, which requires concessions from both sides: the CJEU must accept different interpretative traditions in the Member States and national courts must accept the CJEU's concerns in respect of safeguarding the full effectiveness and uniform application of directives. This dialogue arises from the *mutual* obligation of cooperation between the Union and Member States enshrined in art. 4(3) TEU,[94] a provision which functions as one element of the legal basis for the EU legal duty of consistent interpretation. In sum, the legal methodology of consistent interpretation shows typical features[95] of interlegality: overlapping, interpenetration and dialogue. Interlegality

[91] Consider the tension between the effective legal protection of rights granted by EU law and national procedural autonomy; see *M. Dougan, National remedies before the Court of Justice (Oxford: Hart, 2004), pp.65-67*.

[92] Whether or not this tension originates from the constitutional heart of the EU is heavily contested. The preamble of the TFEU refers to an "ever closer Union"; a notion which seems to prioritise convergence over divergence, uniformity over diversity. For a detailed discussion of the matter see *Dougan, National remedies before the Court of Justice (2004), chapters 2-4*.

[93] Cf. Berman, "Global legal pluralism" (2007) 80 Southern California Law Review 1155, 1165 for the thesis that a pluralistic design of procedural legal mechanisms and institutions in a globalised world is the best available compromise between universalist and territorialist positions. Cf. *E. Cloots, National identity in EU law (Oxford: OUP, 2015), pp.121-123*, who argues that both integration and accommodation of national diversity should be striven for by the Union institutions as a regulative ideal.

[94] On the mutual duty of cooperation see *Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes (C-94/00) [2002] E.C.R. I-9011; [2003] 4 C.M.L.R. 1* at [31]-[32]; *Klamert, The principle of loyalty in EU law (2014), pp.25-28*.

[95] See *Tuori, "Transnational law" in Transnational law (2014), p.11 at p.44*. On the EU legal duty of consistent interpretation and the emergence of interlegality in legal reasoning see also Amstutz, "In-between worlds" (2005) 11 E.L.J. 766.

means that a blending of elements of different legal orders (here national and EU law) occurs.[96] Interlegality is a result of legal pluralism and leads to hybridity.

7. CONCLUSION

This article merged the fragments of a European methodological standard for consistent interpretation from the case law of the CJEU into a coherent framework labelled European methodological rules. These rules apply together with national legal methods and also interact with them via the concepts of overlapping, intervention and Europeanisation from the inside. Based on this relationship between European and national methodological rules, the article argued that the doctrine of consistent interpretation possesses a hybrid methodology. The article thus demonstrated how the European and the national elements of the EU principle of consistent interpretation work together in practice and provided for the theoretical underpinnings of this relationship. Judgments by English and German courts were used to illustrate whether and how domestic courts apply and accept European methodological rules. The reanalysis of the CJEU's case law offered answers to some unresolved methodological questions. The article showed how consistent interpretation impacts on national methods of statutory interpretation. It also demonstrated to what extent judges are required to depart from traditional principles of construction and to what extent European methodological rules broaden the limits of the judicial function as accepted under domestic law. The *contra legem* limit was defined and some of its misinterpretations in existing scholarship were highlighted.

[96] On the concept of interlegality see B. de Sousa Santos, "Law: a map of misreading. Toward a postmodern conception of law" (1987) 14 Journal of Law and Society 279, 297-298.