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REVISITING *VAN GEND EN LOOS*

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**The Evolution of Direct Effect in the EU:
Stocktaking, Problems, Projections**

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Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor Hélène Ruiz Fabri, Director of the UMR de droit comparé de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

THE EVOLUTION OF DIRECT EFFECT IN THE EU: STOCKTAKING, PROBLEMS, PROJECTIONS

By Sophie Robin-Olivier

No account of the development European Law misses the reference to *Van Gend en Loos*. Not that the facts are exciting, captivating, likely to mark memories. Who likes to tell the facts in *Van Gend en Loos*? Nor because there was a cause, a socially sensitive issue, that the case addressed. But because the Court named and shaped a “new legal order”, which can still be characterized by “the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”¹. For that reason, the decision is considered a moment of “passage”, one of these turning points that marked the history of European legal and political integration². Combined with *Costa v. ENEL*³ and the principle of primacy, *Van Gend en Loos* has allowed a considerable expansion of EU law effects, in national courts, an evolution that was fostered by the dialogue between these courts and the Court of justice, through the channel of preliminary ruling⁴.

But what is the significance of the decision today? To be sure, the doctrine of “direct effect”, as affirmed in the decision, remains a powerful instrument through which EU law penetrates national legal systems. And the effectiveness of European treaties’ provisions owes a lot to the role assigned to national courts, in the EC “new legal order”: to protect individual rights conferred by the treaty.

However, EU law has evolved in so many different ways since *Van Gend en Loos* was decided, and the “transformation of Europe”⁵ has been so profound, that one may doubt that the case can be of any help to face today’s challenges concerning the effects of EU law in national courts. To be sure, the doctrine of direct effect has not been called in question: it remains true, and it is an essential feature of EU legal order, that some

¹ See Opinion 1/09 of the Court of justice of 8 March 2011, §65.

² L. van Middelaar, *The Passage to Europe*, Yale University Press (2013).

³ ECJ, 15 July 1964, 6/64.

⁴ On the contribution of preliminary ruling to the effectivity of direct effect, see namely J. Weiler, *The Legal Structure and Political Importance of Van Gend en Loos : the Bright and Dark sides of the Moon*, this volume.

⁵ Cf. J. Weiler, 100 *Yale Law Journal* 2403-2483 (1991).

provisions of EU law can be relied on, in national courts, to claim subjective rights. But the effects of EU law in national courts have diversified and complexified so much that *Van Gend en Loos* seems to grasp only a thin fragment of EU law enforcement issues. It seems, rather, that *Van Gend en Loos* does no longer give an accurate idea of the ways, through which EU law penetrates in member states, through its enforcement in national courts. And it would be an error, I believe, to cling too rigidly to its doctrine, in trying to address the new challenges that the evolution of EU law has created.

The approach taken in this paper focuses on the case law developed by the Court of justice. It is, indeed, a narrow angle: it looks at one particular scene, on which EU law is expressed, and develops, as if it could be isolated from the other “sources” of law development. But, of course, I do not pretend that analyzing the Court’s discourse, and, in particular, the departures from expected repetitions, and the moments when improvisation occurs, allowing changes to take place, can be properly done without taking into account elements of legal, social or political context. However, because the purpose of this reflection is to revisit a case decided by the Court of justice fifty years ago, the choice to focus mainly on case law, existing and prospective, seems appropriate.

When I started to reconsider *Van Gend en Loos*, I asked myself this question: what would be today’s version of that case? Or, rather, what situation(s), concerning the effects of EU law in national courts, would be as challenging for the Court of justice today as *Van Gend en Loos* was, in its time? The answer, I believe, is that the Court of justice would have to decide in a case, or a series of cases, that would be substantially different from *Van Gend en Loos*. Three important shifts would characterize the action(s) before a national court, as compared to the situation in *Van Gend en Loos*. First, the claim would be based, not on one particular provision of the treaty on EU or the TFEU, which fulfills the conditions to be granted direct effect, but rather on a combination of norms, no matter their respective direct effect. Secondly, instead of involving an individual requesting the benefit of a provision of the Treaty, the action would challenge an obligation imposed by the Treaty to a private actor, not the State, or contest a coercive measure applied to an individual, on the basis of EU law: the effects of the Treaty would be contested, not requested. Lastly, the case would imply a prior question on the applicability of the primary law. More precisely, the Court of justice would be questioned on the applicability of the Charter of fundamental rights to the

situation before it, and would have to consider, at the same time, the possibility, for a national court, to enforce fundamental rights protected by the Constitution of the member state, to which it belongs.

Imagining with more details this abstract case is not the purpose of this article. But sketching out the kind of situations that are most problematic allows us to shed light on three essential outcomes of *Van Gend en Loos* that do no longer constitute the major challenges concerning EU law enforcement, in national courts: the existence of a particular category of EU norms, (“direct effect” norms) which implies a process of selection among EU law provisions; the possibility for individuals to claim rights (subjective rights) on the basis of the treaty; and the duty, for national courts, to apply EU law provisions directly (direct enforcement). That trilogy (selection, rights, application) has lost most of its mystery. As far as selection of direct effect norms is concerned, uncertainties have been reduced at a minimal. To be sure, not all questions on that matter have vanished in the course of EU law evolution, but they are somehow overshadowed by a phenomenon that *Van Gend en Loos* ignored: comparison and combination of norms in judicial reasoning. Concerning subjective rights, without denying the fact that individuals have, since *Van Gend en Loos*, gained new rights from the treaty, and from other sources of EU law, there is more to say, today, on the obligations imposed by the Treaty on individuals, and more generally, the methods through which this horizontal effect occurs (or not). Lastly, the duty of national courts to apply EU law, the persistent importance of that function assigned to national courts, is now coupled with one prior question that these courts have to solve, which has become much more sensitive than before, in relation with the growing centrality of fundamental rights’ protection in the EU system: a question on the applicability of EU and national (constitutional) law.

Thus, drawing lines from *Van Gend en Loos*, a dialectical approach can be constructed, using a series of pairs: selection-combination (of norms), (individual) rights-obligations, application-applicability of EU law. This paper intends to use these dialectic pairs, successively (part I to III), in order to examine the new questions concerning EU law enforcement in national courts. Unsurprisingly, the conclusions of these analyses are not straightforward. On the one hand, it is quite clear that there are more opportunities than before to mobilize EU law in national courts. This confirms

what has been a constant evolution since the narrow concept of “direct effect” has been extended to allow a much larger variety of claims based on EU law: new forms of invocability of EU law emerged, and somewhat transformed the notion of EU law effectiveness in national courts. On the other hand, the rigor of direct effect, in its original purity, has become problematic in some particular instances. This is the case, when obligations binding on individuals stem from horizontal application of provisions of primary law, free-market rules, in particular, that were not meant to apply to private actors. More broadly, the effectiveness of European union law is a too simple answer, it seems, in cases, more numerous than before, in which EU law imposes obligations or constraints on individuals, not states. In 2013, the power of EU law to impose transformations of national policies should not be affirmed at all costs, without consideration to the impact of EU policies on individual rights and freedoms protected by national Constitutions. That is an important matter that “revisiting *Van Gend en Loos*” also invites us to think about, in guise of conclusion (IV).

I- From selection to combination

Among the various ways, in which EU law norms are invoked before national courts, there is one, which contrasts sharply with *Van Gend en Loos* concept of direct effect: the combination of norms, emanating from different sources of law. Indeed, in some cases, it seems as if effectiveness of European law depended, not on the respective legal force of the norms invoked before the court, but on the relationship that they entertain. To be sure, this phenomenon is not specific to EU law⁶. But it takes particular colors in EU law, in relation with the specific system of norms of that legal order.

