§12. JUDICIAL DEVELOPMENT OF LAW

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CONTENTS

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I. FOUNDATIONS

1. The European Union legal method is a sub-case of the general legal method. It does not constitute an *aliud* to the national legal methods,[1] but is instead characterised by its special subject in the form of Union law. This then also raises the issue in secondary Union law of whether the courts are bound strictly to the wording of the law or are free to develop and interpret it.

1. Notes on the Terminology of Union Law

2. In accordance with the preponderant use of the German language, the possible literal meaning of the wording of the law constitutes the boundary between interpretation (*Auslegung*) and development of law (*Rechtsfortbildung*).[2]

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1 For an overview of the different methods relating to the legal decision-making process in the individual European states see T. Henninger, *Europäisches Privatrecht und Methode*, 45 sqq.

2 See BVerfG *NJW* 2018, 3091 (para. 21); 2015, 3641 (para. 11); K. Larenz/C.-W. Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd edn. (Berlin: Springer, 1995) 143; F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edn. (Vienna: Springer, 2011) 441, 467 sqq.; K.F. Röhl/H.C. Röhl, *Allgemeine Rechtslehre*, 3rd edn. (Munich: Vahlen, 2008) 614 sqq.; J. Neuner, *Die Rechtsfindung contra legem*, 2nd edn. (Munich: C.H. Beck, 2005) 90 sqq. with further references; for a critical view see e.g. H. Kudlich/R. Christensen, 'Wortlautgrenze: Spekulativ oder pragmatisch?', *ARSP* 93 (2007), 128–142.

This terminological distinction is appropriate, in particular, because the wording may be the basis of a limiting function for the protection of citizens and the preservation of the competences of the Member States.[3] However, the Court of Justice does not use the term 'development of law',[4] instead following the French legal method and using the very general term *interprétation*.[5] This may reflect the fact that French is the working language of the Court. But even on its own terms, treating the terms equally is not detrimental in itself, as long as the Court attaches a distinct meaning to the wording in the context of the interpretation of the law.[6] Criticism of the Court is then essentially reduced to the allegation of imprecise use of language.

3. If the differentiating German terminology is instead preferred, it is essential to avoid false conceptual and legal conclusions. This risk is present particularly where the classical 'three-stage system'[7] of statutory interpretation, supplementation of the law and illegitimate derogation is applied to the Union legal methodology. The qualification of case law as interpretation implies only that it is within the possible literal meaning, but is not adequate proof of legitimation. The concept of the lacuna is also simply a description of the eligibility criteria for the *praeter legem* application of law and does not replace the necessary Union law evaluations. Similarly, the dogma of the prohibition of the *contra legem* administration of justice will remain deficient in terms of reasoning[8] until the relevant arguments in favour of the (strictly binding nature) of the rule of law are identified.

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3 Regarding the necessity of limitations arising from the wording in European Union law, see M. Klatt, *Theorie der Wortlautgrenze* (Baden-Baden: Nomos, 2004) 25 sq.; T. Schilling, *ZEuP* 2007, 754 (757 sqq., 768: 'status of primary law'); H. Schulte-Nölke, 'Elf Amtssprachen, ein Recht? Folgen der Mehrsprachigkeit für die Auslegung von Verbraucherschutzrichtlinien', in R. Schulze (ed.), *Auslegung europäischen Privatrechts und angeglichenen Rechts*, 143–162 (158); S. Grundmann/K. Riesenhuber, *JuS* 2001, 529 (535).

4 Exceptions: CJEU *Parva Investitsionna Banka*, EU:C:2014:2191 para. 34: 'to fill the lacuna found, by means of the decision it is to adopt and in accordance with its own evaluation of the guidance offered by those rules and principles'; also numerous opinions, see most recently AG Pitruzzella, *Ratiopharm*, EU:C:2020:57 pt. 19.

5 See only S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, 289 sqq., 394 sq., 607; J. Anweiler, *Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften*, 39; K. Walter, *Rechtsfortbildung durch den EuGH*, 55 sqq. with further references; for discussion of the French tradition of '*interprétation*' see U. Babusiaux, in this volume, §21.

6 An analysis of all CJEU decisions in 1999 has led to the conclusion that a literal interpretation of the law is the second most commonly used form of argumentation (following the referencing of previous case law); see M. Dederichs, *Die Methodik des EuGH*, 64 sqq.; id., 'Die Methodik des Gerichtshofes der Europäischen Gemeinschaften', *EuR* 2004, 345–359 (349 sqq.); regarding the significance of the wording of the law, see also C. Buck, *Auslegungsmethoden des EuGH*, 168; F. Zedler, *Mehrsprachigkeit und Methode* (Baden-Baden: Nomos, 2015) 221 sqq.

7 D.C. Göldner, *Verfassungsprinzip und Privatrechtsnorm in der verfassungskonformen Auslegung und Rechtsfortbildung* (Berlin: Duncker & Humblot, 1969) 221.

8 See e.g. C. Calliess, 'Grundlagen, Grenzen und Perspektiven europäischen Richterrechts', *NJW* 2005, 929–933 (932).

2. *Notes on the Sovereignty of Union Law*

4. In any attempt to define the prerequisites and limitations for development of secondary Union law more closely, the concept of 'autonomy' is of central importance in the first instance. Both the rationale[9] and the interpretation[10] of Union law are often characterised as 'autonomous', and it therefore seems reasonable to conclude that the definition of the options for the development of secondary Union law should also be autonomous, in other words detached from the standards of the Member States. Given both the fundamental primacy and the special *telos* of integration of Union law, this conclusion is to some extent correct, but does also occasion some qualification. First, it should be emphasised that in terms of theoretical rationale, EU law is still based, at least according to the current status of legitimation, on a national application requirement,[11] which in turn is interpreted in accordance with Member State method standards. Second, it is significant that with respect to the interpretation of Union law, there is no *lingua franca*, that the Union does not have its own 'EU language'. The Court of Justice must therefore take equal account of the official languages pursuant to Art. 55(1) TEU and make an appropriate comparison of languages[12] as part of the grammatical method of interpretation.[13] Third, in terms of substantive issues, there is also the fact that in Art. 2 TEU, the Union adopts the traditional principles of democracy and rule of law of the Member States, and references in

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9 See only CJEU *Courage*, EU:C:2001:465 para. 19; *Costa* v. *E.N.E.L.*, EU:C:1964:66 p. 593.

10 See CJEU *Ekro*, EU:C:1984:11 para. 11; most recently CJEU *Ministerio Fiscal*, EU:C:2020:495 para. 53.

11 See BVerfGE 126, 286 (302); BVerfG *NJW* 2009, 2267 (2284 sqq., para. 332 sqq.); most recently BVerfG *NJW* 2020, 1647 (para. 101 sqq.); for discussion regarding the grounds of validity of Community law, see also W. Schroeder, *Das Gemeinschaftsrechtssystem*, 229 sqq.; J. Neuner, *Privatrecht und Sozialstaat* (Munich: C.H. Beck, 1998) 174 sqq.

12 Using the term 'repeated infringement' as an example, see EGC *Trelleborg Industrie* v. *Commission*, EU:T:2013:259 para. 72 sqq.; however see also C.J.W. Baaij, 'The Significance of Legal Translation for Legal Harmonization', in id., *The Role of Legal Translation in Legal Harmonization* (Alphen aan de Rijn: Kluwer Law International, 2012) 1–24 (15 sq.): 'Between 1960 and 2010, the Court acknowledged discrepancies in only about 170 judgments. And in only about 110 judgments, the Court considered these to cause an interpretation problem. However, contrary to its stance that the interpretation of EU law requires a comparison of language versions, the Court itself did not explicitly compare language versions in more than about 245 judgments, which, when counting the judgments in the Eur-Lex website, is about 3% of all judgments between 1960 and 2010'; similarly for the period 2004–2008 F. Zedler, n. 6 above, 172 ('almost three percent').

13 See in regard to this in more recent literature e.g. A. Arnull, *The European Union and its Court of Justice*, 608 sqq.; F. Vismara, 'The Role of the Court of Justice of the European Communities in the Interpretation of Multilingual Texts', in B. Pozzo/V. Jacometti (eds.), *Multilingualism and the Harmonization of European Law* (Alphen aan de Rijn: Kluwer Law International, 2006) 61–68; K. Lenaerts/J.A. Gutiérrez-Fons, *To Say What the Law of the EU Is*, 8 sqq.; S. Seyr, *Der effet utile in der Rechtsprechung des EuGH* (Berlin: Duncker & Humblot, 2008) 33 sqq.

Art. 6(1)(1), 6(3) TEU the fundamental judicial rights contained in the Charter of Fundamental Rights of the European Union and the ECHR, which also affects the competences of the judiciary.[14]

5. The prerequisites and limitations for judicial development of the law must therefore be derived primarily from Union law, but there are similarities and interdependencies to the method standards and generally recognised principles of law in the Member States.

