The principle of directive-compliant development of the law and the contra legem limit

Thomas M. J. Möllers

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Thomas M.J. Möllers*

The Principle of Directive-Compliant Development of the Law and the *Contra Legem* Limit

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Abstract: The Europeanisation of domestic law calls for a classical methodology to 'update' the established traditions of the law. The relationship between European directives and national law is difficult, since directives do apply, but European legal texts need to be implemented into national law. Whilst directives are not binding on private individuals, there is no direct third-party effect, but only an 'indirect effect'. This effect is influenced by the stipulations of the ECJ, but is ultimately determined in accordance with methodical principles of national law. The ECJ uses a broad term of interpretation of the law. In contrast, in German and Austrian legal methodology the wording of a provision defines the dividing line between interpretation and further development of the law. The article reveals how legal scholars and the case-law have gradually shown in recent decades a greater willingness to shift from a narrow, traditional boundary of permissible development of the law to a modern line of case-law regarding the boundary of directive-compliant, permissible development of the law.

Résumé: En rapport avec la européansiation du droit national une réforme des méthodes classiques de la juridiction de chaque État Membre est nécessaire. Cela est valable pour la relation entre les directives européens et le droit national en particulier, parce que les directives s'appliquent immédiatement mais ont besoin d'être transférés au droit national. Parce que les directives ne sont pas applicables entre les personnes privées sans acte de transformation, l'exégèse du droit national doit être fait en conformité avec le droit européen. La Cour de Justice de l'union européenne (CJUE) a développée des principes généraux, mais l'application dans les cas concrètes et les détails sont déterminées par les cours et tribunaux nationaux. Le CJUE applique le terme de conformité au droit européen très extensivement. La méthodologie juridique allemande et autrichien différencie entre interprétation en conformité et l'extension de la loi en prenant les mots comme

***Corresponding author: Thomas M.J. Möllers,** Universität Augsburg, Universitätsstraße 24, D-86159 Augsburg, E-Mail: thomas.moellers@jura.uni-augsburg.de

limite de l'interprétation. L'article décrit le développement de la juridiction et de la littérature juridique envers une compréhension de l'interprétation conforme au droit européen de plus en plus moderne en survenant les idées traditionnelles. Cette contribution essaie de faire comprendre les arguments différents, qui forment la base de cette développement.

Zusammenfassung: Im Zuge der Europäisierung nationalen Rechts ist auch eine Aktualisierung der klassischen Methodenlehre des jeweiligen Mitgliedstaates erforderlich. Dies gilt im Besonderen für das schwierige Verhältnis von EU-Richtlinien und dem nationalen Recht, weil Richtlinien zwar unmittelbar gelten, aber in das nationale Recht umgesetzt werden müssen. Da Richtlinien nicht unmittelbar horizontal zwischen privaten Personen Anwendung finden, muss nationales Recht richtlinienkonform angewendet werden. Diese richtlinienkonforme Anwendung des nationalen Rechts wurde zwar vom EuGH entwickelt; die Einzelheiten bestimmten sich aber nach nationalem Recht. Der EuGH verwendet einen weiten Begriff der europarechtskonformen Auslegung des Rechts. Die deutsche und österreichische juristische Methodenlehre nutzt hingegen die Wortlautgrenze zur Unterscheidung von Auslegung und wortlautüberschreitender Rechtsfortbildung. Der folgende Beitrag beschreibt, wie Rechtsprechung und Rechtsliteratur in immer stärkerem Maße bereit sind, von einem engen, traditionellen Verständnis einer richtlinienkonformen Auslegung zu einem modernen, weiten Verständnis einer richtlinienkonformen Auslegung zu gelangen. Dieser Beitrag versucht die verschiedenen Argumentationsfiguren nachzuvollziehen, die dieser Entwicklung zugrunde liegen.

I Introduction: no Horizontal Direct Effect, versus the Principle of Indirect Effect

1 Effectiveness of EU Law – the Direct Effect of EU Law

The Court of Justice of the European Union (ECJ) actively uses case-law to promote the notion of creating an ever closer Union.[1] In a chain of rulings, the ECJ has established uncodified principles with the aim of rendering EU law forceful and

1 G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012) 22, 86.

effective. The EU Treaties therefore rank higher than the laws of the Member States, and under certain circumstances can have a direct effect in these States (the principle of direct effect).[2] The principle of vertical direct effect applies to regulations and directives,[3] but the ECJ has denied that there is a direct effect of directives between private parties – the 'horizontal effect'. The wording of Article 288(3) of the Treaty on the Functioning of the European Union (TFEU) contradicts such a development of the law in favour of the recognition of a horizontal direct effect, since only the Member State, but not the citizen, is obliged to implement the directive. This supposed gap in horizontal third-party effect is, however, limited, given that the ECJ has extended vertical third-party effects to include a broad concept of the 'Member State'[4] which obliges national courts to interpret the law in a directive-compliant manner, and may threaten to impose state liability under EU law for any Member State that does not implement it (correctly).[5] This article analyses in detail the implementation of the principle of indirect effect in Germany and Austria. It will show that German case-law and legal literature are shifting the *contra legem* boundary, and will highlight parallel legal developments in Germany and Austria.[6]

2 The Principle of Directive-Compliant Development of the Law

After the ECJ had negated the horizontal direct effect of directives, it developed an obligation to interpret national law in a directive-compliant manner according to the requirements of such directives. The reference material that exists in English uses different terms to define what in German is referred to as '*richtlinienkonforme Auslegung*'. The terms commonly used are 'principle of indirect effect',[7]

2 *Van Gend & Loos* v *Netherlands Inland Revenue Administration* (26/62) EU:C:1963:1 at [7], [25]–[26]; in detail, L. Woods, P. Watson and M. Costa, *Steiner & Woods EU Law* (13th ed, Oxford: Oxford University Press, 2017) 114–118.

3 *Van Duyn* v *Home Office* (C-41/74) EU:C:1974:133 at [12]; *Public Prosecutor* v *Ratti* (C-148/78) EU:C:1979:110 at [21]; *Ursula Becker* v *Finanzamt Münster-Innenstadt* (C-8/81) EU:C:1982:7.

4 *Marshall I* v *Southhampton and South-West Hampshire Area Health Authority* (C-152/84) EU:C:1986:84 at [48]–[56].

5 *Francovich* v *Italian Republic* (C-6/90 *et al*) EU:C:1991:428 at [32]–[37].

6 The article is based in parts on a talk which was given at the conference *Richterliche Rechtsfortbildung und ihre Grenzen* (Judicial further development of the law and its boundaries) held at the Austrian Supreme Court in Vienna on 28 May 2018.

7 P. Craig and G. de Búrca, *EU Law* (6th ed, Oxford: Oxford University Press, 2015) 209–216; Woods, Watson and Costa, n 2 above, 137–144.

'principle of harmonious interpretation'[8] or 'principle of consistent interpretation'.[9] 'Directive-compliant interpretation' seems to be the best term because it is close to the definition used by the ECJ. It requires national law to be interpreted in such a way as to achieve the objectives set out in directives. This obligation covers all national law, not just the law implementing the particular directive.[10] The ECJ stated the requirement as follows in the *Adelener* case:

> 'It should be noted that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that a principle cannot serve as the basis for an interpretation of national law contra legem (see, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285, para 44 and 47).
>
> Nevertheless, the principle that national law must be *interpreted in conformity with Community law* [better: interpreted in a directive-compliant manner][11] requires national courts to do whatever lies within their jurisdiction. They must take the whole body of domestic law into consideration and apply the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see *Pfeiffer and Others*, para 115, 116, 118 and 119).'[12]

Even though the Court denies that directives exert a horizontal effect, a directive-compliant interpretation of provisions that apply between private individuals does not develop the strict primacy of application that primary law or EU regulations can create.[13] The obligation to interpret the directive narrowly already follows from the direct applicability of a directive. According to Article 288(3) TFEU, directives are binding upon each Member State.[14] The obligation to interpret domestic law in a directive-compliant manner is an objective legal requirement addressed to all public authorities in the Member State. The primary objective of the interpretation is to bring national law in line with higher-ranking EU law.