Van Gend en Loos implied identification, by judges, of EU law norms possessing direct effect: such norms could be the basis for subjective rights. It led to distinctions, and the constitution of different categories of norms, depending on their capacity to produce direct effect. Although this is not coming to an end, and the taxonomic enterprise must go on, since many new provisions of EU law come to life with an

⁶ For an analysis of the phenomenon in the case law of the Court of Human rights, see F. Tulkens, S. Van Droogherbroeck, F. Krenc, *Le soft law et la Cour des droits de l'homme: questions de légitimité et de méthode*, Rev. trim. dr. h. (2012) 433. For an example in Canadian labour law, see J. Fudge, *The Supreme Court of Canada and the Right to Bargain Collectively: The Implication of the Health Services and Support Case in Canada and Beyond* 37 *Industrial Law Journal* (2008) 25.

uncertain nature⁷, the power granted to normative combinations has made it less important than before to ascertain the exact effect of each provision of the law.

1) Direct effect as a process of a selection

Van Gend en Loos raised this question: whether a provision of the treaty, article 12 in the case, could be a source of individual rights that national courts should protect. To answer this question, the Court of justice insisted on the nature of the Community legal order, a nature justifying the capacity of provisions mentioned in the treaty to create rights and obligations for individuals, and not only for member states. At the same time, the Court clearly embraced the idea that not all treaty provisions had such effect: only under certain conditions, it indicated, can treaty provisions be invoked by individuals in national courts, in order to claim subjective rights. Since then, the Court of justice has presided over the process of selection of direct-effect norms.

In *Van Gend en Loos*, the Court already mentioned the criteria to be taken into account order to distinguish among EU law norms: to produce direct effect, the provisions concerned must be clear, precise and unconditional. As the subsequent case law showed, these criteria were given extensive interpretation, particularly when treaty provisions were concerned, and the only true requirement became the possibility of effective enforcement, the “justiciability” of the law⁸. This led, namely, to granting all free movement provisions direct effect⁹.

As was already mentioned, this issue of selection, the identification of directly applicable norms, is not an outdated question. The question has come back with great force about the provisions of the Charter of fundamental rights of the European Union. The distinction between “rights” and “principles” contained in that instrument resembles a modern and explicit version of the distinction among EU law provisions that was implicit in the EU treaty, and that the Court unveiled in *Van Gend en Loos*. As Advocate General General Cruz Villalón synthesized: «principles», in the Charter, determine missions assigned to public authorities, and, for that matter, they are

⁷ Cf. in particular, the provisions of the Charter of fundamental rights of the European Union.

⁸ Cf. namely: D. Chalmers et alii, *European Union Law*, 2nd ed. (2010) 271 ; M. Blanquet, *Droit général de l'Union européenne*, Sirey 10th ed. (2012) 281.

⁹ On this expansion, see, in particular : B. de Witte, *the Continuous Significance of Van Gend en Loos*, in M. Poiares Maduro and L. Azoulai (ed.), *The Past and Future of EU law*, Hart Publishing (2010) 11.

different from « rights », which purpose is to protect the legal situation of individuals, a situation directly defined by the text itself¹⁰. Public authorities, he added, must respect the legal situation of individuals guaranteed by « rights », but, as far as « principles » are concerned, their function is much more open: «principles» do not define individual situations, but general matters and outcomes that condition the action of public authorities¹¹.

There are high chances that, in a number of future cases, national courts will turn to the Court of justice to identify the Charter's provisions that are a source of subjective rights that they have to protect. The French *Cour de cassation* did exactly that, not very long ago¹²: in the case *Association de médiation sociale*, it questioned the Court of justice, through the preliminary ruling procedure, on the direct effect of article 27 of the Charter¹³.

However, even if the identification of direct effect norms remains important, action (or defense) before national courts can also rest on a combination of legal references. Precisely, this method is what Advocate General Cruz Villalon relied on in *Association de médiation sociale*¹⁴, once he reached the conclusion that article 27 of the Charter belonged to the category of “principles”, and was, on its own, deprived of direct effect.

2) Legal effects of normative combination

The rise of fundamental rights, which, in EU law, has been narrowly tied, since the beginning, with the existence of a category of general principles, has shown, and this has become more obvious with the Charter of fundamental rights, that seeking direct effect was not always the most appropriate, or most effective, method to sustain claims in situations covered by EU law. As compared, normative combination could be described

¹⁰ Opinion in case C-176/12, delivered on 18 July 2013.

¹¹ On the complexity of the taxonomy implied by the Charter, and more generally, on the ambiguous nature of « principles » in European Law, see our article: *The Contribution of the Charter of Fundamental Rights to the Protection of Social Rights in the European Union: a first assessment after Lisbon*, *European Journal of Human Rights* 1 (2013) 109.

¹² Reference lodged on 16 April 2012 - *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouche-du-Rhône, Confédération générale du travail (CGT)*, case C-176/12.

¹³ Concerning « workers' right to information and consultation within the undertaking ».

¹⁴ Cited above.

as a shift from application of the law to interpretation of the law, if we set aside the fact that the two operations are tightly mingled together. Direct effect would lie on the side of “application”, where normative combination belongs to the realm of “interpretation”. Put differently, some references produce effects directly, while others are only “considered” or “taken into account” to construe other norms. Beside the fact that this does not correspond to all types of combinations that have emerged in the case law of the Court of justice (on which, see below), the distinction, if any, between application and interpretation of the law is not the point I want to discuss in the following lines. What I would like to insist on, instead, is the legal force that the Court of justice recognizes to different sorts of combination of norm, inasmuch as this solution differs radically from the process of selection of direct-effect norms that was the outcome of *Van Gend en Loos*.

To begin with, I must admit that “normative combination” is a very synthetic concept for a phenomenon including a large variety of cases, which only have in common that the solution derives from the use of a series of references, and that these references, taken separately, would be powerless. However, because what I want to show, and question, is the shift from direct effect to a radically different way to ensure EU law effectiveness, I am convinced that various types of combination should be mentioned. They differ according to the source of the norms combined (primary and secondary legislation, soft and hard law, EU law, international or national law); the relationships between these norms, and also, the different effects produced by their interaction. To simplify, I will confine my remarks to a basic typology, distinguishing two categories of combinations.

In the first one, all norms combined belong to EU law: a general principle or a fundamental right is coupled with a provision of derived legislation. Using such a combination, judges were able to satisfy individual claims, whereas neither of the norms, taken separately, could produce such effect.

In the more classical version of this association of norms, provisions of the Charter of fundamental rights, notwithstanding the uncertainty concerning their direct effect (in the Charter language, their identification as “rights” or “principles”) were used to interpret directives in such way as rights to be protected by national courts can

emerge. A good illustration is the *Kamberaj* case¹⁵, in which the Court of justice relied on the aim to ensure a decent existence for all those who lack sufficient resources, mentioned at article 34(3) of the Charter, to decide that third country national have a right to equal treatment for housing benefits, according to Directive 2003/109. Similarly, in *Chatzi*¹⁶, the Court decided, referring to the “principle of equal treatment, which is one of the general principles of European Union law, and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights”, that clause 2.1 of the framework agreement on parental leave “read in the light of the principle of equal treatment” obliges the national legislature to establish a parental leave regime which, according to the situation in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs”. It is incumbent upon national courts, the court added, to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law” (§ 75). To be sure, in *Chatzi*, the claim brought to court may not prove immediately successful. But the reasoning, relying on a combination of norms, implies that national court and the legislator must ensure that the legitimate demand for equal treatment is satisfied.

This type of cases, in which judges use fundamental rights to construe legislative provisions is not uncommon, of course, in other legal orders. To take just one example, German courts do not hesitate to resort to the German Constitution to interpret general provisions of the civil code. In a famous case, the Federal labor Court decided that the interpretation § 315 of the German civil code concerning the specification of performance by one party, and requiring that this specification be “equitable”, had to be consistent with article 4 I of the Constitution, concerning freedom of thought. As a result, an employer was deprived of the right to oblige his employee to perform a duty conflicting with his freedom of thought (producing books glorifying war)¹⁷. In this case, as in the cases decided by the Court of justice, the effect of fundamental rights does not

¹⁵ ECJ, 24 Apr. 2012, C-571/10.