3. *Notes on the Distinctiveness of Union Law*

6. From a methodological perspective, Union law is characterised in particular by two distinct features: first, its multilingualism, and second, its limited regulatory powers. These two phenomena, however, are not new. Both are known challenges in the field of legal theory. For example, the problem of multilingualism is addressed in Art. 33(4) of the Vienna Convention on the Law of Treaties (VCLT) and is equally applicable to nation states with several official languages, such as, for example, Switzerland.[15] Competing legal systems and differing interpretations are also nothing new. Historically, one only needs to be reminded of the relationship of the *ius commune* to the central European tradition of statutory law.[16] A current example is the area of competing federal and state legislation pursuant to Arts. 72 and 74 of the German Basic Law. The discussion of the possibilities for development of secondary Union law is therefore not a matter of entering methodologically 'unknown territory', but can instead build on a broad body of theoretical groundwork.

II. AUTHORITY FOR JUDICIAL DEVELOPMENT OF LAW

7. Both the national courts and the Court of Justice have the authority for judicial development.[17]

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14 See also C. Höpfner/B. Rüthers, *AcP* 209 (2009), 1 (8) with further references.

15 See e.g. E.A. Kramer, *Juristische Methodenlehre*, 6th edn. (Munich: C.H. Beck, 2019) 89 sqq.; I. Schübel-Pfister, *Sprache und Gemeinschaftsrecht* (Berlin: Duncker & Humblot, 2004) 136 sqq., 150 sqq.; M. Schubarth, 'Die Bedeutung der Mehrsprachigkeit der schweizerischen Gesetze für die höchstrichterliche Rechtsprechung', *LeGes* 2001, 49–57, who sees multilingualism as a 'great chance' and 'true enrichment' and emphasises that 'language minorities are (not) ignored' (ibid., 49).

16 For further discussion, see J. Schröder, *Recht als Wissenschaft*, 2nd edn. (Munich: C.H. Beck, 2012) 19 sqq., 67 sqq., 158 sqq. with further references.

17 For further discussion of the national legal situation, see J. Neuner, *Die Rechtsfindung contra legem*, n. 2 above, 47 sqq. with further references.

1. *Judicial Power*

8. Authority for judicial development of law follows both from the traditional principles of Art. 2 TEU and from the special provision of Art. 19(1)(1)(2) TEU, according to which the Court 'shall ensure that in the interpretation and application of the Treaties the law is observed'.[18] In addition to this, reference should also be made to the intention of the founding members,[19] with an emphasis on the fact that the established case law relating to candidates for accession is part of the binding *acquis communautaire*.[20] Losing its persuasive authority, however, is the reference to the dynamic evolutionary approach to integration of primary law,[21] because the functioning of the Union now seems assured.[22]

2. *Legislative Power*

9. While the authority of the Court to develop the law is widely recognised,[23] this does not imply competence comparable to that of the legislature. As established in particular in Arts. 19 TEU, 251 sqq. TFEU, the responsibility of the Court is limited to specific and individual decision making.[24] Functionally, it is significant that the Court does not have its own right of initiative,[25] relying instead on dialogue with the parties to proceedings. Institutionally, the Court

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18 See only W.-H. Roth, 'Europäische Verfassung und europäische Methodenlehre', *RabelsZ* 75 (2011), 787–843 (821 sqq. with further references to Art. 340(2) TFEU for the matter of non-contractual liability); U. Everling, *JZ* 2000, 217 (221); J. Ukrow, *Richterliche Rechtsfortbildung durch den EuGH*, 91 sqq.; see also below at para. 49.

19 See K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin/New York: De Gruyter, 2003) 67 with further references.

20 See Statement of the Commission on 19 January 1972 regarding the membership applications of Denmark, Ireland, the Kingdom of Norway and the United Kingdom, OJ 1972 L73/3; C. Ohler, in E. Grabitz/M. Hilf/M. Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, 53rd edn. (Munich: C.H. Beck, 2014) Art. 49 TEU para. 45; A. Ott, 'Die anerkannte Rechtsfortbildung des EuGH als Teil des gemeinschaftlichen Besitzstandes (acquis communautaire)', *EuZW* 2000, 293–298 with further references.

21 See W. Hummer/W. Obwexer, *EuZW* 1997, 295 (296) with further references.

22 See also R. Streinz, 'Die Auslegung des Gemeinschaftsrechts durch den EuGH. Eine kritische Betrachtung', *ZEuS* 2004, 387–414 (412); V. Nessler, 'Richterrecht wandelt EG-Richtlinien', *RIW* 1993, 206–214 (213).

23 See only BVerfGE 142, 123 (para. 161); 126, 286 (305); 75, 223 (242 sqq.); T. Horsley, 'Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Lawmaking', *CMLR* 50 (2013), 931 (931 sqq., including critical voices).

24 See also in regard to the same T. v. Danwitz, 'Funktionsbedingungen der Rechtsprechung des Europäischen Gerichtshofes', *EuR* 2008, 769–785 (772); U. Everling, 'Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft', *RabelsZ* 50 (1986), 193–232 (208); W. Dänzer-Vanotti, *Festschrift für Ulrich Everling*, vol. I, 205 (213); specifically in distinction to the doctrine of claim preclusion C.F. Germelmann, *Die Rechtskraft von Gerichtsentscheidungen in der Europäischen Union* (Tübingen: Mohr Siebeck, 2009) 404 sqq.

25 See O. Pollicino, *German L.J.* 5 (2004), 283 (291); J. Ukrow, n. 18 above, 172.

lacks any direct democratic legitimation,[26] and organisationally, it is ill-equipped to discharge legislative duties. Law-making in the form of abstract and general provisions is therefore not within the authority of the Court.

3. *De Facto Power*

10. Despite this fundamental limitation of judicial competence to decisions on individual cases, the rulings of the Court have a very broad legal impact and constitute a de facto source of law. The citizens of the Union are guided by the judgments of the Court and expect legal certainty in the form of equal treatment of similar cases.[27] The Court must therefore formulate generalisable rules of law at a 'middle level of abstraction' between norm and case decisions.[28] To avoid disappointing the legitimate expectations of continuity among those subject to the law, *obiter dicta* are also permissible on occasion. In principle, however, the decisions of the Court relate exclusively to the disputes before it. Given this consistent limitation to specific and individual decisions, subsequent proceedings are not subject to any strict obligation to act in accordance with precedent in the sense of the *stare decisis* doctrine, since otherwise a complex legislative amendment procedure[29] would be necessary for each amendment to case law.[30] However, where national courts wish to differ from the case law of the CJEU, the obligation to refer pursuant to Art. 267(3) TFEU is brought up to date in each case.[31]

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26 See only U. Everling, *JZ* 2000, 217 (221); A. Kirsch, *Demokratie und Legitimation in der Europäischen Union* (Baden-Baden: Nomos, 2008) 74, 169 sqq.

27 There is further an obligation to state reasons; for discussion see J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993) 116 sq., 141 sqq.; W.-H. Roth, *RabelsZ* 75 (2011), 787 (838 sqq.); R. Rebhahn, *ZfPW* 2016, 281 (288 sqq.); M. Lochmann, 'Taricco I – ein Ultra-vires-Akt? Zur Rechtsfortbildung durch den EuGH', *EuR* 2019, 61 (76 sqq., with criticism of CJEU *Taricco*, EU:C:2015:555).

28 See E. Schlüchter, *Mittlerfunktion der Präjudizien* (Berlin/New York: De Gruyter, 1986) 123 sqq.; R. Schulze/U. Seif, 'Einführung', in id. (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Gemeinschaft*, 1–26 (8); S. Valta, *Grundfreiheiten im Kompetenzkonflikt* (Berlin: Duncker & Humblot, 2013) 241.

29 Regarding the Union-specific difficulties with legal amendments, see M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Berlin/New York: De Gruyter, 1999) 585 sqq.

30 See U. Seif, 'Methodenunterschiede in der europäischen Rechtsgemeinschaft oder Mittlerfunktion der Präjudizien', in G. Duttge (ed.), *Festschrift für Schlüchter* (Baden-Baden: Nomos, 1998) 133–147 (137 sq.); see also below at para. 23.

31 For discussion of the exceptions to the obligation referring to the *acte clair* doctrine (clear case; unambiguous interpretation) and the *acte éclairé* doctrine (already clarified constellation; secured case law) in detail J. Kühling/S. Drechsler, 'Alles "acte clair"? – Die Vorlage an den EuGH als Chance', *NJW* 2017, 2950 sqq.; A. Arnull, *The European Union and its Court of Justice*, 626 sqq.; J. Schmidt-Räntsch, in this volume, §20 para. 26 sqq.