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8 Craig and de Búrca, n 7 above, 209–216.

9 Woods, Watson and Costa, n 2 above, 137; G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397.

10 *Marleasing SA* v *La Comerical Internacional de Alimentaction SA* (C-106/89) EU:C:1990:395 at [8]; see *Faccini Dori* v *Recreb Srl* (C-91/92) EU:C:1994:292 at [26].

11 Added by the author.

12 *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [110]–[111].

13 W.H. Roth, 'Die richtlinienkonforme Auslegung' (2005) *Europäisches Wirtschafts- und Steuerrecht* 385, 386.

14 *Inter-Environnement Wallonie* v *Région Wallonnie* (C-129/96) EU:C:1997:628 at [41].

3 Considerable Legal Uncertainty – how to ascertain the Limits of the 'Contra Legem' Concept?

Strictly speaking, the ECJ is only permitted to interpret EU law, but not national law.[15] This has not however deterred the Court from stressing the obligation to interpret in a directive-compliant manner in many of its rulings, or from explaining the national legislature's intentions, as well as the systematics and the telos of the interpretation.[16] This leads to considerable uncertainty as to when and where the *contra legem* limit lies.[17] There has been controversial debate for years in Germany and Austria as to whether the obligation of directive-compliant interpretation also encompasses an obligation to reach an outcome that is aligned with European law, even if it goes against the wording of national law. There is now an ever growing tendency to acknowledge such a right to further development of the law, over and above the national wording of the law. Courts have the right to develop the law, but must not rule *contra legem*. It might therefore be worth considering whether a further principle should be introduced into the English usage, namely *directive-compliant development of the law*.[18]

II The Relevance, Definition and General Permissibility of Directive Compliant Development of the Law

1 The Scope of Directive-Compliant 'Interpretation' as a perennial Issue of Methodology

Legal methodology is a theory of legitimacy and legal reasoning. By applying figures of argumentation,[19] legal methodology seeks to render legal decisions

15 Cf art 19 para 1 sentence 2 TEU: 'It shall ensure that in the interpretation and application of the Treaties the law is observed.'

16 Cf n 10, 12 and n 23.

17 Craig and de Búrca, n 7 above, 216: 'It would be very difficult to predict the outcome of any litigation, since the duty of harmonious interpretation demands that national courts consider all national law in deciding whether compatibility with the provisions of the directive can be attained.'

18 Distinguishing between interpretation of the law on the one hand and development of the law on the other seems more precise than the current English terminology simply referring to 'indirect effect' (cf n 7–9).

19 On the term 'figure of argumentation' see T.M.J. Möllers, *Legal Methods* (Oxford: C H Beck – Hart – Nomos, 2020) sec 1 para 67–92.

rationally verifiable.[20] Courts have shown an astonishing level of flexibility in the past 30 years when it comes to applying the law in order to facilitate directive-compliant further development of the law, even where the wording did not comply with the national provision. Three German court rulings demonstrate this development. The first example is nearly thirty years old. The methodological assessment of the Federal Labour Court (*Bundesarbeitsgericht*, BAG) in the *Harz* judgment paved the way for the EU Anti-discrimination Directive to be applied in Germany in 1989. The Directive provided that job applicants who had been the victims of discrimination should be granted access to the courts.[21] In the original version of section 611a of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), the German legislature had only granted job applicants the reimbursement of job application expenses.[22] The ECJ considered this to be insufficient, since it was not very effective and did not have a deterrent effect in terms of protecting job applicants from discrimination.[23] The Federal Labour Court went on to examine section 823 subsection 1 of the Civil Code as a 'small blanket clause of tort law'. The Court created a new right; it found gender discrimination against job applicants to constitute a violation of the right of personality, and awarded damages to the claimant.[24] This judgment has been heavily criticised because it circumvented the wording of section 611a of the Civil Code, and was said not to be aligned with the previous group of cases regarding serious violations of the right of personality.[25]

Thirty years have now passed, and other cases have addressed the directive-compliant development of the law *expressis verbis*. The issue in the *Quelle* deci-

20 Möllers, n 19 above, sec 1 para 92.

21 Federal Labour Court, Judgment of 14 March 1989, 8 AZR 447/87, BAGE 61, 209 at 214 *et seq* – *Harz*; also see art 6, 7 of the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (1976) *OJEC* L 39/40.

22 Federal Law Gazette (BGBl) 1980 I, 1308.

23 *Dorit Harz* v *Deutsche Tradax GmbH* (C-79/83) EU:C:1984:155 at [21]–[28]. Handed down on the same day: *Sabine von Colson and Elisabeth Kamann* v *Land Nordrhein-Westfalen* (C-4/83) EU:C:1984:153 at [21]–[28].

24 Federal Labour Court, Judgment of 14 March 1989, 8 AZR 447/87, BAGE 61, 209 and 215–216 – *Harz*.

25 S. Wiese, 'Verbot der Benachteiligung wegen des Geschlechts bei der Begründung eines Arbeitsverhältnisses' (1990) *Juristische Schulung* 357, 362; C.-W. Canaris, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre', in H. Koziol and P. Rummel (eds), *Im Dienste der Gerechtigkeit, Festschrift für Franz Bydlinski* (Vienna: Springer, 2002) 97–98.

sion was whether a customer had to pay compensation for use when returning a defective good after a certain time. The unambiguous wording of section 439 subsection 4 of the Civil Code had for decades provided compensation for the use of a defective good. The ECJ however denied the seller's claim against the consumer for compensation for use because the warranty claims under Article 3 of the Consumer Sales Directive were to be 'free of charge'.[26] The Federal Court of Justice (*Bundesgerichtshof*, BGH) reversed its former ruling. For the first time, it explicitly adopted the legal concept of directive-compliant development of the law, which had been created by scholars as early as in the 1990s.[27] Contrary to the wording of section 439 subsection 4 of the Civil Code (old version), it affirmed a teleological reduction[28] of this section to eliminate the claim for compensation for use in B2C relationships which had previously been recognised in Germany.[29] This approach was heavily criticised in the literature. As Lorenz wrote: 'All interpretative criteria of German law, including the express intention of the German legislature, argued for a corresponding obligation incumbent on the consumer.'[30]

In the *Tiles* case, the claimant purchased defective tiles and installed them in his house. After recognising the defect, the customer demanded the delivery of non-defective tiles and payment for the cost of removing the old tiles and installing new ones amounting to € 5,830. Such claims had been rejected in the past,[31] or only affirmed if the seller had been responsible for the breach of duty.[32] The ECJ

26 *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (C-404/06) EU:C:2008:231 at [31]–[43].

27 S. Grundmann, 'Richtlinienkonforme Auslegung im Bereich des Privatrechts – insbesondere: der Kanon der nationalen Auslegungsmethoden als Grenze?' (1996) *Zeitschrift für Europäisches Privatrecht* 399 and 420; T.M.J. Möllers, 'Doppelte Rechtsfortbildung contra legem?' (1998) *Europarecht* 20 and 45; T.M.J. Möllers, *The Role of Law in European Integration* (New York: Nova Science Publisher, 2003) 80.