¹⁶ ECJ, 16 Sept. 2010, C-149/10.

¹⁷ BAG, Urteil vom 20.12.1984 - 2 AZR 436/83, NZA 1986, p. 21.

depend on their direct effect, but it is the result of the interpretation of other norms, according to the doctrine of consistent interpretation¹⁸.

More original, and specific to EU law, are cases, in which a directive and a general principle are combined to produce effects, the former being considered a mere “concretization” of the latter. This combination is as a method to compensate for the lack of implementation, or defective implementation, of directives, a particular instrument of EU law that requires transposition in national law. A couple of well-known cases decided by the Court of justice demonstrate, in particular, that derived legislation gains force, when it can be considered to implement a general principle of law or fundamental rights. In *Mangold*¹⁹ and *Kucukdeveci*²⁰, quite remarkably, the general principle of non-discrimination compensates for the absence of horizontal direct effect of directive **2000/78/EC** on equal treatment in employment and occupation²¹. **Reciprocally**, the directive is necessary because the jurisdiction of EU law, and correlatively, the applicability of the general principle in the case, depends on it. The outcome of this clever duo, as the Court mentions in *Kucukdeveci*, is that: “European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal »²². Thus, coupled with the provisions of a directive, general principles of law can, eventually, have the same effect as rights that individuals can claim against other individuals, in national courts. This method is the one that Advocate General General Cruz Villalón suggests in its recent opinion in *Association de médiation sociale*²³: the principle contained in article 27 of the Charter, concretized in article 3 of directive 2002/14²⁴, precludes, he contends, national legislation that excludes some workers from being taken into account when

¹⁸ Consistent interpretation raises other issues, in terms of effectiveness of EU law in national courts, that we will address below, part II.

¹⁹ ECJ, 22 Nov. 2005, C-144/04.

²⁰ ECJ, 19 Jan. 2010, C-555/07.

²¹ Directive of 27 Nov. 2000.

²² § 43.

²³ Cited above.

²⁴ Directive of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

calculating the number of employees of the company, in order to ensure information and consultation²⁵.

The virtue of the association of a general principle and the provisions of a directive can also lie in an extension of the field of application of derived legislation. In *Danosa*²⁶, for instance, the scope of application of directives on equal treatment between men and women was stretched out to include a person, whose status as a worker was uncertain. Referring to the principle of non-discrimination between men and women and article 23 of the Charter of fundamental rights, the Court decided that: “it is of no consequence, whether Ms Danosa falls within the scope of Directive 92/85 or of Directive 76/207, or – to the extent that the referring court categorises her as ‘a self-employed person’ – within the scope of Directive 86/613, which applies to self-employed person » (...). And it added: “*whichever directive applies*, it is important to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy”²⁷. Eventually, which directive applies remained a mystery, but that did not matter to the Court: the claimant obtained the right to equal treatment.

Another category of combinations mingles together a variety of sources that do not all belong to the EU legal order. In the field of fundamental rights’ protection, this phenomenon reaches beyond the borders of EU law and, again, it is not our objective to demonstrate that EU law is singular, in this respect. In terms of normative combination, and the use of a variety of instruments that do not belong to its own legal order, the Court of justice takes a path that a number of other courts also sometimes follow. At the European Court of Human Rights, for example, the decision in the *Demir and Baykara v Turkey* case²⁸ is a perfect illustration of a reasoning involving a series of sources of different origin and nature²⁹.

²⁵ In its decision of 15 January 2014, however, the Court of justice did not follow the opinion of its Advocate General

²⁶ ECJ, 11 Nov. 2010, C-232/09.

²⁷ § 70.

²⁸ ECHR, 12 Nov. 2008, Application n° 34503/97.

²⁹ To interpret article 11 of the European Convention, the Court referred to ILO Convention 98, concerning the Right to Organize and to Bargain Collectively, adopted in 1949, and to the interpretation of this convention by the ILO’s Committee of Experts. It also mentioned Convention 151 on labor relations in the public service, adopted in 1978. Among European instruments, the Court used Article 6(2) of the

Most striking, in this category of cases, is the recourse to international law (by which I mean other norms than the ECHR, which status, in EU law, is very specific³⁰). Of course, international law is often relied on, together with EU norms, for the reason that, in a number of instances, it is binding on EU institutions. One recent example can be found in *N.S.*³¹ where the Court of justice relies on “the duty of the Member States” to interpret and apply Regulation n° 343/2003 in a manner that ensures due respect to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties (as required by article 78 of the TFUE). The even more recent *Ring*³² and *Commission v Italy* cases³³ are another example. In these cases, the Court of justice decided that directive 2000/78 on equal treatment in employment and occupation³⁴ had to be construed according to the UN Convention on the Rights of Persons with Disabilities, a Convention ratified by the EU³⁵. Taking into account the UN Convention has led to an extension of the scope of EU legislation, and in *Ring*, rights could be claimed under the Directive, as a result. But as this case also shows, even when international law is binding on the EU, the combination of EU and International law, is not at all a simple story³⁶. Without entering too much into this thorny problem, the *Ring* case gives an idea of this complex relationship, and the flexibility of the law that goes together with it: “the primacy of international agreements concluded by the European Union over instruments of secondary law”, the Court says, “means that those instruments must *as far as possible* be interpreted in a manner that is consistent with those agreements”. What happens, if such consistent interpretation is not possible³⁷? International law is, at least temporarily, paralyzed. The same is true, as we will see in more details below (part II), concerning the relationship between EU law and national law, when the former does not have direct effect.

European Social Charter (which the State concerned, Turkey, has not ratified), according to which all workers and all unions are granted the right to bargain collectively. The Court also found support in the meaning attributed to this provision by the European Committee of Social Rights (ECSR). Article 28 of the European Union’s Charter of Fundamental Rights was also quoted.

³⁰ On that point, see, recently: ECJ, 26 Feb. 2013, *Akerberg*, C-617/10, §44.

³¹ ECJ, 21 Dec. 2011, C-411/10 and 493/10.

³² ECJ, 11 Apr. 2013, C-335/11 and C-337/11 concerning the notion of disability.

³³ ECJ, 4 July 2013, C-312/11 concerning the notion of reasonable accommodation.

³⁴ Cited above.

³⁵ The Convention was signed by the EU on 30 March 2007, and formally ratified on 23 Dec. 2010.

³⁶ On see topic, see recently : J.-S. Bergé, *L’application du droit national, international et européen*, Dalloz (2013).

³⁷ On this aspect of the case, see namely : A. Boujeka, *Recueil Dalloz* (2013) 1388 esp. §7-8.

This situation, in which EU law is bound (although with some degree of flexibility) by international law, is different from the one, in which international law, without being part of the European legal order, is used in a comparative way, in order to show convergence towards a certain interpretation of a right or the recognition of a fundamental right³⁸. This “consensual” method³⁹, very comparable to the method used by the Court of Human rights in the *Demir and Baykara v Turkey* case⁴⁰, was applied in the famous *Viking*⁴¹ and *Laval*⁴² cases, where the fundamental right to collective action was recognized. In these two cases, the Court quoted, among other references, the European Social Charter, signed at Turin on 18 October 1961 and Convention n° 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation⁴³. More recently, in *Commission v. Germany*⁴⁴, concerning the right to collective bargaining, the Court relied, once again, on article 6 of the European Social Charter.

If this method remains exceptional, the fact that it is enforced in such important and difficult cases suggests that it must be taken seriously. To be sure, the cases do not give much force to the fundamental rights that they identify, based on convergence of a series of legal instruments. Rights are brought to life, but do not bite. The effectiveness of EU law, as far as these rights are concerned sounds quite illusory. But this does not dwarf the potential efficiency of the process of combination.