III. BARRIERS TO JUDICIAL DEVELOPMENT OF LAW

11. Notwithstanding its fundamental competence with respect to development of law, the Court of Justice as a rule is bound by legislation. In addition, prejudices may also limit the Court's decision-making options.

1. Binding Legislation

12. The Court must act in accordance with the law, and this has three dimensions relating to competence, substantive and temporal issues.

a) The Competence Dimension

13. In terms of competence, it is significant that the Court is not only bound by the decisions of the Union legislature, but must also take its limited legislative competence into account.

aa) Institutional Balance

14. The principle of 'institutional balance' is the Union's legal equivalent to the classical separation of powers.[32] It defines the framework of competences of the Union's institutions, and affects both the freedoms of Union citizens and the range of influence of the Member States. For the third power, it follows from the principle of 'institutional balance' that both the discretionary powers of administrative institutions and the decision-making prerogative of the Union legislature must be respected,[33] as the latter would otherwise be left without a role.

bb) Competing Jurisdictional Competence

15. In contrast to the Member States, the EU does not have the power of 'competence-competence', the competence to rule on the extent of its own

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[32] See CJEU *Parliament* v. *Council*, EU:C:2008:257 para. 56 sq.; *Parliament* v. *Council*, EU:C:1990:217 para. 21 sqq.; for discussion of the comparability with the conventional separation of powers, see P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 8th edn. (Baden-Baden: Nomos, 2016) para. 1119 sqq.; H. Goeters, *Das institutionelle Gleichgewicht - seine Funktion und Ausgestaltung im Europäischen Gemeinschaftsrecht* (Berlin: Duncker & Humblot, 2008) 248 sqq.; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, 194 sqq.

[33] See only K.-D. Borchardt, 'Richterrecht durch den EuGH', in A. Randelzhofer/R. Scholz/D. Wilke (eds.), *Gedächtnisschrift für Grabitz* (Munich: C.H. Beck, 1995) 29–44 (41); J. Anweiler, n. 5 above, 412 sq.

jurisdiction, but is instead subject to the principle of conferral pursuant to Art. 5(1)(1), 5(2) TEU.[34] An additional limitation is imposed by the principle of subsidiarity pursuant to Art. 5(1)(2), 5(3) TEU. It is the responsibility of the Court to monitor compliance with this rule of jurisdiction by the executive and legislative branches. With respect to the development of law by means of judgments, there is dispute as to whether the Court must also respect the principle of subsidiarity.[35] Any judicial obligation is denied in particular with the argument that the European courts have exclusive competence with respect to the disputes before them.[36] This view is not convincing, since a verdict that violates the principle of subsidiarity has the same effect on the framework of competences as an analogous legislative act. While the judiciary is not a 'surrogate legislature', it applies in its specific and individual decisions an abstract standard, whose enactment is the exclusive responsibility of the Member States. In terms of judgement, too, there is no difference between the Union legislature for example defining the scope of a Directive too broadly or the Court effecting an analogous extension judicially. Overall, the European courts may therefore not establish a legal consequence that may not also be enacted as a norm by the Union legislature.[37]

b) The Substantive Dimension

16. The Court's obligation to act in accordance with Union law raises the further question of what that obligation means in detail. This subject may lie at the heart of the issue of 'interpretation', but the identification of legislative gaps depends on the method of interpretation. Rulings on the derogation of norms also presuppose an interpretation of the law. At least two brief remarks

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34 For further discussion, see BVerfG *NJW* 2020, 1647 (para. 101 sqq.); BVerfGE 126, 286 (302 sqq.); A. Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001) 149 sqq.

35 See W. Hummer/W. Obwexer, EuZW 1997, 295 (303); generally critical of the inadequate consideration of the subsidiarity principle P.M. Huber, in G. Kirchhof et al., *Europa: In Vielfalt geeint!* (Munich: C.H. Beck, 2020) 143 (154: 'Toothless Tiger').

36 See S. Kadelbach, in H. v. d. Groeben/J. Schwarze/A. Hatje (eds.), *Europäisches Unionsrecht*, 7th edn. (Baden-Baden: Nomos, 2015) Art. 5 TEU para. 32; G. Langguth, in C.-O. Lenz/K.-D. Borchardt (eds.), *EU-Verträge Kommentar*, 6th edn. (Cologne: Bundesanzeiger, 2012) Art. 5 TEU para. 28; G. Hirsch, 'Das Subsidiaritätsprinzip – Architekturprinzip oder Sprengsatz für die Europäische Union?', in R. Böttcher/G. Hueck/B. Jähnke (eds.), *Festschrift für Odersky* (Berlin/New York: De Gruyter, 1996) 197–214 (200).

37 See also M. Franzen, n. 29 above, 66, 500 sqq.; U.P. Gruber, *Methoden des internationalen Einheitsrechts* (Tübingen: Mohr Siebeck, 2004) 325; M. Schmidt, *Konkretisierung von Generalklauseln im europäischen Privatrecht* (Berlin/New York: De Gruyter, 2009) 50; S. Jung/P. Krebs, in S. Jung et al. (eds.), *Gesellschaftsrecht in Europa*, para. 166; T. Horsley, 'Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', *JCMS* 50 (2012), 267 (273 sqq.); W. Schön, *2. Festschrift für Claus-Wilhelm Canaris*, 147 (153).

are therefore required at this point, on the limits of literal meaning and on the purpose of interpretation.

aa) The Limits of Literal Meaning

17. The wording of the law is not only the starting point for interpretation;[38] it also serves as the basis for a limiting function. Particularly in cases of prohibition of reasoning by analogy, the possible literal meaning may constitute a barrier to permissible application of law. In addition, the wording of the law in very general terms represents the basis for the legitimate expectations of citizens, which must be taken into account in the judicial development of law. In Union law, this is complicated by the fact that there are multiple equivalent Treaty languages. However, this multilingualism does not lead in principle to any reduction of the limiting function of the wording.[39] Instead, the variations in meaning between the different language versions provide additional opportunities for demarcation, which must be evaluated in each individual case. Particular consideration is given to the priority of the majority of consistent language versions, the priority of the common minimum of all language versions, and also the relevance of the language version that places the least burden on the citizens of the Union.[40] Other variants are also conceivable[41] and should be considered in each case in light of the specific requirements for the protection of citizens and the Union's framework of competences as a barrier to judicial development of the law. Following case law, 'the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part' in cases of divergence between the various language versions of a Union text.[42]

bb) The Intentions of the Legislature

18. Just as in the national discussions about methods, the traditional controversy concerning the purpose of interpretation also takes place with

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38 The CJEU also proceeds accordingly; see exemplary CJEU *Levin*, EU:C:1982:105 para. 9; see also N. Colneric, *EuZA* 2008, 212 (216); Dederichs, *Die Methodik des EuGH*, 77; C. Baldus/T. Raff, in M. Gebauer/C. Teichmann, *Europäisches Privat- und Unternehmensrecht*, §3 para. 99 with further references.

39 Dissenting H. Schulte-Nölke, in R. Schulze (ed.), n. 3 above, 143 (157).

40 See J. Bengoetxea, n. 27 above, 234 sqq.; J. Anweiler, n. 5 above, 153 sqq.; K. Walter, n. 5 above, 64 sqq. with further references.

41 See e.g. T. Schilling, *ZEuP* 2007, 754 (763: 'the law whose language is accessible to the citizen must be the decisive one'); R. Ahmling, *Analogiebildung durch den EuGH im Europäischen Privatrecht*, 151 sq. ('clearest version', 'priority of the original wording').

42 CJEU *Kolachi Raj Industrial*, EU:C:2019:717 para. 88; CJEU *Borgmann*, EU:C:2004:202 para. 25 with further references; see also S. Seyr, n. 13 above, 37 sqq.

respect to Union law.[43] In secondary Union law, the intentions of the legislature are rightly considered the primary issue.[44] This is supported in particular by the principles of democracy and institutional balance. In the interest of maintaining clarity with respect to methods, a two-step process is indicated that first calls for the reconstruction of the intentions of the legislature, followed by the disclosure and weighting of the reasoning used to legitimise any deviation. In secondary Union law, research into the historical will of the legislature is simplified because of the obligation to state the reasons on which legal acts are based pursuant to Art. 296(2) TFEU and also to make the documents of the Council publicly accessible pursuant to Art. 15(3) TFEU.[45] The CJEU therefore now also increasingly takes account of legal materials.[46]

c) The Temporal Dimension

19. Laws can constitute a barrier to judicial development of law even before their entry into force.[47]

aa) Advance Effect

20. The Court is subject to an obligation to take account of laws not yet in force, derived from the principle of the fidelity of institutions to the Union Constitution.[48] Any prohibition generally only arises with the publication of the future legislative act in the Official Journal of the European Union pursuant to

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43 See G. Conway, n. 32 above, 247 sqq.; S. Grundmann/K. Riesenhuber, *JuS* 2001, 529 with further references.