28 By definition a teleological reduction restricts the wording so that the purpose of the norm fits teleologically, cf Möllers, n 19 above, sec 6 para 82–96.

29 Federal Court of Justice, Judgment of 26 November 2008, VIII ZR 200/05, BGHZ 179, 27 at [26] – *Quelle*.

30 S. Lorenz, in F.J. Säcker *et al* (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th ed, Munich: C H Beck, 2016) before sec 474 subsec 3 [translated from the original German].

31 Federal Court of Justice, Judgment of 15 July 2008, VIII ZR 211/07, *Neue Juristische Wochenschrift* 2008, 2837 at [23]–[27] – refusing to meet the cost of installation in accordance with sec 439 subsec 2 of the German Civil Code.

32 Federal Court of Justice, Judgment of 2 April 2014, VIII ZR 46/13, *Neue Juristische Wochenschrift* 2014, 2183 at [23]–[28] – no installation costs between companies. The legal situation in Austria was the same, cf B. Zöchling-Jud, 'Der Einfluss des Europarechts auf das Privatrecht', in C. Fischer-Czermak *et al* (eds), *Festschrift 200 Jahre ABGB* (vol 2, Vienna: MANZ, 2011) 1771.

however found that the Consumer Sales Directive covers the seller's obligation to install and remove a defective good regardless of fault. The Court furthermore found (more importantly for this Article) that the seller's right to refuse subsequent delivery due to disproportionality in accordance with section 439 subsection 3, third sentence, of the Civil Code (old version) was in contravention of Article 3 of the Consumer Sales Directive. The Directive states that a remedy (ie rectification or supplementary supply) must be free of charge; however, the costs could be restricted to a proportionate amount.[33] To comply with the ECJ's demands, the Federal Court of Justice therefore had to develop the law in a directive-compliant manner, *contrary to the wording of the national provision*. It developed a teleological reduction of section 439 subsection 3 of the Civil Code for consumer goods purchases, so that the disproportionate costs for the purchaser are no longer sufficient to prevent the contract from being cancelled. The further development of the law is said not to be permissible because the wording, history of the law, system and telos clearly justified the refusal of subsequent performance in the case of absolute disproportionality.[34] There have been numerous other judgments in Germany[35] and Austria[36] commenting on the boundaries of direc-

33 *Gebr Weber GmbH* v *Jürgen Wittmer and Ingrid Putz* v *Medianess Electronics GmbH* (C-65/09 *et al*) EU:C:2011:396 at [62], [78].

34 D. Kaiser, 'EuGH zum Austausch mangelhafter eingebauter Verbauchsgüter' (2011) *Juristenzeitung* 978, 986; S. Lorenz, 'Ein- und Ausbauverpflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung' (2011) *Neue Juristische Wochenschrift* 2241, 2244; B. Gsell, 'Die Reichweite der Ersatzlieferungspflicht nach Einbau der mangelhaften Kaufsache durch den Verbraucher' (2012) 5 *Zeitschrift für das Juristische Studium* 369, 374.

35 For example, Federal Labour Court, Judgment of 24 March 2009, 9 AZR 983/07, BAGE 130 and 119 at [57]–[77] – *Holiday pay*; Federal Court of Justice, Judgment of 8 January 2014, V ZB 137/12, *Neue Zeitschrift für Verwaltungsrecht* 2014, 1111 at [10]–[11]; Federal Court of Justice, Judgment of 7 May 2014, IV ZR 76/11, BGHZ 201, 101 at [22]–[23] – *Revocation of life insurance*; Federal Court of Justice, Judgment of 28 October 2015, VIII ZR 158/11, BGHZ 207 and 209 at [34]–[48] – *Gas price adjustment clause*; Federal Administrative Court, Judgment of 31 January 2017, 6 C 2.16, BVerwGE 157, 249 at [26]–[34] – *Price adjustment, Telecommunications Act*; Federal Constitutional Court, Order of 26 September 2011, 2 BvR 2216/06 *et al*, *Neue Juristische Wochenschrift* 2012, 669 at [51]–[66] – *s 5 of the Doorstep Selling Cancellation Act* (*Haustürwiderrufsgesetz*, HWiG); Federal Constitutional Court, Order of 17 January 2013, 1 BvR 121/11 *et al*, ZIP 2013, 924 at [33] – sec 264 subsec 3 of the Commercial Code (*Handelsgesetzbuch*, HGB); Federal Constitutional Court, Order of 17 November 2017, 2 BvR 1131/16, *Neue Juristische Wochenschrift-Rechtsprechungs-Report* 2018, 305 – *Price adjustment, Telecommunications Act*.

36 Austrian Supreme Court of Justice, Judgment of 31 August 2010, 4 Ob 120/10 at [1.1.] – *Thermal hotel L II*; Austrian Supreme Court of Justice, Judgment of 15 February 2011, 4 Ob 208/10g at [3]. – *Bans on promotions*; Austrian Supreme Court of Justice, Judgment of 19 March 2013, 4 Ob 15/13d at [1.5.] – *Clearance sale*; Austrian Supreme Court of Justice, Judgment of 25 March 2014, 9 Ob 64/13x, *Österreichische Juristenzeitung* 2014, 612 – *Installation costs among companies*.

tive-compliant development of the law. The question of how far directive-compliant development of the law can go, and when the *contra legem* limit is overstepped, is one of the most topical concerns of legal methodology in Germany and Austria.

When looking at this matter, it is helpful to clarify what constitutes directive-compliant development of the law (II 2). Directive-compliant development of the law facilitates a national as well as a European perspective. It is both questionable and controversial whether a perspective that maintains the traditional status quo, or a more pro-European perspective, is preferable. The traditional point of view will be addressed first (III). However, it will be demonstrated that significantly more arguments support the modern, European approach that allows for more extensive directive-compliant development of the law, and leads to a more appropriate justification of the *contra legem* limit (IV). I will discuss below what advantages and disadvantages arise from a narrow versus a broad definition of the scope of directive-compliant development of the law because the *contra legem* limit is drawn either narrowly or widely, depending on the individual case.

2 The Definition of Directive-Compliant Development of the Law (richtlinienkonforme Rechtsfortbildung)

In the past, a directive-compliant interpretation comprised development of the law, and thus the term was broadly interpreted. Traditionally, the ECJ does not respect a strict differentiation between the limit of the wording and judicial development of the law.[37] It understands the term 'interpretation' in a wide sense or uses the French term *interprétation*, which in this respect recognises no sharp separation between interpretation and further development of the law that goes beyond the wording.[38] Should German case-law now adopt this broad concept for its own national methodology, and in the future only speak of interpretation or application in the broader sense?

37 *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [110]–[111]. See Federal Court of Justice, Judgment of 26 November 2008, VIII ZR 200/05, BGHZ 179, 27 at [21] – *Quelle* and Möllers, n 19 above, sec 6 para 149.

38 W. Schroeder, 'Grenzen der Rechtsprechungsbefugnis des EuGH', in H. Altmeppen *et al* (eds), *Festschrift für Günter H. Roth zum 70. Geburtstag* (Munich: C H Beck, 2011) 739; a strict separation is also said not to be possible K.-D. Borchardt, 'Richterrecht durch den EuGH', in A. Randelzhofer et al (eds), *Gedächtnisschrift für Eberhard Grabitz* (Munich: C H Beck, 1995) 37.