Considering the different categories of normative combinations that contribute to the development of EU law, it is no exaggeration to say that the effects of EU law in national courts do no longer depend on the identification of norms capable to produce

³⁸ On this type of combination, our articles: « The Magic of Combination: Uses and Abuses of the Globalization of Sources by European Courts », in *European Legal Method : Synthesis or Fragmentation?*, DJØF Publishing, Copenhagen, 2011 (307) ; « Normative Interactions and the Development of Labour Law: A European Perspective », *Cambridge Yearbook of European Legal Studies*, Cambridge, vol. 11, C. Barnard et O. Odudu (ed.) (2009) 377.

³⁹ On this method, see namely : C. Pitea, *Interpreting the ECHR in the light of « other instruments »: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?*, in N. Boschiero and alii, *International Courts and the development of International Law, Essays in Honor of Prof. Tullio*, 2013, p. 545.

⁴⁰ Cited above.

⁴¹ ECJ, 11 Dec. 2007, *Viking*, C-438/05.

⁴² ECJ, 18 Dec. 2007, *Laval*, C-341/05.

⁴³ *Viking* § 43 ; *Laval* § 90.

⁴⁴ ECJ, 15 Jul. 2010, C-271/08.

certain legal effects. Rather, it has become crucial to take into account the fact that EU law provisions are often effective when articulated with one another, or with norms borrowed to other legal systems, which are not necessarily binding, but can allow an evolutive interpretation of the law. Although this phenomenon remains limited, considering the modest number of cases, especially when identifying new fundamental rights is at stake, it indicates that effects of EU law norms can depend, not on their intrinsic nature, but on their association with other references. As a result, there is space, I believe, for a theory of “combined effects” of norms, in the EU legal order, a multifaceted model that depart quite radically from the self-executing and self-sufficient norm celebrated in *Van Gend en Loos*. This new model can be a source of increased effectiveness of EU law in national courts. It can also be seen as the outcome of an adaptation of legal actors, faced with the congenital weakness or incompleteness that characterizes some provisions of European law: building constructive relationships between norms, to compensate this weakness, has become an essential part of legal reasoning.

II- From rights to obligations, and flexible effects of EU law in national courts

A second line that can be drawn from *Van Gend en Loos* comes from this essential element of the case: direct effect was defined as a mechanism, through which individuals could obtain *rights* in Member states’ courts, based on EU law and, more precisely and more importantly, on provisions of primary law. Although this was not absent in the case, the evolution of EU law, since *Van Gend en Loos* was decided, has allowed that, in a larger number of hypothesis, individuals be brought before national courts, on the basis of obligations imposed on them by provisions of the treaties. With so-called horizontal direct effect, EU primary law shifted away from the dominant concern that permeated *Van Gend en Loos*: submitting states to an orthopedic treatment aimed at reforming their public policies, along the lines of internal market’s requirements. In that respect, though, the evolution can still be seen as a continuation of *Van Gend en Loos*: the effectiveness of EU law could justify, to some extent, the submission of private actors to the Treaty, and internal market rules, in particular. As compared, it is no longer a mere extension of direct effect, when, in the absence of direct

effect, national courts are required to interpret national law in conformity with European Union law: under the “indirect horizontal effect” doctrine, the effects of EU law become dependent on the capacity of national courts to tailor national law to European fashion, a made-to-measure approach contrasting with *Van Gend en Loos* uniform requirement, for national courts, to grant subjective rights.

1) Vertical direct effect as a source of subjective rights

As opposed to the French version of the case, the Italian version of *Van Gend en Loos* is explicit about the fact that individuals can claim *subjective rights* on the basis of treaty provisions. The case made it clear that the treaty was available to entertain private claims in municipal courts. As a result, not only would citizens of member states benefit directly from the treaty, but they would, as the court pointed, exercise “an effective supervision” on Member states, to ensure that the latter respected EU law requirements. Individual rights derived from the Treaty were the key, through which EU law could penetrate national legal orders, and transform them. And it did. In particular, when direct effect of common market rules was affirmed, it became clear that Member state would have to face requests based on free movement of goods, persons, capital or free provision of services, and, as a consequence, would have to reform their systems of regulation, in many different fields⁴⁵.

Although the Court also mentions in *Van Gend en Loos* that the treaty imposes obligations on individuals, the lesson from that particular case was that national courts had to protect individual rights, not that they had to make sure that obligations deriving from the treaty were enforced against individuals. At the time, the obligations binding on individuals were indeed quite limited. Competition law was an important source of such obligations, as anti-trust rules and the prohibition of abuse of a dominant position were explicitly targeting the behavior of private companies. They still do, of course, and continue to frame the behavior of private economic actors. But what has been a major source of extension of obligations binding on private parties is the recognition of a horizontal direct effect⁴⁶ to treaty provisions concerning the internal market. This

⁴⁵ For a recent example, in the field of gambling, see : ECJ, 15 sept. 2011, *Dickinger and Ömer*, C-347/09.

⁴⁶ On the notion of horizontal effect, see namely : A. Seifert, L'effet horizontal des droits fondamentaux, RTD eur. 48 (4), Oct.-Dec. 2012, p. 801.

evolution has raised new questions concerning the consequences of direct effect of treaty provisions.

2) Horizontal direct effect and the problem of submitting individuals to free market rules

The evolution that led to the recognition of horizontal direct effect to Treaty provisions, and, in particular, free movement rules has been largely unnoticed, until recently. One reason for this is that the extension was only apparent in rare cases (and not necessarily very clear in all of them, moreover). As a result, it did not seem to imply important changes at once. The story has been told many times⁴⁷, but recent examples have brushed away, it seems, obstacles or limits to the horizontal direct effect of free movement rules, even if the Court of justice has, not so long ago, continued to suggest that free trade provisions of the EU treaty were public law rules⁴⁸.

In spite of this inconsistency, the language used in *Viking*⁴⁹ is not ambiguous: “there is no indication” in case law, the Court of justice said, that horizontal effect “applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers”. No distinction is made, in particular, between the different types of private actions, depending on their impact, a distinction that Advocate General Maduro supported in his opinion on the case. In the subsequent *Laval* case⁵⁰, the court simply pointed that the right of trade unions to take collective action, by which undertakings established in other Member States may be forced to sign a collective agreement, is liable “to make it less attractive, or more difficult, for such undertakings to carry out its activity in the State concerned”, and “therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC” (now art. 56

⁴⁷ See namely: S. Van den Bogaert, *Horizontality: the Court Attacks?* in C. Barnard and J. Scott, (eds.), *The Law of the Single European Market (2002)* 126 and S. Weatherhill, *Bosman changed everything: the rise of EC sports law*, in M. P. Maduro and L. Azoulai (eds), *The Past and Future of EU law*, Hart Publishing (2010) 483.

⁴⁸ See in particular: ECJ, 6 June 2002, *Sapod Audic*, C-159/00, § 74: « contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty since it was not imposed by a Member State but agreed between individuals ». The Court provides no justification for this solution. On the public-private distinction concerning free movement rules, see namely: O. Odudu, *The public/private distinction in EU Internal Market Law*, RTD eur. 46 (4), Oct.-Dec. 2010, p. 826 and L. Azoulai, *Sur un sens de la distinction public/privé dans le droit de l’Union européenne*, RTD eur. 46 (4), Oct.-Dec. 2010, p. 842.

⁴⁹ Cited above.

⁵⁰ Cited above.

TFEU). In sum, only the restriction, or potential restriction, on free exercise of economic freedoms matters, whatever private action induces it, according to these decisions.

