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'Spillovers' from EU Law into National Law: (Un)intended Consequences for Private Law Relationships

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I. Introduction

The idea that European integration involves 'spillover effects' is almost as old as the EU Treaties themselves: the evolution of the Treaties from the narrow beginnings of the European Coal and Steel Community (ECSC) in 1952 was predicted by some contemporary sages to be the result of various political and economic spillovers from the operation of the ECSC, its policies and institutions.[1] While this evolutionary road was not always as smooth as some might have liked,[2] the advent of the European Economic Community and the European Atomic Energy Community Treaties in 1957 can be seen as at least in part a response to the growing economic and political interaction between states in Europe; and the subsequent evolution of EU law at the EU legislative and judicial level has often been effected by the use of Treaty bases to respond to social and economic developments precipitated by the application of the general rules of those Treaties over time.

However, the sense in which this paper proposes to address the notion of a 'spillover' is in a rather more technical, legal form. In particular, it is suggested that a true 'spillover' involves an effect from EU law upon national law which does not occur by virtue of EU law's claim to normative force, of itself, in the national legal order. Rather, spillover effects concern the impact of EU law by virtue merely of its *presence* within the national legal system, requiring the rules

[1] Such as Jean Monnet: see eg F Duchêne, *Jean Monnet: The First Statesman of Interdependence* (New York, Norton, 1994) 239.

[2] Witness the failure of the proposed European Defence Community, on which see DW Urwin, *The Community of Europe—A History of European Integration Since 1945*, 2nd edn (London, Longman, 1995) 60–68, and the complex and controversial negotiations surrounding the European Atomic Energy Community Treaty, on which see P Weilemann, *Die Anfänge der Europäischen Atomgemeinschaft: Zur Gründungsgeschichte von EURATOM 1955–1957* (Baden-Baden, Nomos, 1983).

and structures of that national system to react to EU law, albeit in areas not (intended to be) covered by EU law itself. The identification and mapping of such effects is both an interesting exercise and of potential practical significance for courts, legal advisers, individuals subject to these systems of legal rules and the Member State governments. Appreciating the likely incidence of spillover effects and their potential implications may guide national courts in the interpretation and application of the law, as well as warning the 'users' of the national legal system of such possibilities. Further, a realisation that such spillover effects may be the result of the presence of (new) EU law rules in the national legal order may have an impact upon how those EU law rules are proposed, negotiated and formulated: Member States' governments may argue more carefully in Council about the content and wording of proposed EU legislation, and lobbyists and legal representatives may use spillover implications in their efforts to influence the law-making process on the EU and national levels.

In what follows, a range of scenarios will be outlined in which EU law has an impact upon national law in one way or another (Section II). This serves as the precursor to a first, tentative attempt to identify categories of spillover effects created by EU law (Section III). The penultimate section makes a preliminary effort to identify some of the theoretical perspectives relevant to, and implications of, such spillover effects (Section IV) and then Section V provides some concluding observations.

II. Typology/Taxonomy I: The Impact of EU Law upon National Law

As a first stage in the analysis, I will provide brief coverage which attempts to distinguish the relevant scenarios involved so as to acknowledge *both* the direct impact of EU law upon national private law (where EU law has that impact by virtue of its own normative force within the national legal order) *and* the more indirect impact and/or influence which the presence of EU law has upon the operation of the national legal order outside the scope of application of EU law per se. The following sub-sections thus lay out a series of situations where EU law instruments/principles have an impact upon national private law.

A. Direct, Hierarchically Superior Addition or Replacement/ Substitution by EU law of Substantive Rights (and Duties) on Some Subject Matter of National Private Law

Various Treaty provisions (under what is now the TFEU) have been held to grant rights to and impose obligations upon private parties. These include sex

equality rights in national employment law (see *Defrenne*,[3] and what is now Article 157 TFEU (ex Article 141 EC)); and the freedom of movement for workers (see *Angonese*,[4] and what is now Article 45 TFEU (ex Article 39 EC)).[5] Similarly, a number of horizontally directly effective provisions can be found in secondary legislation, such as the recent passenger rights Regulations in air[6] and rail transport,[7] allowing the enforcement of rules by customers against transport service providers who are (in some fields increasingly) private parties (rather than state bodies à la *Foster v British Gas*)[8] for EU law purposes. Where a total harmonisation Directive—the Unfair Commercial Practices Directive (UCPD) provides a strong recent example—covers a particular field, such replacement/substitution is also clear.[9]

B. Subject Matter of EU Law is Focused Upon a Different Area, but that EU Law Rule has Clear and Direct Consequences for National Private Law by Virtue of a Direct, Superior EU Law Rule

This category is very similar to the first, although its focus is rather more coincidental than direct in the impact of EU law. Thus, there is the perhaps unexpected

[3] Case 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455.