In contrast, the terminological distinction between interpretation and development of the law is widely recognised in Germany and Austria. *Interpretation in the narrow sense hovers at the very boundary of the meaning of the word, and development of the law oversteps the literal sense of the law*.[39] This conceptual distinction is reasonable, given that it increases the obligation to justify the development of the law. The modern state under the rule of law has recognised the separation and the interlinking of powers since Locke and Montesquieu.[40] Legal methodology is now constitutionally justified as a theory of legitimacy. A fundamental idea is therefore the limitation of the power of the legal practitioner, and especially the judge. This idea has two variants. First, it applies in the relationship between the judiciary and the legislature. As a matter of principle, it is incumbent on Parliament to decide on the material objective.[41] Second, legal methodology binds the judge vis-à-vis the citizen. Many examples favour distinguishing in methodical terms between 'interpretation' and 'further development of the law'. The principle of legality as an expression of the principle of the rule of law in criminal law requires that an act may not be punished without a legal basis (*nullum crimen, nulla poena sine lege*).[42] Legal methods are therefore also a theory of legal reasoning.[43] Specifically, the legal practitioner must prove why they wish to establish a development of the law contrary to the wording and history of the law, or to the systematics or telos. Directive-compliant development of the law means that the national judge no longer merely interprets national law in the light of a EU directive, but *oversteps the wording of the national term*, and thus develops new case groups within the boundaries of the wording, or corrects the case-law.[44] The highest German courts are now willing to refer to directive-compliant development of the law as such.[45] Even the ECJ has

39 K. Larenz, *Methodenlehre der Rechtswissenschaft* (6th ed, Berlin: Springer, 1991) 366; Möllers, n 19 above, sec 4 para 36; R. Alexy and R. Dreier, 'Statutory Interpretation in the Federal Republic of Germany', in N. MacCormick and R. Summers (eds), *Interpreting Statutes* (Aldershot: Dartmouth, 1991) 73, 78: 'Decisions which remain with the lexical meaning of a norm's wording are regarded as interpretative, whereas those going beyond or against that meaning are classified as gap-filling.'

40 J. Locke, *The Second Treatise of Government* (London: Awnsham Churchill, 1689) ch 7, s 93; C. Montesquieu, *De l'esprit des lois* (Geneva, 1748) book 11, ch 6.

41 W. Flume, 'Richter und Recht', in Ständige Deputation des Deutschen Juristentages (ed), *Verhandlungen des 46. Deutschen Juristentages* (vol II, Munich: C H Beck, 1967) K3–K35, at 18.

42 H. Schulze-Fielitz, in H. Dreier (ed), *Grundgesetz* (3rd ed, Munich: C H Beck, 2018) art 103 I paras 20, 60–62.

43 For a modern legal methodological approach Möllers, n 19 above.

44 Möllers, n 19 above, sec 12 para 54–57.

45 The term is increasingly being used in Austria as well. Thus Austrian Supreme Court of Justice, Judgment of 19 March 2013, 4 Ob 15/13d at [1.5.] – *Sellout*. Previously, Zöchling-Jud, n 32 above, 1757, 1763.

refined its methodological terminology: it speaks of development of the law, and includes legal concepts such as analogy[46] or interpretation of the law *contra legem*.[47]

3 The Boundaries of Directive-Compliant Development of the Law in Accordance with the Case-Law of the ECJ and of the Federal Constitutional Court

The distribution of competences between higher and lower levels plays a major role in a multi-tier system. This applies for instance to the competitive relationship between the Member States and the European Union. The ECJ encountered important argumentative concepts of directive-compliant interpretation in numerous decisions. Having said that, its stipulations are not always homogeneous. In terms of the legislature's intention, the ECJ presumes that the Member State generally 'intended to fully meet the obligations arising from the directive'.[48] This should apply 'notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule'.[49] In terms of systematics, the ECJ holds that the directive is the focus of analyses, meaning that the Member States interpret the national law 'in the light of the directive' within their national margin of appreciation.[50] The directive's telos should be taken into account.[51] 'The principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction.'[52] The ECJ, however, considerably restricted these stipulations because Member States

46 For example, *Krohn* v *Bundesanstalt für landwirtschaftliche Marktordnung* (C-165/84) EU:C:1985:507 at [14], [29]; cf also *Koninklijke Coöperatie Cosun UA* v *Minister van Landbouw, Natuur en Voedselkwaliteit* (C-248/04) EU:C:2006:666 at [40]; *Union française de céréales* v *Hauptzollamt Hamburg Jonas* (C-6/78) EU:C:1978:154 at [4].

47 Cf n 12 above.

48 *Wagner Miret* v *Fondo de garantía salarial* (C-334/92) EU:C:1993:945 at [20]; similar wording in Joined Cases *Pfeiffer* v *Deutsches Rotes Kreuz* (C-397 & C-403/01 *et al*) EU:C:2004:584 at [112].

49 *Björnekulla Fruktindustrier AB* v *Procordia Food AB* (C-371/02) EU:C:2004:275 at [13].

50 Joined Cases *von Colson/Kamann* v *Land Nordrhein-Westfalen* (C-14 & C-79/83) EU:C:1984:153 at [26]; *Strafverfahren* v *Kolpinghuis Nijmegen BV* (C-80/86) EU:C:1987:431 at [12].

51 *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [110]–[111].

52 *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [111]; cf also *Mono Car Styling SA* v *Odemis and others* (C-12/08) EU:C:2009:466 at [61]; *OSA* v *Léčebné lázně Mariánské lázně* (C-351/12) EU:C:2014:110 at [45].

must fully exhaust the margin of appreciation regarding national law.[53] To this end, the national court must decide whether it prefers to disregard the national rule in question.[54] Moreover, the national judge's obligation to consult the content of the directive when interpreting the relevant provisions would be limited by the general legal principles and in particular by the principle of legal certainty and non-retroactivity, and may not be used as a basis for an interpretation of the national law *contra legem*.[55]

The ruling made by the German Federal Constitutional Court regarding the range of directive-compliant further development of the law is still somewhat imprecise. In principle, it is undisputedly recognised that EU law affects national law and must be applied by German courts.[56] However, there are only a few initial (not yet homogeneous) chamber decisions of the Federal Constitutional Court on directive-compliant development of the law. The Court explicitly recognises directive-compliant development of the law as an argumentative concept, and also accepts the legal concept that the national legislature's intention is, in case of doubt, not directed at violating its obligation to implement the directive pursuant to Article 288(3) TFEU.[57] This results in an unintended regulatory gap, and thus in the possibility to develop the law.[58]

53 Joined Cases *von Colson/Kamann* v *Land Nordrhein-Westfalen* (C-14 & C-79/83) EU:C:1984:153 at [28].

54 *Dansk Industri* v *Nachlass des Karsten Eigil Rasmussen* (C-441/14) EU:C:2016:278 at [37].

55 *Dansk Industri* v *Nachlass des Karsten Eigil Rasmussen* (C-441/14) EU:C:2016:278 at [33]–[34].

56 Federal Constitutional Court, Order of 18 October 1967, 1 BvR 248/63 *et al*, BVerfGE 22, 293 and 296 – *EEC Regulations*; Federal Constitutional Court, Order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339, 375 – *As long as II*.

57 Federal Constitutional Court, Order of 26 September 2011, 2 BvR 2216/06 *et al*, *Neue Juristische Wochenschrift* 2012, 669 at [51] – *s 5 of the Doorstep Selling Cancellation Act*; Federal Constitutional Court, Order of 17 January 2013, 1 BvR 121/11 *et al*, ZIP 2013, 924, 926 at [33] – sec 264 subsec 3 of the Commercial Code.