Even more striking is the comparison between two cases, one decided in 2000 and the second in 2012. In *Ferlin*⁵¹, the Court limited to certain hypothesis, it seemed, the horizontal application of the non-discrimination rule in a case of free movement of workers: “article 6 of the Treaty also applies in cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty”⁵²). In *Erny*⁵³, as compared, the Court went much further, bluntly affirming that the prohibition of discriminations laid down in 45(2) TFEU on free movement of workers “applies not only to the actions of public authorities, but also to all agreements intended to regulate paid labour collectively, *as well as to contracts between individuals*”⁵⁴. As in a previous case⁵⁵, one must admit, this solution only concerns the prohibition of discriminations based on nationality, which may well be a limit to the extension of horizontal effect of free movement rules, and could be justified by the particular status of the principle of non-discrimination, as a general principle of EU law.

This possible restriction of horizontal direct effect of free market rules does not call in question the observation that, in the course of EU law development, private parties have been submitted to some provisions of the treaty, concerned with the realization of the internal market, that were considered to be binding only on government at the time of *Van Gend en Loos*. Through horizontal direct effect, these provisions of the treaty stepped in the realm of private law. The “constitutionalization of private law” that this evolution achieves creates a series of problems that the Court of justice has not yet addressed in its case law⁵⁶. Rather, although the transposition of a reasoning designed for cases involving states or other public entities is not necessarily

⁵¹ ECJ, 3 oct. 2000, C-411/98.

⁵² § 50.

⁵³ ECJ, 28 juin 2012, C-172/11.

⁵⁴ § 36.

⁵⁵ ECJ, 17 July 2008, *Racanelli*, C-94/07.

⁵⁶ On the problems of horizontal direct effect of Constitutional law, and in particular EU fundamental freedoms, see namely H. Collins, *The Constitutionalization of European Private Law*, in *The Many Concepts of Social Justice in European Private Law*, H. Micklitz (ed.), Edward Elgar (2011) esp. 142-146. See also A. Seifert, *loc. cit.*.

appropriate, when private law relationships are concerned, the Court of justice has, until now, ignored the need for a separate doctrine, when obligations binding on individuals are derived from free market rules. This is particularly striking in *Erny*⁵⁷, concerning the justification of restrictive measures: “neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the disputed provisions », the court contends. Yet, it is clear enough that justification of restrictions by general interest reasons, or the public good, is hardly available, when private actors are responsible for a restriction to free movement. The crucial issue of justification of free movement restrictions, to which the Court and legal scholars have devoted enormous attention after *Cassis the Dijon*⁵⁸, remains a virgin land, when private restrictive conducts are at stake.

In addition, the types of actions and remedies available, in cases of treaty violations resulting from the behavior of individuals, need to be adapted to the particular situation of private actors⁵⁹. If making states liable for free movement restrictions is the inevitable, and acceptable, outcome of their commitments at the EU level, the same is not true for private actors. In particular, when the latter fulfill a particular economic or social function, which is the case for trade unions or other non-governmental organizations, making them liable under free movement provisions may jeopardize their very existence. This is not only because of potentially high damages. The unpredictability generated by the introduction of constitutional arguments (the reference to fundamental freedoms) in private law disputes is also problematic. Indeed, uncertainty may deter the organizations concerned from taking action, although this action can be considered socially useful. In the same line, when fundamental freedoms reach the sphere of contractual relations, the resulting disruption in the parties' commitments should also be taken into account. Until now, “insufficient attention was paid to the way in which private law has already sought to balance competing rights through its legal doctrines and rules”⁶⁰.

⁵⁷ Cited above.

⁵⁸ ECJ, 20 Feb. 1979, 120/78.

⁵⁹ For an illustration concerning the issue of sanctions in Swedish courts, after the decision of the Court of justice in the *Laval* case (cited above): J. Malmberg, *Trade Union Liability for «EU-Unlawful» Collective Action*, ELLJ 3, n°1 (2012) 5.

⁶⁰ H. Collins, loc. cit. 143.

As compared, the requirement of a consistent interpretation of EU law, a source of indirect horizontal effect, seems more respectful of existing settlements between competing rights⁶¹. The questions it raises are of a different kind, but still closely related to the effectiveness of EU law in national courts: the issue is not the overbroad conception of what the effectiveness of EU internal market law requires (imposing obligations on individuals), but the variability of this effectiveness, when it applies to private relationships, depending on the possible interpretations of national law according to national courts. This solution lies a far cry from the recognition of direct effect to a treaty provision, which allowed individuals to claim the same right before all national courts.

3) Indirect horizontal effect and the challenge of variable effectiveness

The doctrine of indirect effect requires national courts to interpret national law “in the light” of EU law⁶². Indirect effect is a method to ensure the effect of EU law, when direct effect is missing. As the Court of justice states: “this obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them”⁶³. If this requirement is “inherent in the system of the Treaty”, as the Court mentions, it is also part of a more general trend: in recent times, domestic courts have, outside any European obligation, relied on the doctrine of indirect effect to give force to international law⁶⁴. This method of internalization of international law, transcending the distinction between monist and

⁶¹ *Ibid.*

⁶² On this doctrine, see namely: A. Rosas and L. Armati, *EU Constitutional Law*, Hart Publishing (2012) 72-76. On the distinction between direct and indirect effect, see R. Schütze, *Direct Effects and Indirect Effects of Union Law*, in *Oxford Principles of European Union Law*, Schütze, Robert & Tridimas (ed.), Takis Oxford University Press (2014).

⁶³ ECJ, 24 Jan. 2012, *Dominguez*, C-282/10, § 24.

⁶⁴ For an example in German law see: BVerfG, JZ 62 (2007), 887 (19.9.2006), a decision, in which the German Constitutional Court found that the right to a fair procedure guaranteed by the German Constitution had to be interpreted in light of Art. 36 of the Vienna Convention of Consular Relations.

dualist systems, has retained much attention, and concern, beyond the frontiers of EU law⁶⁵.

In EU law, consistent interpretation was used in order to apply EU law in disputes between private parties: individuals were submitted to EU law provisions, even when these provisions had no horizontal direct effect. The requirement of a consistent interpretation implies a consideration of EU law in many cases, in which it generates no subjective rights that individual can claim, but may still result in unexpected duties or burdens for individuals. Thus, indirect effect contributes, when applied horizontally, to increase obligations on individuals resulting from EU law developments.

The progress of harmonization in many fields of private law⁶⁶, criminal law or tax law⁶⁷, has resulted in new rights and duties for member states' citizens, which, in most instances, did not need the doctrine of direct effect, nor any theory about the effects of EU law in national courts, to be enforced: these obligations, having their source in EU directives, only applied after implementation through internal law. However, the impact of directives themselves in private disputes has become more and more obvious over time. But, having accepted long ago that directives could have vertical direct effect⁶⁸, the Court of justice has, continuously, refused to give horizontal direct effect to their provisions⁶⁹. As a result, directives are still considered not to be binding on individuals, and should not be a source of obligations for them, the Court continuously confirmed⁷⁰. However, at the same time, the ECJ's case law has constructed bypasses, allowing

⁶⁵ See namely: G. Betlem and A. Nollkaemper Giving Effect to Public International Law and European Community Law before Domestic Courts, A Comparative Analysis of the Practice of Consistent Interpretation, 14 EJIL 569 (2003) and A. Tzanakopoulos, Domestic Courts in International Law: The International Judicial Function of National Courts, 34 Loy. L.A. Int'l & Comp. L. Rev. (2011) 133.

⁶⁶ For a stimulating reflection on the europeanization of private law, see: D. Caruso, *The Missing View of the Cathedral : The Private Law Paradigm of European Legal Integration*, 3 ELJ (1997) 3 .

⁶⁷ For a recent illustration, see ECJ, *Akerberg*, cited above : « tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT according to EU law. ». On that decision, see, in particular: D. Simon, Europe, Comm. 154, 14 (2013) ; M. Aubert, E. Broussy and H. Cassagnadère, *Chronique de jurisprudence de la CJUE*, AJDA, 1154-1156 (2013).