[4] Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

[5] A similar practical effect can be achieved by the application of directly effective free movement provisions where Member States seek to impose restrictions going beyond the minimum standards laid down in EU Harmonising legislation (as discussed at sections II.C and D below), such as measures which are more protective of consumers than in the relevant Directives. For an outline in the consumer protection field, see H Unberath and A Johnston, 'The Double-Headed Approach of the ECJ concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237, 1245–52. Similarly, the application of vertically directly effective Treaty provisions, such as Art 34 TFEU, see eg Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, may prevent the application of a national law rule which might otherwise have protected a consumer defendant from a particular commercial practice.

[6] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

[7] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14.

[8] Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.

[9] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 ('Unfair Commercial Practices Directive' (UCPD)). For a vivid recent illustration with regard to German law, where a more consumer-protective national provision in the Unlauteren Wetbbewerbsgesetz (UWG) was held precluded by the UPCD, see Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs v Plus Wahrenhandelsgesellschaft* [2010] ECR I-217. Henceforth, no blanket ban could be imposed on the relevant clause (which made the participation of consumers in a lottery conditional on the purchase of goods or the use of services); rather, its unfairness had to be assessed on a case-by-case basis. The earlier Joined Cases C-261 and 299/07 *VTB-VAB and Galatea* [2009] ECR I-2949 followed the same approach, because the relevant practices in all of these cases did not appear in the exhaustive list of 31 presumptively unfair practices in Annex I to the UCPD.

example from the law of probate in the UK, concerning the status of the Bank of Ireland in being able to undertake business in England and Wales so as to prove in such probate proceedings. We can contrast the cases of *HJ Barlow*[10] and *Re Bigger*:[11] in the latter, the directly effective nature of what was then Article 52 EEC (now Article 49 TFEU) meant that the Bank of Ireland's status under Irish law was sufficient to allow it so to act on English territory.

C. EU Harmonising Legislation (Typically Directives) Requiring Member State Implementation to Achieve Results on the Same Subject Matter as National Private Law

There are, of course, numerous examples under this category,[12] covering both substantive rights and obligations and, sometimes, specific procedures for

[10] *Re HJ Barlow (Deceased)* [1933] P 184, which held that the Irish statute constituting the Bank of Ireland could not give it the power to undertake trust business in England and Wales, thus meaning that the Bank did not satisfy the Public Trustee Rules 1912.

[11] *Re Bigger (Deceased)* [1977] Fam 203; [1977] 2 All ER 644, holding that the Irish legislation could enable the Bank to act in England and Wales, thus satisfying the terms of Art 30(1)(b) of the Public Trustee Rules 1912, which had been added by the Public Trustee (Custodian Trustee) Rules 1975, SI 1975, No 1189 when the UK had joined the EEC (and which were intended to implement the obligations arising under Art 52 EEC). I am indebted to J Usher, 'Community Law and Private Law—A View from the United Kingdom' in P-C Müller-Graff (ed), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2nd edn (Baden-Baden, Nomos, 1999) 241, 254 for this example.

[12] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 ('Unfair Terms in Consumer Contracts Directive'); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 ('Distance Selling Directive'); Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 ('Doorstep Selling Directive').; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/16 ('Directive on Electronic Commerce'); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37 ('Directive on Privacy and Electronic Communications'); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23 ('TV Broadcasting Directive'); Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16 ('Distance Marketing of Financial Services Directive'); Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83 ('Timeshare Directive'); Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59 ('Package Travel Directive'); Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51 ('Consumer Injunctions Directive)'; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66 ('Consumer Credit Directive); Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 ('Consumer Sales and Guarantees Directive').

enforcement and particular remedies (damages,[13] injunctions,[14] etc). It serves no purpose to address these in detail in the text here: specific examples will be referred to in the subsequent discussion where relevant.

D. Treaty Provisions or EU Harmonising Directives Covering Private Law Subject Matter, but Having Clear Consequences for National Private Law Concerning the EU Provision's Implementation (Enforcement, Remedies, etc)

Sometimes, this heading will grow from or overlap with the preceding type of situation, since particular rights and/or duties may be laid down by a harmonising Directive, yet the Directive might not specify details concerning procedures and remedies within the national legal order (or, if it does, it may do so only partially/incompletely). This can often be seen as a reflection of the influence of subsidiarity considerations within the EU legislative process.