58 Federal Constitutional Court, Order of 17 January 2013, 1 BvR 121/11 *et al*, ZIP 2013, 924, 926 at [33] – sec 264 subsec 3 of the Commercial Code.

III The traditional, narrow Concept of the Contra Legem Boundary

1 Argumentation Concepts regarding the Rejection of Directive-Compliant Development of the Law

Many commentators consider the ECJ's statements to be a purely optional aid,[59] and opine that the decisive factor remains the national methodology.[60] This is the view that is taken in Austrian law.[61] In addition, there is a popular opinion which vehemently sets very narrow boundaries on the permissible directive-compliant development of the law and presents numerous arguments: The value plan (*Wertungsplan*) of national law is exclusively relevant.[62] The judge only has the right to develop the law in a directive-compliant manner if a margin of appreciation results from national law.[63] Consequently, directive-compliant development of the law should not be permitted to override[64] or 'bend'[65] the law. And finally, judicial development of the law would be tantamount to an impermissible horizontal effect.[66] Since directive-compliant interpretation and its boundary are argumentation concepts of the national law, the judge must not fundamentally re-

59 For instance, the wording used by H. Hayden, 'Richtlinienkonforme Interpretation und Methodenautonomie – Verlauf der Contra-legem-Grenze am Beispiel des Abgabenrechts' (2016) 32 *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung* 244, 249.

60 W.-H. Roth and C. Jopen, 'Interpretation in Conformity with Directives', in K. Riesenhuber (ed), *European Legal Methodology* (Cambridge: Intersentia, 2017) sec 13 para 31.

61 Austrian Supreme Court of Justice, Judgment of 31 August 2010, 4 Ob 120/10s at [1.2.]: The national interpretation rules limit the interpretation in conformity with the directive; R. Rebhahn, in A. Fenyves *et al* (eds), *Großkommentar zum Allgemeinen Bürgerlichen Gesetzbuch – Klang* (3rd ed, Vienna: Verlag Österreich, 2014) after sec 6, 7 para 139.

62 C. Baldus and R. Becker, 'Haustürgeschäfte und richtlinienkonforme Auslegung – Probleme bei der Anwendung angeglichenen europäischen Privatrechts' (1997) *Zeitschrift für Europäisches Privatrecht* 874, 882.

63 C. Höpfner, 'Voraussetzungen und Grenzen richtlinienkonformer Auslegung und Rechtsfortbildung' (2009) *Jahrbuch Junger Zivilrechtswissenschaftler* 73, 85.

64 Canaris, n 25 above, 94.

65 B. Heß, 'Zur Frage der unmittelbaren Anwendbarkeit von EG-Richtlinien' (1995) *Juristenzeitung* 150, 151.

66 M. Zöckler, 'Probleme der richtlinienkonformen Auslegung des nationalen Zivilrechts' (1992) *Jahrbuch Junger Zivilrechtswissenschaftler* 141, 157 as well as the authors in n 25.

define the normative content of the national provision[67] or lend it any other meaning.[68]

2 Advantages and Disadvantages of the traditional Perspective

A number of arguments suggest such a traditional, narrow *contra legem* limit. Maintaining the abovementioned argumentative canon thus appears methodologically consistent, given that Article 288(3) TFEU in fact permits the implementation of the directive in national law, and therefore the deduction of meaning through legal methods is only possible at a national level.[69] The judge would not have to perform any methodological contortions. Above all, given his or her national perspective, the judge can reject the surprising 'deviant interpretation result'[70] of the ECJ, and does not have to worry about how to implement it in national law in terms of development of the law. The judge must as a matter of principle accept the decisions of Parliament. He or she does not examine whether a legal solution is the most appropriate, sensible or fair.[71] The national court plays the role of a servant in relation to Parliament, but in European Law it must serve three masters at once.[72] At European level, the Commission, the Council and Parliament issue a directive, which claims validity and thus applies at national level. The national legislature then has to implement the EU directive. The national judge is bound by the stipulations relating to implementation. And finally, the ECJ – to which the national judge typically submits a question of interpretation regarding the EU directive in a preliminary ruling procedure – clarifies EU law. The national judges must then go on to decide how to resolve this multipolar conflict – namely whether they can concur with the ECJ's stipulations in conformity with the directive, or whether they must refuse to do so and to transmit the

67 Austrian Supreme Court of Justice, Judgment of 8 September 2005, 8 ObS 13/05b, 5; Austrian Supreme Court of Justice, Judgment of 19 December 2007, 9 ObA 106/06p, 10; Austrian Supreme Court of Justice, Judgment of 7 February 2008, 9 ObA 161/07b, 3.

68 Rebhahn, n 61 above, after sec 6, 7 para 140; S. Perner, *EU-Richtlinien und Privatrecht* (Vienna: MANZ, 2012) 94; cf also the authors in n 99.

69 Baldus and Becker, n 62 above, 874, 882.

70 For instance the wording of Austrian Supreme Court of Justice, Judgment of 25 March 2014, 9 Ob 64/13x at [4.10].

71 Established case law, for instance Federal Constitutional Court, Judgment of 17 December 1953, 1 BvR 323/51 *et al*, BVerfGE 3, 162, 182; Federal Constitutional Court, Order of 26 March 1980, 1 BvR 121/76 *et al*, BVerfGE 54, 11, 26.

72 The judge as a servant of the legislature, P. Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 *Archiv für die civilistische Praxis* 1, 19–23.

implementation order to the national legislature. This is not a question of the judge modelling the law at the expense of the legislature, but of the national judge trying to optimally serve all three masters.

IV The New, Modern Approach of Case-Law regarding the Boundary of Permissible Directive-Compliant Development of the Law

How can judgments of the German Federal Labour Court,[73] the Federal Court of Justice[74] and the Austrian Supreme Court of Justice[75] be justified when they overrule the wording of a provision of the Civil Code and explain this with a teleological reduction of the provision so that they do not have to apply it? Contrary to the traditionally narrow perspective presented above, it will be shown below that numerous legal figures of argumentation favour a broad, modern boundary of the directive-compliant development of the law. Interest-based, historical, teleological and systematic arguments support this.

1 Interest-based Considerations of Directive-Compliant Development of the Law

A directive-compliant interpretation corresponds first and foremost to the intention of the national Parliament. If the national Parliament errs, then the case-law can remedy the error by means of directive-compliant development of the law. If the directive-compliant development of the law is affirmed in a broad sense, this allows the Member State to make mistakes in the process of implementing the law. In other words, the national Parliament now utilises its margin of appreciation to implement the directive in such a way that as little as possible of the pre-

73 For example, Federal Labour Court, Judgment of 24 March 2009, 9 AZR 983/07, BAGE 130, 119 at [64] – *Holiday pay*.

74 Federal Court of Justice, Judgment of 26 November 2008, VIII ZR 200/05, BGHZ 179, 27 at [21]–[35] – *Quelle*; Federal Court of Justice, Judgment of 21 December 2011, VIII ZR 70/08, BGHZ 192, 148 at [30]–[47] – *Tiles*; Federal Court of Justice, Judgment of 7 May 2014, IV ZR 76/11, BGHZ 201, 101 at [22]–[23] – *Revocation of life insurance*.