44 See K. Riesenhuber, in this volume, §10 paras. 11, 32 sqq., 53; J. Neuner, *Privatrecht und Sozialstaat*, n. 11 above, 193; more recently C. Höpfner/B. Rüthers, *AcP* 209 (2009), 1 (13 sqq.); S. Martens, *Methodenlehre des Unionsrechts* (Tübingen: Mohr Siebeck, 2013) 383 sqq.; differing opinion e.g. T. Henninger, n. 1 above, 375 sq.

45 For further discussion, see M. Gellermann, in R. Streinz (ed.), *EUV/AEUV Kommentar*, 2nd edn. (Munich: C.H. Beck, 2012) Art. 15 TFEU para. 7 sqq.; B.W. Wegener, in C. Calliess/M. Ruffert (eds.), *EUV/AEUV Kommentar*, 4th edn. (Munich: C.H. Beck, 2011) Art. 15 TFEU para. 6 sqq.

46 See e.g. CJEU *IT company for software development*, EU:C:2020:395 para. 33; CJEU *ÖBB-Personenverkehr*, EU:C:2013:613 para. 43 sqq.; CJEU *Pammer*, EU:C:2010:740 para. 43; CJEU *Eschig*, EU:C:2009:538 para. 57 sq.; regarding the judicature of the CJEU see also K. Lenaerts/J.A. Gutiérrez-Fons, n. 13 above, 22 sqq.; W.-H. Roth, *RabelsZ* 75 (2011), 787 (800); W.G. Leisner, 'Die subjektiv-historische Auslegung des Gemeinschaftsrechts – Der "Wille des Gesetzgebers" in der Judikatur des EuGH', *EuR* 2007, 689–706 with various references.

47 For further discussion of the pre-effect of European Union law, see J. Neuner, in J. Hager et al. (eds.), *Kontinuität im Wandel der Rechtsordnung*, 83 (110 sq.) as well as C. Hofmann, in this volume, §15.

48 For further discussion, see J. Ukrow, n. 18 above, 213 sqq.

Art. 297(1)(3)(1) TFEU.[49] Any earlier date is ruled out in principle because until that date, there may be amendments or failure to reach a consensus. With respect to content, the prohibition does not lead to a general prohibition on judicial development, but only to an obligation not to defeat the intended legislative goal. The CJEU has already formulated such a prohibition in its decision *Inter-Environnement Wallonie* for the advance effect of Directives on national legislative proceedings.[50] This benchmark, based on the principle of proportionality, is appropriate and suitable as a general barrier to judicial development, especially considering its similarity with the obligation under international law not to defeat the object and purpose of a treaty pursuant to Art. 18 VCLT. In addition to having a prohibitive effect, future norms, as an expression of legislative consensus, can also inspire and legitimise judicial development in the positive sense of a 'source for the creation of precedent',[51] thereby also ensuring legal certainty.

bb) Retroactive Effect

21. In contrast to the advance effect, the retroactive effect is based on the application requirement for a law already in force. This is binding in principle unless annulled due to an infringement of primary law.[52] As the Court found in the *Racke* case, the principle of legal certainty generally prohibits any (substantial) retroactive effect unless it is required to fulfil the objective to be achieved and the legitimate expectations of those concerned are duly observed.[53]

2. Binding Precedent

22. The options for judicial development of law are limited not only by legislative requirements, but also by precedent.

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49 See also A. Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen* (Baden-Baden: Nomos, 1994) 141 sq.; K. Meßerschmidt, 'Begründen Richtlinienvorschläge der EG-Kommission eine Stillhaltepflicht für den deutschen Gesetzgeber?', *ZG* 1993, 11–34 (22 sqq., 28 sqq.).

50 CJEU *Inter-Environnement Wallonie*, EU:C:1997:628 paras. 35 sqq., 44 sq.; *Mangold*, EU:C:2005:709 para. 68 (irrespective of whether the national law aims to achieve transposition or not); *Adeneler*, EU:C:2006:443 para. 122 (the obligation to refrain also applies to national courts); *Angelidaki*, EU:C:2009:250 para. 206; see also A. Röthel, 'Vorwirkung von Richtlinien: viel Lärm um Selbstverständliches', *ZEuP* 2009, 34–55 (36 sqq.).

51 Expression from C.-W. Canaris, 'Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen', in J. Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen: Mohr Siebeck, 2000) 5–31 (9).

52 See also below at para. 49 sqq.

53 CJEU *Racke*, EU:C:1979:14 para. 20; also EUCST *Isabel Mendes*, EU:F:2013:35 para. 72; see also C. Latzel, 'Schutz vor rückwirkendem Recht kraft Unionsrechts', *EuR* 2015, 415 (419 sqq.) with further references.

a) The Principle of Freedom of Decision

23. In contrast to *common law*, Union law contains no strict obligation to act in accordance with precedent in the sense of a prohibition on judicial development.[54] This helps to prevent the risk of petrification of case law and allows improved legal insights to gain acceptance. As a consequence, the Court sees no fundamental impediment to judicial development in contrary or alternative judgments.[55]

b) The Principle of Protection of Legitimate Expectations

24. In general, however, the CJEU does base its decisions on its previous case law.[56] This obligation to abide by its own rules (*patere legem quam ipse fecisti*) is also required in the interests of citizens because precedents, like legislative acts, can create substantial legitimate expectations.[57] A situation of trust can be established with a single judgment, and is consolidated as settled case law develops. It grows in intensity when case law has the wide agreement of the scientific community. Protection of legitimate expectations can, however, become untenable[58] if a judgment does not embody a situation of trust because, for example, it is contradictory in itself. The same applies if there are opposing reasons in the person in question. This is the case, for example, with conduct contrary to good faith. The expectations of continuity originating in the precedents of the Court are therefore not a fixed, but rather a variable factor to be weighed against the requirement for the substantially warranted decision in itself.[59] In the rare cases to date in which the CJEU has amended its own rulings, it has done so retroactively in each case, applying them to past

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54 See also K. Langenbucher, *JbJZ* 1999, 65 (75 sq.); D. Edward, 'Richterrecht in Community Law', in R. Schulze/U. Seif (eds.), n. 28 above, 75–80 (76); J. Bengoetxea, n. 27 above, 69; F. Rosenkranz, *Die Beschränkung der Rückwirkung von Entscheidungen des Europäischen Gerichtshofs* (Tübingen: Mohr Siebeck, 2015) 21 sqq.; see further above at para. 10; regarding common law see more currently L. Alexander/E. Sherwin, *Demystifying Legal Reasoning*, 53 sqq.; F. Schauer, *Thinking Like a Lawyer*, 57 sqq.

55 For further discussion, see AG Trstenjak, *Internationaler Hilfsfonds* v. *Commission*, EU:C:2007:191 para. 84 sqq.; A. Arnull, n. 13 above, 629 sq.; G. Hager, *Rechtsmethoden in Europa* (Tübingen: Mohr Siebeck, 2009) 254 sq.; J. Ukrow, n. 18 above, 189 sq. with further references.

56 For further discussion of 'distinguishing' in the jurisdiction of the CJEU, see G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, 243 sqq., 257 sqq.

57 See also G. Hager, n. 55 above, 255 sqq.; J. Ukrow, n. 18 above, 190 sqq., 353.

58 For further discussion, see J. Neuner, 'Handelsrecht – Handelsgesetz – Grundgesetz', *ZHR* 153 (1993), 243–290 (280 sqq.).

59 See K. Langenbucher, 'Rechtsprechung mit Wirkung für die Zukunft', *JZ* 2003, 1132–1140 (1134 sqq.); id., *Die Entwicklung und Auslegung von Richterrecht* (Munich: C.H. Beck, 1996) 121 sqq.

decisions and not only to future decisions in the sense of a mere *prospective overruling*.[60]

25. Of course, the CJEU only rarely discloses changes in case law.[61] In particular, it does not sufficiently distinguish between a departure from existing jurisprudence and a first-time interpretation in which it enters 'new judicial territory' by way of (extensive) interpretation or judicial development.[62] In the view of the CJEU, in these constellations where there is 'by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed',[63] retroactive effect can only exceptionally be limited if two basic criteria are met, 'namely that those concerned acted in good faith and that there is a risk of serious difficulties.'[64] The CJEU uses the general primary law principle of legal certainty as the basis of legitimacy for such retroactive restrictions in the context of 'interpretation decisions'.[65]

26. In the case of declarations of nullity, the Court of Justice can, according to Art. 264 (2) TFEU, waive the *ex tunc* effect, which applies in principle, 'if it considers this necessary'. The Court of Justice relies on this 'in the case where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the cases concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment.'[66]

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60 See F. Bydlinski, 'Gegen die "Zeitzündertheorien" bei der Rechtsprechungsänderung nach staatlichem und europäischem Recht', *JBl.* 2001, 2–28 (26); V. Klappstein, *Die Rechtsprechungsänderung mit Wirkung für die Zukunft* (Berlin: Duncker & Humblot, 2009) 209 sqq.