⁶⁸ ECJ, 4 Dec. 1974 , *Van Duyn*, 41/74.

⁶⁹ ECJ, 14 Jul. 1994, C-91/92, *Faccini Dori*.and for a recent confirmation : ECJ, *Dominguez*, cited above.

⁷⁰ Cf. *Dominguez*, cited above.

directives to produce effects in private disputes⁷¹. And these bypasses, including indirect horizontal effect⁷², have proved, *prima facie*, as powerful as direct horizontal effect⁷³.

At first, consistent interpretation seems to be a very basic demand, in line with the principle of sincere cooperation laid down at article 4 (3) TFUE. But, looking closer, it is not so trivial as it seems⁷⁴. Consistent interpretation compels judges to overrule previous interpretations, if needed. This means, possibly, to introduce, without notice, an unexpected change in the law⁷⁵. Of course, overruling also happens in member states' courts, without EU commanding it. But the disruption it creates, depriving citizens of their legitimate expectations, should make it exceptional. As a method, prescribed by EU law, to give effect to a directive, when states have failed to implement it properly, overruling loses its marginality. This is not, to say the least, a satisfying way for EU law to penetrate national legal systems.

However, the most problematic aspect of consistent interpretation, related to EU law effectiveness in national courts, lies elsewhere. The outcome of the order to interpret national law in conformity with EU law very much depends on the flexibility of national law. When the provisions of national legislation that are inconsistent with EU law are very clear and precise, according to their interpreters, EU law will have little impact, because interpreting *contra legem* is not required⁷⁶. When, on the contrary, the fabric of national law is soft, moldable, or at least considered so by those in charge of its enforcement, the impact of EU law will be, potentially, much stronger. As a result, the penetration of EU law in national legal orders depends on national legislators, national legislative styles, and national techniques of interpretation. To be sure, the Court of justice does not leave entire discretion to national courts, and requires that they try as hard as they can to achieve consistent interpretation, which implies, for instance, that they take « the whole body of domestic law into consideration » and make use of the

⁷¹ On the different ways to invoke norms of EU law, see namely : K. Lenaerts and T. Corthaut, Tim, *Of birds and hedges: the role of primacy in invoking norms of EU law*, European Law Review, 31 (2006) 287.

⁷² For a consecration of this doctrine, see: ECJ, 10 Apr. 1984, *Von Colson*, 14/83 and 13 Nov. 1990, *Marleasing*, C-106/89.

⁷³ For a nuance, in the field of criminal law, comp. : ECJ, 26 Sept. 1996, *Arcarao*, C-168/95 and 16 June 2005, *Pupino*, C-105/03.

⁷⁴ On the power of the duty of consistent interpretation : K. Lenaerts and T. Corthaut, *loc.cit.* .

⁷⁵ Which is exactly what happened in *Dominguez*.

⁷⁶ ECJ, *Pupino*, cited above.

interpretative methods recognized by domestic law with a view to ensuring that EU law is fully effective. But, eventually, it remains clear that such interpretation is not always possible⁷⁷.

The resulting flexibility concerning the effects of EU law throughout the Union contrasts with *Van Gend en Loos*, a case in which the Court decided what the effect of a EU law norm was going to be in all states and before all courts. This flexibility could be considered an aspect of procedural autonomy, a concept that describes and justifies the limited effectiveness of EU law, in the absence of a complete system of justice and procedural rules. Because procedural autonomy concerns remedies, it may indeed result in differences in enforcement of EU law. But the various consequences of consistent interpretation, which depend on national substantive law, would imply a considerable extension of that concept. Indeed, the hypothesis is one, in which the variation in the implementation of EU law does not depend on the system of justice and procedures, but on the legal force given to the EU provisions concerned, in each national court: the variation concerns the binding force of the norm. The doctrine of consistent interpretation admits, contrary to *Van Gend en Loos*, that it is not possible, for every individual, to expect that EU law will have a pre-determined effect, in national courts.

As a result of consistent interpretation, individual claims will thrive in some national courts, and obligations will be imposed to individuals, as a result, whereas, in others, they will be unsuccessful, because of the limits in the courts' power to interpret national law. This solution seems quite remote from the idea of direct application and full effectiveness of EU law: beyond procedural autonomy, EU law effectiveness is made dependent on the specificity of national substantive laws and methods of interpretation.

If this is acceptable, and the effect of EU law in national courts can differ in such way, depending on the substance of national law, and the techniques of interpretation available to national courts, there may be a case for more flexibility in other instances, in particular, when applicability of constitutional rights is concerned.

⁷⁷ ECJ, *Dominguez*, § 30 and 31.

III- From application to applicability

According to *Van Gend en Loos*, national courts “must” apply treaty provisions, and protect individual rights that they create. The mission entrusted to national courts in that case imposed “role splitting”⁷⁸: national judges were required to act both as organs of national and European judiciary, and apply the rules emanating from two different legal orders. 50 years after *Van Gend en Loos*, it is still not absolutely sure that all national courts have fully understood, and accepted, that role. Looking, for instance, at the variations in the use of the preliminary ruling procedure among national courts⁷⁹ suffices to indicate that national contexts have an influence on the impact of EU law in national courts. However, in terms of effective application of EU law norms in national courts, there is little doubt that direct effect, coupled with preliminary references, contributed extensively to effective application of EU law. The “collaboration” of national courts with the Court of justice⁸⁰ was rightly considered a decisive source of EU law effective enforcement.

Today, the issue of EU law enforcement in national courts is faced with another major challenge: the uncertainty concerning the applicability of EU law. In recent times, this question has been particularly visible, and strenuous, in the field of fundamental rights’ protection. On one side, the question is one of applicability of EU law provisions protecting fundamental rights. It has, indeed, become a more acute issue since the Charter of fundamental rights has gained the same legal value as the Treaties with the Lisbon Treaty⁸¹, and at a time when it is settling in the EU legal environment. To be sure, this does not mean that the issue of applicability has not been a major concern in other fields, such as free movement of citizens, as the *Zambrano* saga illustrated⁸², but the issue concerning the applicability of the Charter of fundamental rights has a much broader scope. On the other side, fundamental rights’ protection by national courts

⁷⁸ On this theory and its application to EU law, see A. Cassese, Remarks on Scelle's Theory of “Role Splitting” (dédoulement fonctionnel) in *International Law*, *Eur J Int Law* (1990) 1(1), p. 210-231. On this topic, see Morten Broberg and Niels Fenger, Variations in Member States’ Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?, *European Law Journal* (2013), 19 (4), p. 488–501.

⁷⁹ For recent statistics, see the Annual Report of the Court of justice for 2012, curia.europa.eu (2013).

⁸⁰ See Opinion 1/09 of the Court of justice, cited above, §69.

⁸¹ Cf. Article 6 §1 of the Treaty on European Union.

⁸² ECJ, 8 March 2011, *Ruiz Zambrano*, C-34/09 ; 5 May 2011, *McCarthy*, C-434/09; 15 Nov. 2011, *Dereci*, C-256/11.

depends on the applicability of national Constitutions protecting these rights and freedoms. In this respect, the question that arises, and that national courts have to face, concerns the restriction to the protection of fundamental rights granted by national Constitutions, which is, or should be, required in order to ensure effectiveness of EU law. The ever growing impact of EU policies on fundamental rights has brought to the front stage the question on the limits to the effectiveness of EU law, that would leave space for national Constitutions. This issue touches on a tension deeply rooted in the history of EU federalism.