75 Austrian Supreme Court of Justice, Judgment of 15 February 2011, 4 Ob 208/10g at [3] – *Zugabenverbot*.

vious national doctrine must be abandoned.[76] This is best demonstrated by the cases relating to the Consumer Sales Directive.[77] If the national judge were to be deprived of the directive-compliant development of the law as a legal instrument, thus putting the national Parliament at risk of incurring state liability, in the future Parliament would be best advised to refrain from implementing that law in national codifications, and then simply declare the directive to be binding national law on expiry of the implementation period. This would render obsolete the notion that directives impinge on national law to a lesser extent than regulations do, and in accordance with Article 288(3) TFEU leaves 'to the national authorities the choice of forms and methods'. Moreover, the court only temporarily impinges on the legislature's competences, given that the principle of transparency developed by the ECJ requires that an unambiguous regulation be incorporated into national law in the medium term.[78] In all three cases mentioned above, the German legislature created a legal regulation for the implementation of the ECJ's stipulations.[79] The legislature is free to correct the court's solution at any time.[80] This is separation of powers *par excellence*.

2 The national Legislature's Intention

Moreover, it can be argued that the German legislature did not intend to violate its obligation of implementation in accordance with Article 288(3) TFEU.[81] If courts base their further development of the law on the presumption of an across-the-

76 On this already Möllers (2003), n 27 above, 72.

77 Cf n 26 above.

78 *Comission* v *Kingdom of the Netherlands* (C-144/99) EU:C:2001:257 at [21] – principle of transparency in the Directive on unfair terms in consumer contracts; on this H.-W. Micklitz, 'Kommentar zu EuGH vom 10.05.2001 – (Rs C-144/99)' (2001) *Europäisches Wirtschafts- und Steuerrecht* 486, 487.

79 Following the ECJ's *Draehmpaehl* Judgment, the German legislature introduced a claim regardless of fault for damages in sec 611a of the German Civil Code, old version, Federal Law Gazette (BGBl) 2002 I, 42, 156. The legislature took the Federal Court of Justice's *Quelle* ruling as an occasion to rule out claims of the seller for use in the event of the sale of consumer goods, sec 474 subsec 5 of the German Civil Code, BT-Drucks 16/10607, 5–6. The *Tiles* ruling is implemented in sec 439 subsec 3 of the German Civil Code, BGBl 2017 I, 969–970.

80 The legislature has thus rescinded the former contrary case-law of the Federal Court of Justice. Put in explicit terms for instance in BT-Drucks 18/8486, 27. On the previous law, Federal Court of Justice, Judgment of 17 October 2012, VIII ZR 226/11, BGHZ 195, 135 at [17]–[28].

81 Federal Constitutional Court, Chamber's Order of 26 September 2011, 2 BvR 2216/06 *et al*, BVerfGE 19, 89, 101 – *s 5 of the Doorstep Selling Cancellation Act*: '[...] given that it is a law implementing a Union-wide legal act such as a directive, it may be taken into account at national level by assuming that, in case of doubt, the legislature of the Member State in question did not wish to act in

board willingness to implement, this does not contradict the separation of powers, given that courts must comply with the will of the legislature. Even if it is often not possible to explicitly identify such an across-the-board willingness to implement, it will be possible to presume its existence.[82] Otherwise, it would risk becoming liable for damages. In the *Quelle* case, the Federal Court of Justice considered the legislature's subjective intention to correctly implement the directive to be material, and consequently affirmed an unintended regulatory gap constituting an entitlement to develope the law by teleological reduction of section 439 subsection 4 of the Civil Code.[83] Since the development of the law changes the existing law to a greater extent than interpretation does, the directive-compliant development of the law should be supported by further legal arguments regarding the telos of the directive and an intention to maintain the consistency of the system.

3 The Alignment of National Argumentative Concepts with the Telos of the Directive

Finally, the telos of the directive must be considered in order to determine the boundaries of the directive-compliant development of the law. However, the reasoning in the legal literature is inadequate in some respects. One view interprets the German legal provision in the light of the directive, meaning that it considers the German provision in the context of the overall legal system which is composed of national law and of the directive.[84] This has been criticised, holding that the directive is an independent regulatory system that is however not directly applicable to everyone in Germany. Following these systematic reflections would degrade the domestic legal provisions so that they would merely become a dynamic

violation of its obligation under Article 288 sentence 3 TFEU to implement the objective of the directive within the time limit.'

82 T.M.J. Möllers and A. Möhring, 'Recht und Pflicht zur richtlinienkonformen Rechtsfortbildung bei generellen Umsetzungswillen des Gesetzgebers' (2008) *Juristenzeitung* 919, 922; H. Schulte-Noelke and C. Busch, 'Mittelbare horizontale Direktwirkung von umgesetzten EG-Richtlinien', in A. Hendrich *et al* (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag* (Munich: C H Beck, 2007) 800–803; Roth and Jopen, n 60 above, sec 13 para 39.

83 Cf n 29. Similar for Austria: Austrian Supreme Court of Justice, Judgment of 15 February 2011, 4 Ob 208/10g at [2.3.(a)] – *Zugabenverbot*.

84 M. Auer, 'Neues zu Umfang und Grenzen der richtlinienkonformen Auslegung' (2007) *Neue Juristische Wochenschrift* 1106, 1108; O. Mörsdorf, 'Verpflichtung des Käufers zur Zahlung eines Nutzungsentgelts im Rahmen der Neulieferung einer mangelhaften Kaufsache' (2008) *Zeitschrift für Wirtschaftsrecht (ZIP)* 1409, 1415.

reference to the directive in its respective version as currently propagated by the ECJ.[85] Moreover, such an interpretation would contradict the principles of the protection of legitimate expectations, especially the requirements for clarity and finality of legal provisions.[86] A second view finds the primacy of the directive sufficient to consider it as an 'objective-teleological' criterion.[87] This view is rightly criticised, given that an obligation cannot result from primacy as such.[88]

A different justification is consequently required in order to establish the relevance of the directive when interpreting national law. The ECJ has developed a two-tier concept, distinguishing between direct applicability and primacy of application. A European provision applies directly in each Member State without the concrete consent of the Member State.[89] The ECJ explains this direct applicability of EU law in the Member States with the fact that the legislative powers have been conferred on the EU from the Member States by virtue of their signing the EEC Treaty.[90] This applicability refers to all sources of EU law, including EU directives. European provisions apply directly in the Member States.[91] It is recognised that the advance effect of a directive already engages when the directive comes into force without the implementation period having yet expired. This shows that the direct applicability of a directive triggers the obligation to interpret national law in a directive-compliant manner.[92] In doctrinal terms, national law and the directive constitute a comprehensive legal system.[93] Even if the directive itself does not

85 M. Herdegen, 'Richtlininenkonforme Auslegung im Bankrecht: Schranken nach Europa- und Verfassungsrecht' (2005) *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 1921, 1928–1929; G. Schulze, 'No compensation for use in the case of a supplementary delivery: Comment on ECJ Judgment of 17 April 2008, C-404/06 – Quelle' (2008) *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 128, 131.

86 Herdegen, n 85 above, 1929; J. Schürnbrand, 'Die Grenzen richtlinienkonformer Rechtsfortbildung im Privatrecht' (2007) *Juristenzeitung* 910, 916; M. Franzen, 'Heininger und die Folgen – ein Lehrstück Gemeinschaftsprivatrecht' (2003) *Juristenzeitung* 321, 327.

87 Canaris, n 25 above, 87–89.

88 Perner, n 68 above, 108–109.

89 M. Nettesheim, in E. Grabitz *et al* (eds), *Das Recht der Europäischen Union* (60th ed, Munich: C H Beck, October 2016) art 288 TFEU para 41; W. Frenz, *Europarecht* (2nd ed, Berlin: Springer, 2016) para 9.