61 Comp. F. Rosenkranz, 'Gerichtlicher Vertrauensschutz gegen Rechtsprechung: Das Zusammenspiel von Unions- und nationalem Recht', *ZfPW* 2016, 351–382 (357); D. Düsterhaus, 'Zwischen Rechts- und Vertrauensschutz: Die zeitlichen Wirkungen von Auslegungsurteilen des EuGH nach Artikel 267 AEUV', *EuR* 2017, 30–55 (35).

62 Comp. also W. Weiß, 'Die Einschränkung der zeitlichen Wirkungen von Vorabentscheidungen nach Art. 177 EGV', *EuR* 1995, 377–397 (386).

63 CJEU *Hein*, EU:C:2018:1018 para. 58; CJEU *Imofloresmira-Investimentos Imobiliários*, EU:C:2018:134 para. 59.

64 CJEU *Herst*, EU:C:2020:295 para. 56; CJEU *Schuch-Ghannadan*, EU:C:2019:828 para. 61 with further references; see also D. Düsterhaus, *EuR* 2017, 30–55 (39 sqq.); R. Rebhahn, in A. Fenyves/F. Kerschner/A. Vonkilch (eds.), *Klang-Kommentar zum ABGB*, 3rd edn. (Vienna: Österreich, 2014) Nach §§6 und 7 para. 17 as well as F. Rosenkranz, in this volume, §16 para. 21 sqq.

65 In detail V. Klappstein, n. 60 above, 161 sqq. with further references.

66 CJEU *Raffinerie Tirlemontoise*, EU:C:2017:105 para. 38 with further references; in detail on this as well as on the analogous legal situation in the event of a determination of the invalidity of secondary legal acts according to Art. 267(1) para. 1 lit. b) alt. 1 TFEU, F. Rosenkranz, n. 54 above, 3 sqq.

IV. THE METHODOLOGY OF JUDICIAL DEVELOPMENT OF LAW

27. Beyond the limits of the wording of the law, the traditional German legal method distinguishes the areas of *praeter* and *contra legem.*[67] Within the limits of the wording, however, justice can also be administered against the law if, where there are several possible meanings (of the wording), the meaning that does not correspond to the intended legislative purpose is chosen. The differentiation between *praeter* and *contra legem* also corresponds to a different judgment, depending on the concept of law underlying it. According to the objective theory of interpretation, the designation of an application of law as *contra legem* is associated with a normative judgment of inadmissibility, which of course depends on what the interpreter assumes to be an 'objective' interpretive result in each case.[68] If on the other hand one follows the subjective method of interpretation, the *contra legem* sector is not stigmatised, it is simply characterised by an increased need for justification. According to this view, which may be considered preferable, derogation is not illegitimate a priori, but is rather admissible and appropriate in exceptional situations.

1. The Praeter Legem *Application of Law*

28. If one first analyses the prerequisites and limitations for a *praeter legem* judicial development of secondary Union law, it is useful to have recourse to the idea of the 'lacuna', 'omission' or 'gap' as an 'involuntary omission within the positive law ... measured against the benchmark of the overall legal system in force'.[69,70] It is, however, harmless if the CJEU follows this terminology only sporadically,[71] as long as it sets out and follows the essential functional criteria transparently.

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67 See e.g. F. Bydlinski, n. 2 above, 472 sqq. with further references; according to A. Metzger, *Extra legem, intra ius*, 185 sq. with n. 116, every decision which goes against the wording of the law is to be considered a *contra legem* administration of justice, which is, however, not necessarily inadmissible.

68 See K. Larenz/C.-W. Canaris, n. 2 above, 250 sqq.

69 C.-W. Canaris, *Die Feststellung von Lücken im Gesetz*, 2nd edn. (Berlin: Duncker & Humblot, 1983) 39, 198.

70 Of another opinion, A. Flessner, 'Juristische Methode und europäisches Privatrecht', *JZ* 2002, 14–23 (21); S. Vogenauer, 'Eine gemeineuropäische Methodenlehre des Rechts – Plädoyer und Programm', *ZEuP* 2005, 234–263 (254); N. Grosche, *Rechtsfortbildung im Unionsrecht*, 109 sqq.

71 The term 'lacuna' is for example used in CJEU *Brouwer-Kaune*, EU:C:1979:156 para. 8; *Karageorgou*, EU:C:2003:604 para. 49; *Stadeco*, EU:C:2009:380 para. 35; see also AG Tanchev, *Baltic Cable*, EU:C:2019:973 pt. 34 sq.

a) The Identification of Lacunae

29. With respect to the identification of lacunae, a special feature of Union law is that it is not the legal system as a whole, but only the European partial legal system that constitutes the benchmark for comparison.[72] Following the terminology used in international uniform law, it is therefore possible to distinguish internal and external lacunae[73] and delimit the two systems accordingly.

aa) The External System

30. An involuntary omission in European law can occur from the outset only in an area within the competence of the Union and not reserved by the Member States. According to the plan of Union law, the principles of conferral and subsidiarity apply. The judiciary therefore cannot accept a lacuna if the Union legislature would not also be authorised to fill it for this case.[74]

bb) The Internal System

31. Any *praeter legem* judicial development of law also presupposes an involuntary omission in the internal system of secondary law. This finding is measured primarily from the perspective of the Union legislature and depends on the extent to which the legislation is intended to be conclusive or is as yet incomplete.[75] A special technical feature here in the area of secondary law is the instrument of the Directive. Like Regulations, Directives can also have lacunae, but this does not apply where the specific interpretation results[76] in the

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72 See K. Riesenhuber, *System und Prinzipien*, n. 19 above, 68 sqq. with further references.

73 See M. Franzen, n. 29 above, 605 sqq.; H. Fleischer, 'Europäische Methodenlehre - Stand und Perspektiven', *RabelsZ* 75 (2011), 700–729 (713 sq.); despite A. Metzger, n. 67 above, 397 sqq., this terminology seems appropriate, especially to distinguish judicial competences and to preserve the interests of Member States (as well as in comparison to the open-textured concept). It is further immaterial whether the legislator intended a '(reasonably) complete regulation', as the purpose of the term lacuna is only to convey that the legislative's role as law-making authority is not being questioned; dissenting W.-H. Roth/C. Jopen, in this volume, §13 para. 51.

74 See above para. 15.

75 To the *argumentum e contrario*, which excludes the assumption of a gap in principle because the law contains a negative provision (legal consequence L should only apply to case C_1 and not to C_2, in order to treat unequal situations unequally): CJEU *Rensen Shipbuilding*, EU:C:2020:194 para. 33; *ReFood*, EU:C:2019:443 para. 55; see also R. Ahmling, n. 41 above, 173 sq.; G. Beck, n. 56 above, 221 sq.; C. Baldus/T. Raff, in M. Gebauer/C. Teichmann, n. 38 above, §3 para. 161 sqq.; delimited from the prohibition of analogy (similarity case, but not equal treatment for reasons of legal certainty) C.-W. Canaris, n. 69 above, 47.

76 For further discussion, see I. Wolff, *Die Verteilung der Konkretisierungskompetenz für Generalklauseln in privatrechtsgestaltenden Richtlinien* (Baden-Baden: Nomos, 2002) 60 sqq.

choice of form and methods being ceded to the Member States.[77] If, for example, a Directive grants the Member States the choice between several regulatory alternatives, there is no involuntary omission on the part of Union law.

b) The Benchmarks for Filling Lacunae

32. The instruments available for filling lacunae in secondary law are essentially the principle of equality and the primary law.

aa) The Principle of Equality

33. The positive principle of equality dictates that similar cases must be treated equally, which is to say that the legal consequence L applies not only to a case C_1 regulated by law but by analogy also to an equivalent case C_2.[78] Such conclusions by analogy can be found repeatedly in the case law of the CJEU.[79] In the *Krohn* judgment,[80] however, the Court made the filling of lacunae by means of analogy conditional on a violation of higher-ranking Union law, and in particular on a violation of prohibitions on discrimination.[81] This was too restrictive. Primary law includes not only the explicit prohibitions on discrimination, but also the general principle of equality that can be derived inductively from these prohibitions and from Art. 6 TEU in conjunction with Arts. 20 and 21 ChFR, which moreover can also be counted among the essential elements of the legal concept and therefore an a priori component of the Union's legal system.[82] Today, the CJEU therefore also interprets the principle of equal treatment as a 'general principle of European Union law ... According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.'[83]

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77 See also CJEU *Sena*, EU:C:2003:68 para. 34; *Schmeink & Cofreth and Strobel*, EU:C:2000:469 para. 48 sq.; *Karageorgou*, EU:C:2003:604 para. 49; P.F. Bultmann, 'Rechtsfortbildung von EG-Richtlinien', *JZ* 2004, 1100–1106 (1103 sq.).