As a starting point, the Court's jurisprudence on what is commonly referred to as 'national procedural autonomy', but which the present author prefers to describe as the 'national legal environment' (NLE), lays down some founding principles. Where EU law provides no particular procedures or remedies, then it is for national law to ensure that EU law rights are enforced, subject to two basic conditions.[15] First, such national law must not provide for that enforcement of EU law rights on a basis less favourable than that afforded to comparable national law rights (the principle of 'equivalence' or 'non-discrimination'). And, second, those national law rules must not render the enforcement of those EU law rights impossible or excessively difficult (often, and perhaps too readily, known as the 'effectiveness' criterion).[16] While the operation of the principle

[13] Consumer Sales and Guarantees Directive (n 12).

[14] Consumer Injunctions Directive (n 12).

[15] See Case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043; Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805.

[16] Because the Court of Justice of the EU only occasionally uses the positive notion of 'effectiveness' in its judgments in this sphere: these occur most regularly and consistently in the field of Council Directive 76/207/EEC of 9 February 1976 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] OJ L39/40 (see now Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23). In that case law, the Court has referred to the need for national law to provide that compensation provided for must be such as 'to ensure that it is effective and … has a deterrent effect' (Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 28), leading to requiring the disapplication of national provisions, inter alia, capping the extent of damages recoverable, imposing fault requirements as a precondition to liability, and refusing to allow the award of interest on the damages payable. See eg Case 14/83 *Von Colson*, above; Case C-177/88 *Dekker v Stichting VJV-Centrum* [1990] ECR 3941 and Case C-271/91 *Marshall v Southampton and SW Hampshire Area Health Authority* ('*Marshall (No 2)*') [1993] ECR I-4367. Yet in other apparently comparable areas, the Court seems to have adopted a less interventionist approach. For example,

of equivalence is not without its interesting elements,[17] it is really the implications of the 'practical possibility' criterion which have been, and will be, of most significance for national private law.

Located just beyond these basic principles are those cases where the Court of Justice has found that certain specific rights laid down in a given directive, or stemming from a directly effective Treaty provision, must entail particular procedural or remedial consequences, even in the absence of any detailed provisions in the relevant directive as to what such procedural or remedial outcomes must be. Thus, in the series of German cases on so-called 'waste property' (*Schrottimmobilien*) (such as *Heininger*,[18] *Schulte*[19] and *Crailsheimer Volksbank*),[20] the Court has delivered far-reaching judgments that have made significant extensions to the practical protection afforded to consumers by the Doorstep Selling Directive,[21] including: refusing to allow the application of national time-limits to claims to cancel a contract on the ground that the requisite information (concerning the right to cancel) had not been provided to the consumer (*Heininger*); and transferring the risks associated with the contract (which had been entered into by the consumer without such information) that had to be borne by the bank which had failed to inform the consumer of the right to cancel (*Schulte* and *Crailsheimer Volksbank*). This reading of the Directive will pose various challenges for national law, under which traditional national approaches to causation and fault as a prerequisite for liability may be threatened by this (over)expansive approach to the Doorstep Selling Directive.[22]

In a similar vein, the Court's judgment in the *Simone Leitner* case addressed the types of loss recoverable by consumers exercising rights under the Package Travel Directive and found that the term 'damage' in Article 5(2) of that Directive did extend to 'compensation for non-material damage arising from the loss of enjoyment of the holiday'.[23] For those Member States in which such a head of damages would not ordinarily be recoverable,[24] this interpretive extension of the Directive again raises difficult questions under national private law; but it is by no means impossible that this approach to what is encompassed by the notion of 'damage' may spread into other areas of EU law as and when they arrive at the Court of Justice for interpretation and determination.

compare *Marshall (No 2)* with cases such as Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475 and Case C-66/95 *R v Secretary of State for Social Security ex parte Sutton* [1997] ECR I-2163.

[17] See eg Case C-261/95 *Palmisani v Istituto Nazionale della Previdenza Sociale* [1997] ECR I-4025; and see the discussion of Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 below, text at nn 25ff.

[18] Case C-481/99 *Heininger v Bayerische Hypo- und Vereinsbank* [2001] ECR I-9945.

[19] Case C-350/03 *Schulte v Bausparkasse Badenia* [2005] ECR I-9215.

[20] Case C-229/04 *Crailsheimer Volksbank v Conrads* [2005] ECR I-9273.