90 *Costa* v *E.N.E.L.* (6/64) EU:C:1964:66, 1253, 1270; W. Schroeder, in R. Streinz (ed), *EUV/AEUV* (3rd ed, Munich: C H Beck, 2018) art 288 TFEU para 36.

91 *Italian Finance Administration* v *Simmenthal II* (C-106/77) EU:C:1978:49 at [17]–[24].

92 *Inter-Environnement Wallonie* v *Région wallonne* (C-129/96) EU:C:1997:628 at [48]; *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [121]; on this Schroeder, n 90 above, paras 68–67.

93 Roth and Jopen, n 60 above, sec 13 para 32; C. Herresthal, *Rechtsfortbildung im europarechtlichen Bezugsrahmen* (Munich: C H Beck, 2006) 224.

exert any horizontal effect between citizens, it can assert its applicability given that, in accordance with Article 288(3) TFEU, it is binding on every Member State. The obligation to interpret national law teleologically in the light of the directive follows only from this. The content of the directive thus does not create explicit supremacy like primary European law. The content of the directive is, however, also not national law, as is claimed at times.[94] The content of the directive must, however, be taken into account when interpreting national law. Twenty years ago, the obligation incumbent on Member States that the directive's value judgment must be reflected in national law – even if only imperfectly – was established in doctrinal terms.[95] The image of the *Hin- und Herwandern des Blickes* (wandering back and forth between the facts and the provision) can be used for this purpose.[96] The directive-compliant development of the law does not cling to the hitherto national systematics, nor does it force the result of the directive's interpretation. In doctrinal terms, the accord between the directive and the national provision must be taken into account as the objective of interpretation, and this applies already when identifying the content of the national provision.

The teleological interpretation is two-tiered because the first step consists of defending the asserted purpose, and the second lies in developing its consequences for the interpretation of the law.[97] Thus the search for the telos is only a premise which must be substantiated by further argumentative concepts.[98] Yet, if the directive is part of the overall legal order – and directive-compliant interpretation requires one to roam between national law and the directive – then the decisive regulatory objective is no longer the national provision, but in fact the directive. Questions concerning an unintended regulatory gap, the margin of appreciation or the normative purpose must therefore include the directive in the argumentation. This results in a new interpretation of the provision, but the result

94 Cf n 84 above.

95 For instance, Möllers (2003), n 27 above, 72; concurring Roth and Jopen, n 60 above, sec 13 para 39.

96 K. Engisch, *Logische Studien zur Gesetzesanwendung* (3rd ed, Heidelberg: C. Winter, 1963) 15; T. Pfeiffer, 'Richtlinienkonforme Auslegung gegen den Wortlaut des nationalen Gesetzes – Die Quelle Folgeentscheidung des BGH' (2009) *Neue Juristische Wochenschrift* 412, 413: 'Roaming of the gaze between national law and the relevant directive law' (*Pendelblick zwischen nationalem Recht und dem maßgebenden Richtlinienrecht*).

97 M. Morlok, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel and R. Gröschner (eds), *Subsumtion* (Heidelberg: Mohr Siebeck, 2012) 204. A conclusion is the further development of the law by analogy or teleological reduction to achieve the purpose of the norm.

98 F. Müller and R. Christensen, *Juristische Methodik* (vol II, 3rd ed, Berlin: Duncker & Humblot, 2013) para 103; S.A.E. Martens, *Methodenlehre des Unionsrechts* (Tübingen: Mohr Siebeck, 2013) 457, 461.

of the ECJ's interpretation of the applicable directive is being taken into account. Following the above deliberations that national law and the directive constitute an overall legal order does not mean that the provisions of EU law must automatically be disregarded due to a lack of direct horizontal third-party effect. In fact, the *contra legem* limit continues to apply, albeit with limited scope. In consequence, however, the widespread proposition that the directive-compliant interpretation depends on the value-plan of national law is incorrect.[99] Fortunately, some of the highest courts are now – albeit still tentatively and with caution – adopting the perspective which the author had already presented twenty years ago.[100] For example, the Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) and the Federal Court of Justice write: 'The directive thus serves both as the benchmark for identifying regulatory gaps and for remedying them'.[101] And finally: 'If the legislature strives for directive-compliant implementation, this purpose – albeit possibly imperfectly realised – must be prioritised over the objective pursued by the individual provision'.[102]

4 Dogmatic Consistency of the System

The principle of directive-compliant development of the law is doctrinally[103] consistent. The Member States voted to adopt the directive in the Council and the European Parliament; there is no doubt that there is sufficient democratic legitimacy. Accepting this circumstance and the image of the three masters, it appears to be consistent to align legal doctrine and national methodology to the limits of development of the law in order to resolve the conflict. In constitutional law, higher-ranking law can force a development of the law *contra legem* as well, so that the constitutional development of the law is pertinent.[104] In terms of metho-

99 Cf n 62 above.

100 Cf n 27 above.

101 Federal Court of Justice, Judgment of 7 May 2014, IV ZR 76/11, BGHZ 201, 101 at [23] – *Revocation of life insurance* [translated from the original German]; concurring Federal Administrative Court, Judgment of 31 January 2017, 6 C 2.16, BVerwGE 157, 249 at [26] – *Price adjustment, Telecommunications Act*.

102 Federal Court of Justice, Judgment of 7 May 2014, IV ZR 76/11, BGHZ 201, 101 at [26] – *Revocation of life insurance* [translated from the original German].

103 Doctrine gives law a structure and inner coherence by postulating adherence to principles, cf Möllers, n 19 above, sec 9 para 2–8a.

104 The Federal Court of Justice developed a claim for such damages due to a violation of personality rights in contradiction to the wording and intention of the legislature. Cf Federal Constitutional Court, Order of 14 February 1973, 1 BvR 112/65, BVerfGE 34, 269 and 288 – *Soraya*.

dology, directive-compliant interpretation is less than the primacy of application and interpretation in compliance with primary law because it entails that EU law must be applied directly. The national judge must reinterpret the law of the Member State subject to the stipulations of the ECJ. This is development of the law. This view does not equate the effect of a directive to a horizontal third-party effect[105] because the *contra legem* limit and national dogmatics continue to apply.

V Finally: the Contra Legem Limit

1 The Shift of the Contra Legem Limit

Development of the law often does not fit into the doctrine of national law; the national legislature hopes to preserve certain legal institutions. Development of the law now forces a U-turn, which is a typical element of development of the law. This phenomenon is not entirely unknown in the constitutional development of the law. According to the view expressed here, historical, systematic and teleological arguments must be combined in national and European contexts under directive-compliant development of the law. The three abovementioned rulings relating to German law can be harmonised with German law. The cases may not, however, only be interpreted in the context of previous German law, but directive-compliant further development of the law requires German law to be interpreted in the context of EU directives. The wording, history, systematics and telos of German law are not decisive because it is the telos of the directive that is at stake. In the *Harz* case, the Federal Labour Court relied on the claim to damages for pain and suffering due to a violation of personality rights, since this claim has been recognised by the case-law for decades.[106] The personality right is a framework right. A contravention of legal interests is consequently contingent on balancing legal assets and interests, and this must be carried out on a case-by-case basis.[107] However, a comparison with the offences of defamation – such as negative statements regarding race, religion or party affiliation – of necessity lead to the unlaw-

105 But for instance, Franzen, n 86 above, 327; Schürnbrand, n 86 above, 913; B. Gsell, 'Zur Frage des Nutzungsersatzes bei Lieferung einer mangelhaften Kaufsache beim Verbrauchsgüterkauf' (2009) *Juristenzeitung* 522, 524.