78 See only C.-W. Canaris, n. 69 above, 71; for further discussion regarding 'analogical reasoning from case to case' see L. Alexander/E. Sherwin, n. 54 above, 66 sqq.; F. Schauer, n. 54 above, 85 sqq.; C.R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996) 62 sqq.

79 For discussion see W. Schön, n. 37 above, 150 sqq.; C. Baldus/T. Raff, in M. Gebauer/C. Teichmann, n. 38 above, §3 para. 180 sqq.; J. Anweiler, n. 5 above, 321 sqq. with further references.

80 CJEU *Krohn*, EU:C:1985:507 paras. 14, 23.

81 See also J. Anweiler, n. 5 above, 318 sqq. with further references.

82 For discussion see C.-W. Canaris, n. 69 above, 57, 71 with further references.

83 CJEU *Akzo Nobel Chemicals Ltd.*, EU:C:2010:512 para. 54 sq. with further references (relying on Arts. 20, 21 ChFR); *ExxonMobil*, EU:C:2019:518 para. 90.

34. What might almost be regarded as a methodological object lesson in equal treatment for the purposes of reasoning by analogy is contained in the *Sturgeon*[84] decision on compensation obligations in the air transport industry.

> The CJEU first makes a distinction between cancellation and delay of a flight.[85] Building on this, it then holds that 'it does not expressly follow from the wording of Regulation No. 261/2004 that passengers whose flights are delayed have such a right' to compensation for delays (para. 41). In its subsequent reasoning, the Court states that, given the diversity of the damage and the immediate measures required, Art. 6 of the Directive on assistance in the event of delays is not conclusive (para. 64 sqq.). It also refers to recitals (Nos. 1 to 4, and in particular to the equivalence of delay and cancellation in No. 15, see para. 43 sqq., 67), while also making objective-teleological reference to a loss of time, which, 'given that it is irreversible, can be redressed only by compensation' (para. 52). Finally, the Court compares both situations before concluding (para. 60): 'Given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed.' While one might attack this decision with respect to the identification of a lacuna,[86] from the methodological perspective, it nevertheless demonstrates the classical conclusion by analogy.[87]

35. Sometimes a conclusion of similarity is drawn with earlier decisions,[88] just as individual legislative acts are compared with one another. In the *Coman* case, the Court of Justice emphasised that although no right of residence for the same-sex spouse can be derived from the Free Movement of Persons

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84 CJEU *Sturgeon*, EU:C:2009:716; regarding delay because of missed connecting flights, CJEU *Air France* v. *Folkerts*, EU:C:2013:106 para. 25 sqq.; see on this analogous case law also C. Wendehorst, 'Privatrechtsdogmatik und Verbraucherschutzrecht', in M. Auer et al. (eds.), *2. Festschrift für Claus-Wilhelm Canaris* (Munich: C.H. Beck, 2017) 681 (701).

85 '[A] flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning', para. 39 of the *Sturgeon* decision, see n. 84 above.

86 The courts of lower instance in Germany and Austria had denied claims for compensation, see paras. 16, 24 of the decision; for a critical view see also K. Riesenhuber, 'Interpretation and Judicial Development of EU Private Law – The Example of the Sturgeon-Case', *ERCL* 2010, 384–408.

87 Further example: CJEU *Davidoff*, EU:C:2009:422 para. 24 sq.: 'According to its wording, it only allows "the right-holder of a Community trade mark" ... action by the customs authorities of one or more other Member States. However, following the assimilation into Community trade marks of internationally registered trade marks, it must necessarily be accepted that, in conformity with the Community legislature's intention in adopting Regulation No 1992/2003, the application of Article 5(4) of Regulation No 1383/2003 may also be requested by the holder of an internationally registered trade mark'; on the existing legislative gap S. Jung/P. Krebs, in S. Jung et al. (eds.), *Gesellschaftsrecht in Europa*, para. 168.

88 CJEU *Russische Föderation*, EU:C:2020:262 para. 75; CJEU *Radgen*, EU:C:2016:705 para. 47 ('to refer, by analogy, to the principles established by the Court's case-law').

Directive 2004/38/EC, Art. 21(1) TFEU can be considered as a basis and the requirements may not be stricter than those according to the Free Movement Directive.[89] In another case, the Court of Justice considered whether the exception provided for in one Directive applies by analogy to another Directive.[90] This was rejected in this instance with reference to the implausible set of methods that exceptions are to be interpreted strictly.[91] But the result was also teleologically secured in several respects.[92]

36. Occasionally, the CJEU also employs an *argumentum a fortiori*, asserting that the rationale for a rule applies to an even greater extent to a case not explicitly regulated.[93] In the *Marra* decision, for example, the Court states:

> Nevertheless, since Article 23 affords the Parliament the right to submit written observations in cases concerning the validity or interpretation of an act for which it is a co-legislator, such a right must, a fortiori, be afforded to it where a reference for a preliminary ruling concerns the interpretation of an act adopted by that institution of which it is the sole author, such as the Rules of Procedure.[94]

The case law sometimes also uses an *argumentum a fortiori* with reference to earlier judgments, for example in the decision *Région Nord-Pas-de-Calais*:

> The Court of Justice has acknowledged that the European Union institutions are entitled ... to withdraw, on the ground that it is unlawful, a decision granting a benefit to its addressee. That entitlement for the European Union institutions to withdraw an unlawful decision must apply *a fortiori* where it is a question of an unlawful measure which does not create rights, such as the contested decision.[95]

37. The negative principle of equality requires treating dissimilarities differently, i.e. the legal consequence L determined for case C_1 must not be applied accordingly to the unequal case C_2. The CJEU illustrated this in the judgment in *ÖBB-Personenverkehr*:

> In that regard, it should be noted that the situation of undertakings operating in different transport sectors is not comparable since the different modes of

89 CJEU *Coman*, EU:C:2018:385 paras. 25, 39.

90 CJEU *Carbotermo and Consorzio Alisei*, EU:C:2006:308 para. 51.

91 For this missed rule of interpretation see in detail K. Riesenhuber, in this volume, §10 para. 62 sqq.; M. Herberger, *„Ausnahmen sind eng auszulegen"* (Berlin: Duncker & Humblot, 2017).

92 CJEU *Carbotermo and Consorzio Alisei*, EU:C:2006:308 paras. 55, 53 sq.

93 See also G. Beck, n. 56 above, 220 sq. with further references.

94 CJEU *Marra*, EU:C:2008:579 para. 22; see further *Rheinmühlen Düsseldorf*, EU:C:1971:100 para. 5.

95 EGC *Région Nord-Pas-de-Calais* v. *Commission*, EU:T:2011:209 para. 189 sq.

transport ... Accordingly, the grounds for exemption provided for by EU legislation applicable to other modes of transport cannot be applied by analogy to carriage by rail.[96]

38. The requirement of unequal treatment also applies if the wording of the law is too broad and lacks a necessary restriction, i.e. a restrictive interpretation is required,[97] which in German usage is termed *teleologische Reduktion* (teleological reduction).[98] Although the CJEU does not differentiate between interpretation and legal development,[99] it does reflect on restrictive interpretations of norms and often introduces them with the methodological prolegomenon: 'Pursuant to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.'[100]

39. To illustrate a teleological reduction, the *Dowling* decision on Art. 25(1) sentence 1 of the Second Directive 77/91/EEC (= Art. 29(1) sentence 1 Directive 2012/30/EU) is appropriate.

The rule reads: 'Any increase in capital must be decided upon by the general meeting.' Nevertheless, the Irish finance minister received new shares in a company during the economic crisis of 2008 without a resolution by the general meeting in return for a capital contribution. According to the CJEU, 'the protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.'[101]

40. As with other legal judgments, the principle of subsidiarity must also be observed with a teleological reduction, which means that the reasoning

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96 CJEU *ÖBB-Personenverkehr*, EU:C:2013:613 para. 47 sq.

97 See e.g. CJEU *Parliament and Denmark* v. *Commission*, EU:C:2008:176 paras. 65 sqq., 71; *Van Dalfsen* v. *Van Loon*, EU:C:1991:379 para. 19 sqq.; see further C. Buck, n. 6 above, 217 sqq. with further references.

98 However, some Advocates General already use the term 'teleological reduction', see the Opinion in cases C-118/16, EU:C:2018:146 pt. 94 (AG Kokott); C-372/16, EU:C:2017:686 pt. 81 (AG Saugmandsgaard Øe); C-177/15, EU:C:2016:474 pt. 37 (AG Bobek).

99 See already above para. 2.

100 CJEU *Kolachi Raj Industrial*, EU:C:2019:717 para. 82; CJEU *Parliament* v. *Commission*, EU:C:2008:176 para. 67 with further references.