[21] See above n 12.

[22] See the more detailed discussion of these cases in Unberath and Johnston (n 5) 1258ff.

[23] Case C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631.

[24] And there are some where this poses no problem: see, in English law, the cases of *Jarvis v Swan Tours* [1973] QB 233; *Jackson v Horizon Holidays* [1975] 1 WLR 1468 and, in German law, § 651f(2) of the German Civil Code (referred to by AG Tizzano in his Opinion in Case C-168/00 *Leitner* (n 23) paras 27–36).

The development by the Court of Justice of the EU of various elements encouraging the private enforcement of competition law (potentially encompassing both damages and restitutionary claims)—in cases such as *Courage v Crehan* and *Manfredi*—shows a similar phenomenon in the effective enforcement of directly effective rights under a provision of the TFEU.[25] Mr Crehan was the tenant of two pubs owned by Inntrepreneur. The leases included beer ties which required him to purchase his beer from Inntrepreneur at higher prices than other public houses, reducing his profitability to such an extent that his business failed. Mr Crehan brought a claim against Inntrepreneur that the beer ties were in breach of Article 101 TFEU (ex Article 81 EC) and claimed damages for breach of competition law to recover the higher prices charged to him as a tied publican for the beer supplied.

During the course of these proceedings a reference was made by the English court to the Court of Justice of the EU asking whether, and in what circumstances, EU law would allow a person in Crehan's position, who was himself party to the illegal agreement, to recover damages. The Court held that a party to an illegal (in breach of Article 101 TFEU) agreement can rely on that agreement and claim damages from the other party, to the extent that there is no equality of bargaining power between the parties and that the party claiming the damages did not bear significant responsibility for the distortion of competition.[26] The Court also held that the full effectiveness of Article 101 would be put at risk if it were not open to any individual to claim damages for loss caused by a contract or conduct liable to restrict or distort competition.

What, then, was the impact of this judgment of the Court of Justice of the EU upon English private law concerning the question of 'illegality'? Traditionally, the basic position in English law was that neither party to an illegal contract could base any claim upon that illegal relationship—the result was that everything stood where it was at the time that the illegality was declared, and the law would not aid either party to alter that position.[27] Thus, the so-called 'illegality bar' under English law seemed to stand in the way of Crehan's claim. The Court's judgment has been taken by some to require, *as a matter of EU law*, that damages claims must be available for such breaches of EU competition law (subject to the caveats listed previously).[28] However, this interpretation is not consistent with the approach taken by the Court in the field of EU law's impact upon national remedies law (as outlined above). Rather, the Court's judgment is better understood as requiring that national law be interpreted so far as possible to use pre-existing national remedies to achieve the effective protection of the

[25] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297; Joined Cases C-295 to 298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

[26] Case C-453/99 *Courage* (n 25) para 33.

[27] See eg *Langton v Hughes* (1813) 1 M&S 593 and the general discussion in E Peel, *Treitel. The Law of Contract*, 11th edn (London, Sweet and Maxwell, 2003) ch 11.

[28] G Mäsch, 'Private Ansprüche bei Verletzung des europäischen Kartellverbots—"*Courage*" und die Folgen' [2003] *Europarecht* 825; G Cumming, '*Courage v Crehan*' (2002) 23 *European Competition Law Review* 199.

relevant EU law right. And, in English law, there is a relatively straightforward way of achieving this by interpretation: using a traditional exception to the illegality bar, any legal provision which intends to *protect* a party or interest by rendering an arrangement illegal should *not* be permitted to damage that very interest to be protected through rendering it illegal. This notion can be found in statutes protecting certain forms of tenancy/lease and the cases dealing with their application.[29] Thus, the impact was, it is submitted, far subtler than some have suggested,[30] simply requiring a contextual application of the pre-existing rules on illegality, developing the common law by way of interpretation, in response to changing forces and circumstances. Indeed, this can straightforwardly be characterised as an application of the NLE principle of equivalence or non-discrimination.