106 Federal Constitutional Court, Order of 14 February 1973, 1 BvR 112/65, BVerfGE 34, 269 at [281]–[284] – *Soraya*.

107 W. Fikentscher and A. Heinemann, *Schuldrecht*, (11th ed, Berlin: De Gruyter, 2017) paras 1571, 1584–1590.

fulness of the discrimination.[108] Affirming a claim for damages therefore complies with the German system. As a result, the development of the law by the Federal Labour Court was permissible.[109] In the *Quelle* case, besides the legislature's intention, arguments can be made with the telos of the directive, but also with the telos of the Civil Code. As a result of the implementation of the Consumer Sales Directive in the Civil Code, the perspective is different than in the previous law. The question therefore arises as to whether the current system of the Civil Code, which includes the change of perspective, allows the remedying of an unintended regulatory gap by development of the law in conformity with the doctrine. The decisive point in the *Quelle* case was that the claims for defects could be asserted 'free of charge' in accordance with the wording and regulatory purpose of the directive, as otherwise the consumer would be deterred from asserting these rights. Such a regulatory purpose is definitely compatible with the German law of obligations. The ECJ has already provided the decisive argument here: as the buyer had never acquired the goods in a non-defective state, the right to compensation for use was ruled out because the buyer had not been enriched.[110] But if the values espoused by the Consumer Sales Directive, namely to achieve a remedy free of charge, are taken into account in the *Tiles* case, this goal would be counteracted by an objection of disproportionality.[111]

2 The Contra Legem Limit as the Boundary of Development of the Law

The ECJ stressed that the *contra legem* boundary can limit directive-compliant interpretation.[112] It has not yet been fully clarified what the *contra legem* limit actually means in the European perspective that is represented here. Three cases will be mentioned here. Firstly, if the *national legislature* deliberately *disregards*

108 C.W. Beyer and T.M.J. Möllers, 'Die Europäisierung des Arbeitsrechts' (1991) *Juristenzeitung* 24, 28; different view K. Larenz and C.-W. Canaris, *Lehrbuch des Schuldrechts, Besonderer Teil* (vol II/2, 13th ed, Munich: C H Beck, 1994) 502.

109 Beyer and Möllers, n 108 above, 28–30, Möllers (2003), n 27 above, 80.

110 *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (C-404/06) EU:C:2008:231 at [40]–[41].

111 For instance the stipulations of the Federal Constitutional Court, Order of 2 April 1974, 1 BvR 92/97 *et al*, BVerfGE 37, 67 and 81; Federal Court of Justice, Judgment of 21 December 2011, VIII ZR 70/08, BGHZ 192, 148 at [37]–[47] – *Tiles*.

112 Cf the quotation at n 12 above, *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [110]–[111]. Woods, Watson and Costa, n 2 above, 139–143: '*contra legem* principle'.

EU law, directive-compliant development of the law is not possible. The same applies if the legislature did not wish to regulate the case constellation. The 8th Senate of the Federal Court of Justice, which handed down the *Quelle* and *Tiles* rulings, has recently rejected directive-compliant development of the law. The ECJ had found that the right of German gas suppliers to change prices violated the directive's transparency requirements.[113] The 8th Senate considered rejecting development of the law because the legislature did not wish to regulate the rules on transparency itself, but instead to leave the regulation up to the EU legislature.[114]

Secondly, directive-compliant development of the law is moreover impossible if the intention to implement EU law is not reflected in national law as a value decision, and if directive-compliant development of the law would lead to a *significant infraction of the system in national law*. This is referred to as a closed system, and development of the law would modify the basic concept of the legislature. Examples include the distinction between fault-based liability and strict liability in German private law.[115] After the Federal Labour Court had recognised a claim for damages for pain and suffering due to a violation of personality rights in accordance with section 823 subsection 1 of the Civil Code in the *Harz* case,[116] the question arose as to whether the fault characteristic in section 823 subsection 1 of the Civil Code could be waived. The Federal Labour Court explicitly rejected this in the *Kalanke* case.[117] This was appropriate, and would have resulted in an impermissible development of the law *contra legem* because the Civil Code makes no provision for general strict liability.[118]

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113 Joined Cases *Schulz* v *Technische Werke Schussental* (C-359 & C-400/11) EU:C:2014:2317 at [53].

114 Federal Court of Justice, Judgment of 28 October 2015, VIII ZR 158/11, *Neue Juristische Wochenschrift* 2016, 1718, 1722 at [44] – *Price adjustment clause*; concurring Federal Constitutional Court, Chamber's Order of 17 November 2017, 2 BvR 1131/16, *Neue Juristische Wochenschrift-RechtsprechungsReport* 2018, 305 at [38] – *Price adjustment, Telecommunications Act*.

115 Möllers, n 19 above, sec 13 para 29–32.

116 Federal Labour Court, Judgment of 14 March 1989, 8 AZR 447/87, BAGE 61, 209 and 215–216 – *Harz*.

117 Federal Labour Court, Judgment of 5 March 1996, 1 AZR 590/92, BAGE 82, 211, 230 – *Kalanke* (Bremen women's quota): 'An interpretation of ss 823 and 847 of the German Civil Code [now: ss 823 and 253 subsec 1 of the German Civil Code] in conformity with Community law in accordance with which fault should be waived in cases of discrimination is not possible.'

118 Supreme Court of the German Empire, Judgment of 11 January 1912, VI 86/11, RGZ 78, 171, 172 – *Luftschiffer*; Federal Court of Justice, Judgment of 29 April 1960, VI ZR 113/59, *Neue Juristische Wochenschrift* 1960, 1345 and 1346 – *Drag lift*: negating an analogy to the Liability Act (*Haftpflichtgesetz*, HaftPflG); G. Wagner, in F.J. Säcker *et al* (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th ed, Munich: C H Beck, 2017) before sec 823 paras 25–26.

Thirdly, in the *Kolpinghuis Nijmegen* case, the ECJ found that the general principles must be considered – meaning that criminal sanctions cannot be based on a directive that has yet to be implemented.[119] In the *Adeneler* case, the ECJ addressed the prohibition of retroactive effect and the *protection of legitimate expectations* as a limit on the development of the law.[120]

V Summary

1. Under German and Austrian Law there is a strict distinction: interpretation remains within the wording of a statute, development of the law exceeds the limits of the wording. The linguistic distinction of interpretation and development of the law reflects the different justification effort. However, the ECJ does not recognise this distinction and generally uses the term 'interpretation' in a wide sense, covering both interpretation and further development of the law that goes beyond the wording.

2. In the past, the *traditional* view in Germany restricted the development of the law in conformity with the directive to the limits of the wording. However, this disregards the principle that courts have to do whatever lies within their national judicial power to interpret the law in a directive-compliant manner. Therefore, German courts have continuously corrected their previous case law based on the stipulations of the ECJ. This *modern* approach has developed the law contrary to the wording and justified this with an obligation to develop the national law in conformity with the directive.

3. Development of the law in conformity with the directive would be legally inadmissible if the legislator intentionally disregards the directive's stipulations, the result fundamentally contradicts the previous system of the national law, or legitimate expectations are substantially violated.

119 Criminal Proceedings against *Kolpinghuis Nijmegen BV* (C-80/86) EU:C:1987:431 at [13].

120 Cf n 12, *Adeneler* v *Ellinikos Organismos Galaktos* (C-212/04) EU:C:2006:443 at [110]–[111]. In a ruling on Irish law the ECJ accepted hat no retrospective application was possible at the expense of the citizen. Cf *Impact* v *Minister for Agriculture and Food and others* (C-268/06) EU:C:2008:223 at [102]–[103].