Considered from these two angles, the protection of fundamental rights appears as one of the most important domains, if not the most important, in which EU law effectiveness is challenged, these days, in relation with the issue of applicability of EU and national law. This has been illustrated in recent important cases. Correlatively, “role splitting” is no longer the new frontier for national courts, but their mission to ensure a distribution of roles, when confronted with a plurality of sources of protection of fundamental rights and freedoms. Some of the hardest questions, for national courts, are no longer whether EU law contains rights that they have to protect, but, rather: on the one hand, whether fundamental rights embedded in EU law can apply in the case before them (a question of applicability of fundamental rights protected by the EU) and, on the other hand, whether they have power, and to which extent, to guarantee a higher degree of protection of fundamental rights, on the basis, namely, of their own Constitution, even if the situation lies within the scope of EU law (a question of applicability of constitutional or international law, in situations falling under EU law).

The answers to both questions are crucial for the enforcement of EU law in member states’ courts. The applicability of fundamental rights protected by EU law would be a mundane question, although no less tricky, for that matter, on the jurisdiction of EU law, if the question had not given rise to recent developments in the case law of the Court of justice that need to be confronted to the doctrine of EU law effectiveness in national courts. As far as the applicability of national constitutional rights (or rather, as the case law indicates, the refusal, by the Court, to accept this applicability) is concerned, recent developments do not only show that the need to ensure EU law effectiveness, an heritage of *Van Gend en Loos*, resists the passing of time: the question

concerning space remaining for national law, when the fabric of EU law is only loosely woven, has become more crucial than ever.

1) Applicability of fundamental rights protected by the EU

Since the Charter of fundamental rights has been proclaimed, and, even more so, since the Lisbon treaty conferred the status of primary law to that instrument, the delimitation of its scope of application has been a major concern, and a source of uncertainty in national courts, in charge, as *Van Gend en Loos* made clear, of enforcing EU law. Interpretations of article 51(1) of the Charter, according to which the Charter only applies to Member state “when they are implementing EU law”, are not unanimous. Whether this provision should be narrowly construed to include only situations of actual implementation of EU law or should be interpreted more extensively to allow EU fundamental rights to apply in all situations falling within the scope of EU law, has been the source of important debates⁸³.

Recently, the Court of justice showed preference for the extensive approach, in the *Akerberg* case⁸⁴. Questioned on the application of *ne bis in idem* principle laid down in Article 50 of the Charter to criminal proceedings and tax penalties for tax evasion, the Court answered that “in essence, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations”⁸⁵. And the Court went on explaining: « that definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it”. According to those explanations, “the requirement to respect fundamental rights defined in the context of the Union is only

⁸³ See recently: S. Iglesias Sanchez, “The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ’s approach to fundamental rights”, *C.M.L.Rev*, 2012, p. 1565-1583 ; H. Kaila, “The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States”, in *Constitutionalising the EU Judicial System Essays in Honour of Pernilla Lindh*, Hart Publishing, 2012, p. 291-294, T. Von Danwitz and K. Paraschas, “A fresh start for the Charter: Fundamental questions on the application of the European Charter of Fundamental Rights”, *Fordham International Law Journal*, 2012, p. 1396, K. Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights”, *European Constitutional Law Review*, 2012, p. 375.

⁸⁴ Cited above. On this extensive approach, see namely J.F. Akanji-Kombé, *Journal de droit européen*, 2013, p. 184.

⁸⁵ § 20.

binding on the Member States when they act in the scope of Union law” (§20). And it is « the applicability of European Union law » that determines « applicability of the fundamental rights guaranteed by the Charter »⁸⁶.

The line drawn by the Court relies, eventually, on the notion of implementation, distinguished from a stricter notion of “transposition”: the Court insists that tax penalties and criminal proceedings at stake, even not adopted in order to *transpose* a EU directive, are meant to *implement* an obligation imposed on the Member States by the Treaty. As a result, the concept of “implementation”, construed extensively, becomes the central criterion. Therefore, to answer the question of EU law effects, national law must scrutinize national law and identify if it fits, or not, within the notion of “implementation”.

As compared to the reasoning suggested by Advocate General Cruz Villalon in its opinion on the case, the approach followed by the Court of Justice does not provide much guidance to national courts. The Court of justice did not accept the idea that “the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union” and that “the mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the ‘implementation’ of Union law”⁸⁷. If the applicability of the Charter had been considered to depend on « the presence, or even the leading role, of Union law in national law in each particular case »⁸⁸, that would have required national courts to assess the intensity of the role of Union Law in each field. That would not have been an easy test, in all cases, admittedly. But it would have given national courts a more precise guideline than the solution deriving from *Akerberg*. In the absence of such guideline, the effectiveness of EU law, as far as fundamental rights are concerned, remains very uncertain.

⁸⁶ §21.

⁸⁷ § 40 of the Opinion.

⁸⁸ § 41 of the Opinion.

**2) Applicability of constitutional rights in situations covered by EU law:
testing the resistance of EU law effectiveness**

Having considered the applicability of fundamental rights protected by EU law, it may seem a sharp bifurcation to turn to the protection granted by national Constitutions, in situations submitted to EU law. It is not. As *Akerberg* shows, the two questions are tightly connected. In that case, after dealing with the applicability of the Charter, the court envisaged the possible application of national standards of protection of fundamental rights.

Until now, the Court of justice has been faithful to the philosophy of *Van Gend en Loos*, requiring national courts, including constitutional courts, in case of conflict, to enforce EU law, including obligations or coercive measures resulting from EU legislation, even if this was inconsistent with constitutional rights. This orthodoxy can be justified, in part, by the fact that protection of fundamental rights is supposed to be ensured through integrating fundamental rights protection in the process of drafting legislation, in order to make sure that those rights are not violated, where high risks exist that such violations occur (in such fields as cooperation for criminal matters, or immigration law, namely)⁸⁹. This is a requirement of both article 6 TFUE, according to which fundamental rights constitute general principles of EU law, and article 51 of the Charter of fundamental rights, requiring Union institutions to respect the rights and observe the principles of the Charter.

To take a recent example, such reliance on preventive integration of fundamental rights was well illustrated in the *Jeremy F.* case⁹⁰ concerning the European arrest warrant, in which the Court recalled that article 1 (3) of the framework decision⁹¹ indicates that the text « shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union », obligation which “in addition, concern all member states,

⁸⁹ This concern to integrate the fundamental rights dimension throughout the process of drafting legislation was thoroughly described by the Commission in its Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights (2009).

⁹⁰ ECJ, 30 May 2013, C-168/13 PPU.

⁹¹ Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299 of 26 Feb. 2009.

in particular the Member state issuing and executing the arrest warrant”⁹². It added, that, as far as article 47 of the Charter and the right to an effective remedy were concerned, « the provisions of the framework decision already organise a procedure that respect article 47 of the Charter, independently of the modalities chosen by member states to enforce that framework decision »⁹³. Similarly, in *Melloni*⁹⁴, the Court mentioned that the framework decision ensures the protection of the rights of defense by providing an exhaustive list of the circumstances, in which the execution of a European arrest warrant can be issued in order to enforce a decision rendered *in absentia*⁹⁵.

However, this is not sufficient to guarantee that constitutional rights are never affected by EU legislation. On the contrary, the enforcement of EU law has been challenged in national courts on the basis of member states’ constitutional laws⁹⁶, and the conflict reaches the Court of justice, in some instances, through preliminary ruling, as the recent *Melloni* case shows. In *Jeremy F.*, by contrast, the question is about the exact requirements stemming from the EU legislation at stake: the possible conflict between that legislation and the protection of fundamental rights guaranteed by the Constitution depends on this prior question⁹⁷.

In *Melloni*, the Spanish constitutional court suggested that article 53 of the Charter should be interpreted as giving a general authorization to Member States to apply the standard of protection of fundamental rights guaranteed by their Constitution, when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law⁹⁸. The Court refused this

⁹² § 40.

⁹³ § 47.

⁹⁴ ECJ, 26 Feb. 2013, C-399/11. On that decision, see namely : H. Labayle, *Mandat d'arrêt européen et degré de protection des droits fondamentaux, quand la confiance se fait aveugle*, <http://www.gdr-elsj.eu> (3 March 2013), R. Medhi, *Retour sur l'arrêt Melloni : quelques réflexions sur les usages contradictoires du principe de primauté*, <http://www.gdr-elsj.eu> (29 March 2013) ; F. Gazin, *Europe*, Comm. 166, 23 (2013).