101 CJEU *Dowling*, EU:C:2016:836 para. 50; see also S. Jung/P. Krebs, in S. Jung et al. (eds.), *Gesellschaftsrecht in Europa*, paras. 106, 175: 'Because the case, however, revalued the purpose of the norm, it is at the same time at least in the border area of judicial development contra legem.' Classification as *contra legem* would require disregard of the legislative purpose, but could be justified as an exceptional case; see below para. 52.

underpinning any judicial development that at the same time expands secondary law and limits national law must be more extensive than in the reverse case of teleological reduction of Union law.[102]

41. For the assumption of a general unwritten principle of secondary law the CJEU requires sufficient evidence.[103] The *Audiolux* ruling emphasises

> that the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain.[104]

Any indicative value can therefore only be deduced 'if those provisions are drafted so as to have binding effect ..., showing the well-defined content of the principle concerned'.[105] *In concreto*, the CJEU rejects the inductive acquisition of a general principle, primarily because the relevant provisions are 'limited to well-defined situations',[106] in other words concern themselves exclusively with a series of special cases.[107] The *Infopaq* decision[108] on the Information Society Directive 2001/29/EC, in which a general European 'work concept' was derived from various Directives, is considered a (positive) example of an inductively obtained standard.[109]

42. Where a Directive or Regulation contains no explicit prohibition on circumvention, circumvention of the law can sometimes be precluded by a restrictive or broad interpretation. Beyond the limits of the wording of the law,

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102 See K. Langenbucher, 'Bankaktienrecht unter Unsicherheit', *ZGR* 2010, 75 (84 sq.).

103 See regarding general rules of law as criteria for the filling of lacunae, R. Ahmling, n. 41 above, 168 sqq. with further references.

104 CJEU *Audiolux*, EU:C:2009:626 para. 34; for a commentary see L. Klöhn, 'Zur Frage des Bestehens eines ungeschriebenen Gleichbehandlungsgrundsatzes im europäischen Gesellschaftsrecht', *LMK* 2009, 294692; reluctantly also, AG Trstenjak, *Dominguez*, EU:C:2011:559 pt. 140.

105 CJEU *Audiolux*, EU:C:2009:626 para. 34 with further references.

106 CJEU *Audiolux*, EU:C:2009:626 para. 35.

107 See also in regard to the methodological differentiation, C.-W. Canaris, n. 69 above, 97 sqq.

108 CJEU *Infopaq International*, EU:C:2009:465 paras. 35, 37: 'Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation. ... In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.'

109 See further A. Metzger, 'Rechtsfortbildung im Richtlinienrecht: Zur judikativen Rechtsangleichung durch den EuGH im Urheberrecht', *ZEuP* 2017, 836–862 (849 sqq.); V. Roder, *Die Methodik des EuGH im Urheberrecht* (Tübingen: Mohr Siebeck, 2016) 8 sqq., 359 sqq., 496.

reasoning by analogy or teleological reduction may be considered if the parties are attempting to achieve the purpose of a business not allowed under the law by means of another that is not explicitly prohibited.[110]

bb) Primary Law

43. Just as in national law, lower-ranking law must be interpreted in the light of higher-ranking law in Union law.[111] In the hierarchical structure of Union law, primary law constitutes the *lex superior* compared to secondary law. This hierarchy of norms follows from the quasi-constitutional character of primary law, in particular the provision of Art. 288 TFEU on legislative competence at the secondary level.[112] Above all, the system concept and the authority of the parties to the Treaty dictate that secondary Union law must be interpreted in conformity with primary law to the greatest extent possible.[113]

44. The substantive provisions of primary law include all principles of the rule of law, in particular the principle of proportionality.[114] In addition, the Union's fundamental rights must also be considered in any application of law in conformity with primary law.[115]

45. With respect to the limits of the wording of the law, one can distinguish terminologically between interpretation in conformity with primary law and development in conformity with primary law.[116] However, interpretation in conformity with primary law is a subsidiary concept that may only be considered if, after exhausting the traditional *canones*, the specific intentions of the legislature cannot be reconstructed.[117] Otherwise, the court would be

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110 See B. Heiderhoff, *Europäisches Privatrecht*, 3rd edn. (Heidelberg: C.F. Müller, 2012) para. 109; J. v. Lackum, *Die Gesetzesumgehung im Europarecht* (Cologne: Carl Heymanns, 2009), especially at 196 sqq. regarding the CJEU's case law on circumvention.

111 See only CJEU *Bossen*, EU:C:2017:644 para. 19; *Wunderlich*, EU:C:2016:753 para. 26 with further references.

112 See also W. Schroeder, n. 11 above, 363 sqq.; F. Müller/R. Christensen, *Juristische Methodik II*, 3rd edn. (Berlin: Duncker & Humblot, 2012) para. 541 sq.

113 See also S. Leible/R. Domröse, in this volume, §8 para. 22 sqq.; S. Grundmann, 'Inter-Instrumental-Interpretation', *RabelsZ* 75 (2011), 882–932 (895 sqq.).

114 See CJEU *Planta Tabak-Manufaktur*, EU:C:2019:76 para. 50 sqq.; V. Trstenjak/E. Beysen, 'Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung', *EuR* 2012, 265–284; T. Tridimas, *The General Principles of EU Law*, 2nd edn. (Oxford: Oxford University Press, 2006) 136 sqq. with further references.

115 For discussion see F. Müller/R. Christensen, n. 112 above, para. 180 sqq.; R. Rebhahn, in A. Fenyves/F. Kerschner/A. Vonkilch (eds.), n. 63 above, Nach §§6 und 7 para. 66 sqq. with further references.

116 See also J. Ukrow, n. 18 above, 197.

117 See also J. Neuner, *Privatrecht und Sozialstaat*, n. 11 above, 194.

disregarding the institutional balance.[118] Similarly, if the purpose pursued by the legislature is contrary to primary law, the unlawful provision may not be reinterpreted into a provision in conformity with primary law. Instead, the Court must annul any unlawful provision, specifically by means of either preliminary rulings pursuant to Art. 267(1)(b) TFEU or an action for annulment pursuant to Art. 263(1) TFEU.[119] This procedure is objectively necessary, because otherwise potential alternatives for action on the part of the European Union legislature would be cut off and institutional balance would be completely destabilised by the judicial substitution of norms.[120] Where there are several options for interpretation, however, the option that is compatible with primary law is preferable.[121]

c) The Limits for Filling Lacunae

46. Secondary Union law is by its nature not hostile to reasoning by analogy, although it does to some extent have an exceptional character. While conclusion by analogy may not turn a rule–exception relationship upside down through the development of a general principle, two very similar special legal cases must also always be treated equally.[122] The filling of lacunae is ruled out essentially only in two cases:

aa) Prohibition Against Reasoning by Analogy

47. Particularly with respect to the protection of the fundamental rights and freedoms of European citizens, the possible literal meaning can constitute a barrier to permissible judicial development of the law. This applies in the case of provisions that prescribe a punishment, or are at least punitive in character (for example the imposition of fines by the EU Commission).[123] Over and above the principle of *nulla poena sine lege stricta*, a prohibition against reasoning

118 In this respect critical of the CJEU case law in the area of labour law R. Wank, 'Die unmittelbare Wirkung von Unionsrecht unter Privaten im Arbeitsrecht', *RdA* 2020, 1 (3 sqq.).

119 See also K. Riesenhuber, *System und Prinzipien*, n. 19 above, 63.

120 See also below at para. 51.

121 See CJEU *Commission* v. *Council*, EU:C:1983:369 para. 15; EGC *Melli Bank* v. *Council*, EU:T:2009:266 para. 76; S. Jung/P. Krebs, in S. Jung et al. (eds.), *Gesellschaftsrecht in Europa*, para. 132 with further references.

122 See C.-W. Canaris, n. 69 above, 181; T. Schilling, 'Singularia non sunt extendenda – Die Auslegung der Ausnahme in der Rechtsprechung des EuGH', *EuR* 1996, 44–57 (52 sq.) with further references.