The relevance of this example for our purposes here is that the impetus for this interpretive development in English law was provided by the existence of a directly effective EU law right (here, under Article 101 TFEU) which required a remedy to be made available in national law to ensure its effective enforcement. However, if one were to take the view that the Court's judgments in *Crehan* and *Manfredi* actually indicate the existence of a right to damages as a matter of *EU* law (rather than the application of national remedies to enforce an EU law right),[31] then this is an even clearer illustration of the impact of EU law upon established doctrines of national private law—here, with regard to the availability of damages (and, indeed, other remedies such as a claim in restitution).[32]

A cognate situation arises under the provisions of the Commercial Agents Directive concerning remedies for termination of the agency relationship, and the UK's implementation of those remedies provisions leading to difficult questions of the appropriate interpretation and application of those principles in national law.[33] Under Articles 17–19 of the Directive, compensation for, or the indemnification of, the commercial agent on termination of the agency agreement were modelled respectively upon the positions under French and German law; however, detailed definition of what 'compensation' or 'indemnification' involve is not provided in the Directive. Although it is open under the UK regulations for the parties to an agency contract to choose the indemnification option, the default position is that compensation will be payable to the agent: the relevant

[29] See eg *Kiriri Cotton v Dewani* [1960] AC 192.

[30] Eg Mäsch (n 28) and Cumming (n 28).

[31] And, further, that UK law was not capable of accommodating such a claim within national law as it then stood, whether by flexible interpretation of pre-existing national law or otherwise.

[32] See eg *Scott v Brown* [1892] 2 QB 724. On the impact of EU law in the area of restitution and disavowal under EU law of much of the defence of 'passing on', see the recent (and controversial) judgments of the Court of Justice of the EU in Case C-398/09 *Lady & Kid and others v Skatteministeriet*, Judgment of 6 September 2011, and Case C-310/09 *Ministre du Budget et al v Accor*, Judgment of 15 September 2011, analysed by R Williams, '*Lady & Kid A/S and others v Skatteministeriet* and *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA*: Unjust Enrichment and the Court of Justice, a Loss of National Competence and Principle?' [2011] *British Tax Review* 631.

[33] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

UK provision is Regulation 17(6) of the Commercial Agents (Council Directive) Regulations 1993,[34] which provides simply that 'the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal'. The UK courts have faced considerable difficulty in grappling with what 'compensation' encompasses in this novel situation for national law (see *Lonsdale v Howard & Hallam Ltd* for discussion),[35] but the point here is that the primary EU law rules under the Directive concerning the commercial agency relationship also present difficult questions for national law concerning the remedies available to enforce those rights.

E. EU Harmonising Directive Covering Other Subject Matter, but Having Clear Consequences for National Private Law Concerning the Directive's Implementation (Enforcement, Remedies, Etc)

Under the Services Directive,[36] obligations are imposed concerning the provision of information by service providers (typically at the pre-contractual stage: see its Article 22, concerning information which must be provided as a matter of course to service recipients[37] and that which must only be provided on request).[38] There are various relevant points under this heading for our purposes here.[39]

First, under Article 22(4), while generally the information must be provided 'in good time before the conclusion of the contract', where there is no written

[34] SI 1993/3053, as amended by SI 1998/2868.

[35] *Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 1 WLR 2055. See, further below, text after n 103.

[36] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36. On the Directive generally, see C Barnard, 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review* 323. On some of the private law implications of the Directive, see M Schauer, 'Contract Law of the Services Directive' (2008) 4 *European Review of Contract Law* 1.

[37] These information duties refer, essentially, to the identity of the provider and to the main features of the service contract. So, the provider has to inform the recipient about his name, his legal status and form and about his registration in a public register if there is any such registration. He also has to inform the recipient about the main features of the service contract, providing information about: the main features of the service, 'if not already apparent from the context'; the price of the service, if it is predetermined by the provider for a given type of service; the general conditions and clauses; and any after-sales guarantee.

[38] The examples of these include: details of the price, if it is not predetermined for a given type of service, or to the method of calculating the price, or a sufficiently detailed estimate; a reference to the professional rules if the activities performed by the providers are part of a regulated profession, or to codes of conduct to which the provider is subject.

[39] Further potentially difficult questions arise from the fact that, with regard to information duties, the Directive is a minimum harmonisation measure, so that a Member State can go further in imposing additional information requirements upon service providers located on its territory. See Art 22(5). The implications for the service recipient's position will be played out in the field of private international law: to take one example, the applicable law might turn out not to be that of the Member State where the service provider is established (leading to complications if the applicable law was of a system which had not imposed such extra information duties). See, further, Schauer (n 36) 10–11.

contract then the information must only be made available before the service is provided. Thus, in the latter case, a recipient may need to fall back upon ordinary domestic contract law to protect his or her interests (eg in order to seek rescission for mistake; non-incorporation of non-notified clauses; contract void if no price or method for its calculation (although contrast German law, which would complete such a contract)).[40] This would also raise questions concerning which is the applicable law under the contract.