⁹⁵ §44.

⁹⁶ See, in particular, the decisions of the German Constitutional Court : 2236/04 of 18 Jul. 2005 (on the law implementing the framework decision on the European arrest warrant, cited above) and 256/08, 263/08, 586/08 of 2 March 2010 (on the law implementing directive 2006/24 of 15 March 2006 on data protection).

⁹⁷ In the case, the conflict is avoided. According to the Court of justice: “provided that the application of the Framework Decision is not frustrated (...) it does not prevent a Member State from applying its constitutional rules relating inter alia to respect for the right to a fair trial“ (§53).

⁹⁸ §55 and 56 of the decision.

interpretation: “the primacy, unity and effectiveness of European Union law”, it considered, shall not be compromised. This language was reiterated in *Akerberg*⁹⁹. Applying the higher standard of protection guaranteed by a national Constitution is rejected, namely, because it would cast “doubt on the uniformity of the standard of protection of fundamental rights defined in that framework decision”, “undermine the principles of mutual trust and recognition which that decision purports to uphold” and, therefore, “compromise the efficacy of that framework decision”¹⁰⁰.

Only when some competence remains in the hands of member states, in the process of transposing EU law in national law, as *Akerberg* suggests, can national Constitutions step in: “where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation *where action of the Member States is not entirely determined by European Union law*, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights”¹⁰¹. In *Melloni*, this opening could not be exploited, because member states had been deprived of all competence, as a result of uniformization of the law: action of member states, in the domain concerned, was entirely determined by EU law.

This touches upon one decisive point, for the purpose of applicability of other sources of fundamental rights than EU law, in situations covered by EU law: the measure, in which action of the Member States is determined by European Union law. Determining the degree of harmonization, total or partial, and, in the latter case, the remaining powers of member states, was already an issue, when national Constitutions were not concerned¹⁰². But the current resistance to EU law influence, in some constitutional courts, makes it more sensitive than before. Indeed, Constitutional courts are not always keen, these days, to follow the direction of direct effect and supremacy¹⁰³.

⁹⁹ Cited above.

¹⁰⁰ §63.

¹⁰¹ §29.

¹⁰² See for instance, concerning the harmonization achieved by the Directive on defective products: ECJ, *Commission v France*, 25 Avr. 2002, C-52/00.

¹⁰³ See namely the decision of the Polish Constitutional Court of 16 Dec. 2011 (SK 45/09), in which that Court considered that it had the power to review, on the basis of the Polish Constitution, EU regulation 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In this context, clashes can only be avoided, when situations are only partially determined by EU law, and space remains for constitutional protection¹⁰⁴.

Otherwise, the lines of force that find their origin in *Van Gend en Loos* continue to resist the changes of times. Undeniably, if the solution proposed by the Spanish constitutional court had been accepted, the situation of EU citizens in national courts would have been, in a number of cases, very different from the one that brought *Van Gend en Loos* before the Dutch *Tariefcommissie*: in many instances, nationals of member states would request, and possibly obtain, constitutional protection against coercive measures taken against them, in the course of implementation of EU law. If the Court of justice accepted that solution, it would, no doubt, limit, albeit only in the particular field of fundamental rights' protection (and not in general), the effectiveness of European Union law.

IV- Conclusion: EU law effectiveness reconsidered

Important as it is for European integration, effectiveness of European Union law is not absolute. And this is not only the outcome of procedural autonomy. As the requirement of consistent interpretation illustrates, for instance (see part II of this paper), there are hypothesis, in which it is accepted that EU law yields, at least temporarily, when confronted to the resisting substance of national law. And this does not undermine the presence of EU law in national courts, where it is quite clear that not only the increased domain, but also the evolutive reasonings that characterize the development of EU law, prompt an extension, rather than a retraction, of EU law influence. Overall, EU law executive force is contingent to the situation of each national legal system (rules, actors), and this is a feature of the system of EU law. That is already a reason why effectiveness does not stand as a very strong argument to justify that constitutional protections be set aside, even in cases, in which the solution is entirely determined by EU law.

At the time of *Van Gend en Loos*, it was probably difficult to imagine that the impact of EU policies on individual rights and freedoms would become a major concern. Today, no one contests that the protection of fundamental rights has become a central

¹⁰⁴ This was exactly what happened in the cases decided by the German Constitutional Court, cited above.

issue, especially in the development of the area of freedom, security and justice¹⁰⁵. In that field, the reasoning and principles that were crafted for the achievement of the internal market are not always adapted, although they may apply, at the moment. More generally, there is a distinction to be made between the possibility, for individuals, to obtain that the interests they draw from EU law are effectively protected in national courts, and the situation, in which individuals are brought to courts, and held responsible for their actions under European law. As these situations become more frequent, in relation, namely, with the development of EU policies, it is urgent to reconsider the effects of EU law in member states, in order to avoid a decline of individual rights and freedoms resulting from EU law enforcement. The same is true, when the situation cannot be described in terms of reduced protection, but is one, in which a European conception of a fundamental right or freedom is opposed, without solid justification, to the national conception of the same right. This hypothesis was illustrated in the recent *Alemo-Herron* case¹⁰⁶. In that case, the Court based its interpretation of the directive¹⁰⁷ on transfers of undertaking on a particular conception of the freedom to conduct a business laid down by article 16 of the Charter, which includes, according to the decision, freedom of contract. That interpretation was preferred to the British conception of contractual freedom, which would have allowed enforcement of the terms of a private contract.

To avoid such solutions, judicial discretion, at national courts' level, could be a tentative method. By judicial discretion, I only mean granting a margin of appreciation to national courts in cases, in which enforcement of EU law impacts fundamental rights or freedoms. Inspiration can be found, *mutatis mutandis*, in the relationships entertained by courts of different legal orders (the European Court of Human Rights and the European Court of justice, for instance), where mutual trust goes together with some retained sovereignty. But if national courts are allowed to enforce constitutional

¹⁰⁵ On this point, see H. Labayle, Conference for the 50th Anniversary of the judgment in *Van Gend en Loos*, on line at : http://curia.europa.eu/jcms/jcms/P_95693/ and for a summary : [Refonder l'ELSJ à la lumière de la jurisprudence Van Gend en Loos ?](#), **working paper n° 5** : <http://www.gdr-elsj.eu/working-papers>.

¹⁰⁶ ECJ, 18 July 2013, C-426/11.

¹⁰⁷ Directive 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

rights, this cannot be without restriction. The disruption to the basic principles of EU federalism needs to be contained, and occur only in hypothesis, in which it is particularly important that national constitutional rights are not called in question. In this perspective, article 4 (2) TUE must be considered¹⁰⁸: it can justify that national constitutional law prevails¹⁰⁹, and, at the same time, avoid abuses. If, according to this article, the Union must respect “member states national identities, inherent in their fundamental structures political and constitutional”, national courts should be able to set aside EU law provisions, in order to preserve their national identities, whenever it is threatened by the application of EU law. In addition to this condition, national courts’ discretion could also be limited by taking into account the need to ensure that the essential objective pursued by EU law, in the particular field, can still be fulfilled. Teleological interpretation, a traditional method of interpretation of EU law, would serve, this time, to circumscribe, not expand, EU jurisdiction.

¹⁰⁸ On the interpretation of this article, see namely : A. von Bogdandy and S. Schill, *Overcoming absolute Primacy : Respect for National Identity under the Lisbon Treaty*, 48 *Common Market Law Review* (2011) 1417.

¹⁰⁹ On this idea, see D. Chalmers, *Van Gend en Loos and the Representation of Europeans*, this volume, suggesting that art. 4 (2) be granted direct effect.