123 See CJEU *Könecke* v. *Balm*, EU:C:1984:288 paras. 11, 13, 16; *ThyssenKrupp Nirosta* v. *Commission*, EU:C:2011:191 para. 80: 'requires that European Union rules define offences and penalties clearly'; K. Langenbucher, *JbJZ* 1999, 65 (76 sq.); K. Walter, n. 5 above, 289 sqq. with further references.

by analogy is basically indicated for burdensome interventions.[124] The CJEU therefore rejects in principle any analogous application of rules, especially in tax law, that encumber the individual citizen.[125] Likewise, according to established case law, rules of jurisdiction must be foreseeable, so 'that special rule of jurisdiction, because it derogates from the principle stated in Article 2 of Regulation No 44/2001 ..., must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation.'[126]

bb) Unfillable Lacunae

48. In addition to lacunae that may not be filled due to a prohibition against reasoning by analogy, there are also lacunae which it is not legally possible to fill.[127] The CJEU considers itself unable to fill lacunae where mere considerations of expediency are required. The same applies where there are several regulatory alternatives in conformity with primary law.[128] The CJEU then logically refers such lacunae to the national courts and legislatures[129] and to the competent Union institutions.[130]

2. The Contra Legem *Application of Law*

49. The requirement for judicial rule of law is matched by a corresponding general prohibition on judicial derogation. The CJEU is aware of this restriction and explicitly emphasises its lack of competence with respect to the correction of norms for provisions it considers unsatisfactory.[131] As with any principle,

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124 See J. Anweiler, n. 5 above, 402 sq.; K. Langenbucher, *JbJZ* 1999, 65 (77); restrictive in accordance with the 'no surprise effect approach' T. Rademacher, *EPL* 23 (2017), 319–346 (343 sqq.).

125 CJEU *Ireland* v. *Commission*, EU:C:1987:546 para. 18; see also *Ze Fu Fleischhandel and Vion Trading*, EU:C:2011:282 para. 52: 'In such a situation, if a national court were to be allowed ... to reduce a given limitation period applied hitherto down to a level capable of complying with the principle of proportionality when a limitation rule derived from European Union law and directly applicable in its legal system is in any event available to it, this would run specifically counter to the principles that, first, in order to fulfil its function of ensuring legal certainty, a limitation period must be fixed in advance ... and, secondly, any application "by analogy" of a limitation period must be sufficiently foreseeable for a person ...'.

126 CJEU *Solvay*, EU:C:2012:445 para. 21; *Painer*, EU:C:2011:798 para. 74 sq. with further references; see also C. Baldus/T. Raff, in M. Gebauer/C. Teichmann, n. 38 above, §3 para. 70 sq.

127 See C.-W. Canaris, n. 69 above, 172.

128 See W. Dänzer-Vanotti, n. 24 above, 205 (221); J. Anweiler, n. 5 above, 324 sqq.

129 CJEU *Schmeink & Cofreth and Strobel*, EU:C:2000:469 para. 48 sq.; *Stadeco*, EU:C:2009:380 para. 35; see further in *Rogers* v. *Arthenay*, EU:C:1983:131 para. 21.

130 CJEU *Met-Trans and Sagpol*, EU:C:2000:154 para. 32; *Ruckdeschel*, EU:C:1977:160 para. 13.

131 See e.g. CJEU *Interfood*, EU:C:1972:30 para. 5; further references in K.-D. Borchardt, n. 33 above, 29 (41); criticising certain decisions, S. Vogenauer, n. 5 above, 395 sqq. with further references; from a tax law perspective H. Leitl, 'Rechtsauslegung contra legem durch den

there are also exceptions with respect to the judicial rule of law.[132] Consequently, Art. 19(1)(1)(2) TEU states that the Court is required to uphold the 'law' and not merely 'legislation'.[133]

a) The Identification of Nullity

50. In Union law, the basic theoretical qualifications of judicial rule of law are superfluous to the extent that pursuant to Art. 263(1), 267(1)(b) TFEU, the CJEU has the competence to annul a provision.[134] This competence extends to all cases in which a secondary rule of law is in conflict with primary law. The benchmark is set here in particular by the constitutional principles recognised by the Member States pursuant to Art. 2 TEU[135] and the fundamental rights of the ChFR and the ECHR pursuant to Art. 6(1)(1), 6(3) TEU.

b) The Consequences of Nullity

51. In most cases, the identification of nullity has the effect of restoring competence to the Union legislature, which can then decide on legitimate alternatives to the annulled provision. Given this restoration of competence, the identification of nullity proves to be the most moderate intervention in the framework of the separation of powers. This is reflected in the subjective theory of interpretation by the fact that it demands annulment in the event of deviation

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EuGH', *UVR* 2008, 138–147; from an employment law perspective, R. Wank, 'Methodische Bemerkungen zu einigen neueren EuGH-Urteilen zum Arbeitsrecht', in H. Konzen/S. Krebber/T. Raab/B. Veit/B. Waas (eds.), *Festschrift für Birk* (Tübingen: Mohr Siebeck, 2008) 929–956.

132 For further discussion, see J. Neuner, *Die Rechtsfindung contra legem*, n. 2 above, 139 sqq.

133 Analogous wording can also be found in most other texts, cf. J. Ukrow, n. 18 above, 91 sq. with further references; criticising the interpretation of Art. 220 EC as law-making authority for the court, W. Buerstedde, *Juristische Methodik des Europäischen Gemeinschaftsrechts* (Baden-Baden: Nomos, 2006) 145, which on the one hand departs from the wording of Art. 220 EC (old version), to on the other hand be able to maintain the thesis (albeit mistaken on a national level) that judicial rulings must be traceable to the wording of the law.

134 See e.g. CJEU *Commission* v. *Parliament and Council*, EU:C:2003:42 para. 72 (violation of the obligation to state reasons); *Germany* v. *Parliament and Council*, EU:C:2000:544 para. 115 sqq. (lack of legal basis); *Schecke* v. *Hessen*, EU:C:2010:662 para. 53 sqq. (fundamental rights/data protection); the CJEU only very rarely declares a norm null and void; as a rule, the validity is confirmed, as in: *Schaible* v. *Baden-Württemberg*, EU:C:2013:661 para. 76 sqq., according to which the principle of equality before the law according to Art. 20 ChFR is not violated to the detriment of sheep farmers compared to cattle farmers, because the introduced electronic identification may be carried out gradually and only has to be checked in the future on the basis of the experience acquired. For control by the Court of Justice, see also U. Everling, 'The control of the Community legislature by the European courts', in C.-O. Lenz/W. Thieme/F. Graf v. Westphalen (eds.), *Freundesgabe für Gündisch* (Cologne: Carl Heymanns, 1999) 89–112 (92 sqq.), with criticism of the latter's relatively extensive reluctance towards the Union legislature; P.M. Huber, in G. Kirchhof et al., n. 35 above, 143 (151 sqq.).

135 See also above at para. 44, as well as A. Metzger, n. 67 above, 458 sqq. with further references.

from the intentions of the legislature. While the objective theory of interpretation may be generally successful in avoiding annulment, there is a risk that forgoing cassation may be bought at the price of the judicial definition of norms. The Court's competence with respect to filling lacunae is limited to exceptional cases in which primary law does not afford alternatives and calls for a specific ruling.

c) Justice in Individual Cases

52. Notwithstanding the constitutional standards of primary law, secondary law drafted in general terms may in very rare situations not meet the specific circumstances of a case. In such situations, annulment by the Court is ruled out, because the fault here lies 'neither in the law nor in the legislature, but in the nature of things'.[136] *Contra legem* administration of justice may therefore be considered in exceptional situations if the dispute in question deviates so glaringly from legally fixed norms that application of the rule of law would lead to unacceptable results.

V. CONCLUSION

53. In conclusion, it should be noted that the Court of Justice also has the competence to develop secondary law. Its role in this area is neither to act as an 'engine of integration', nor is it subject to the principle of judicial self-restraint. The former risks exceeding its competence through the development of an independent integration policy, while the latter risks failing to fulfil its responsibilities by disregarding the requirements of Union law. In exercising its competence, the Court also does not have to comply with any particular terminology of methods, as long as the relevant criteria are observed.[137] These include in particular the principles of horizontal and vertical separation of powers and the principle of the protection of legitimate expectations. The Court is therefore not free in its choice of method.[138] Its primary duty is instead to respect the principles of primary law in its development of secondary Union law.

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136 Aristoteles, *Die Nikomachische Ethik*, 7th edn. (Munich: Deutscher Taschenbuch Verlag, 2006) 1137b 18 sq.; see also F. Schauer, n. 54 above, 119 sq.

137 See further regarding the justified demand by J. Kühling/O. Lieth, 'Dogmatik und Pragmatik als leitende Parameter der Rechtsgewinnung im Gemeinschaftsrecht', *EuR* 2003, 371–389 (384) for a cautious transfer of national dogmatic concepts to Union law issues.

138 Of another opinion, K. Lenaerts/J.A. Gutiérrez-Fons, n. 13 above, 4: 'the ECJ is, in principle, free to choose which of the methods of interpretation at its disposal best serves the EU legal order'; with a critical attitude R. Rebhahn, *in* A. Fenyves/F. Kerschner/A. Vonkilch (eds.), n. 64 above, Nach §§6 und 7 para. 28; see also BVerfG *NJW* 2020, 1647 (para. 112); BVerfGE 142, 123 (para. 160): 'The mandate of Art. 19 I 2 TEU does not cover an obvious disregard of the interpretation methods adopted in the European legal area.'