Second, one might wonder: do these requirements apply only to cross-border provision of services or also to domestic situations? The answer to this question has far-reaching implications for the impact of the Directive in national law generally (and for private law, given the information duties noted above). Arguments can be made either way. On the one hand, the goals of the Directive are: to remove of barriers to cross-border service provision (Recital 1); to facilitate freedom of establishment and freedom to provide services (Article 1(1)); and to ensure that providers and recipients of services benefit from those two freedoms.[41] Such arguments would tend to favour the restriction of these provisions to cross-border situations only. Yet, on the other hand, the wording of the Directive in no way makes explicit that its provisions are to be restricted to cross-border service provision. No reference is made to the supplier and recipient of services being in different Member States (see Articles 2(1) and 4(2) and (3)); and one could argue that the point of encouraging these freedoms is to establish a competitive market in services in the EU (Recital 2): this requires a level playing field for competitors engaging in the same market, so that such duties should apply to domestic providers too.

Third, with regard to remedies and enforcement, no specific requirements are laid down in the Directive, leaving it to Member States to ensure that the Directive is enforced. This could be achieved via regulatory enforcement (whether by some State regulator, such as the Office of Fair Trading (OFT) or similar, or by entities qualified to act to protect such interests, eg of service consumers). But it could also lead to remedies for private parties in contract law, eg rights to revoke the contract and, if loss is suffered, claim damages. This will depend upon specific domestic implementation and/or the underlying national private law rules (and whether they are found to apply to such information duties as laid down in the Services Directive).

[40] See, generally, BS Markesinis, H Unberath, and A Johnston, *The German Law of Contract: A Comparative Treatise*, 2nd edn (Oxford, Hart Publishing, 2006) ch 3.

[41] European Commission, *Handbook on Implementation of the Services Directive* (Luxembourg, Office for Official Publications of the European Communities), http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf, 6.

F. EU 'Soft law' Instruments (eg Recommendations, Guidelines) with No More Than Persuasive (Interpretive) Value but which Impinge, Directly or Indirectly, Upon National Private Law Subject Matter

So-called 'soft law' instruments, such as recommendations and guidelines, do not grant rights directly to individuals and typically have no more than persuasive (interpretive) value in EU law,[42] yet their substance may in some cases impinge, directly or indirectly, upon national private law subject matter. Three particular areas provide excellent illustrations of the potential for such soft law instruments to influence developments in national private law, although there is insufficient space here to discuss these dynamics in detail.[43]

(i) EU Company Law[44]

Commission Recommendations have been adopted on both directors' remuneration[45] and directors and board committees.[46] In the light of the recent financial crisis, in April 2009 the Commission adopted a further Recommendation complementing these two previous documents.[47] The potential for such

[42] Case 322/88 *Grimaldi v Fonds des maladies professionelles* [1989] ECR 4407: '[N]ational courts are bound to take … recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law' (19). See, generally, L Senden, *Soft Law in European Community Law* (Oxford, Hart Publishing, 2004).

[43] Although one might envisage that others will emerge. See eg, in the EU Energy Law field, the recommendations expected to emerge from the Agency for the Cooperation of Energy Regulators (ACER) may have a significant impact upon the *contractual* behaviour of various private parties in the energy field, particularly transmission system operators. See eg ACER, 'Framework Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission Network', FG-2011-G-001, 3 August 2011. For discussion of the role of ACER, see A Johnston and G Block, 'Energy' in D Vaughan and A Robertson (eds), and P Eleftheriadis (managing ed), *Law of the European Union* (looseleaf) (Oxford, Oxford University Press, 2007 onwards, EU Energy Law section, 2012) s 13, esp paras 824ff.

[44] I am grateful to Felix Steffek for his suggestions in this area.

[45] Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies 2004/913/EC [2004] OJ L385/55.

[46] Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board 2005/162/EC [2005] OJ L52/51. For its Report on Member States' application of this Recommendation, see Commission Staff Working Document SEC(2007) 1021 final. Of the 21 Member States covered by the Report, it appears that most already apply the provisions of the Recommendation to a large extent while others are pursuing reforms to do so: see Annexes 1 and especially 2 to the Report.

[47] Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies C(2009) 3177, accompanied by Communication COM(2009) 211 final. Even more recently, reforms have been proposed to modify the Capital Requirements Directives (2006/48/EC and 2006/49/EC), including bringing the remuneration policies of credit institutions within the field of prudential supervision (in a 'hard law' sense). See Commission Press Release IP/09/1120 of 13 July 2009 and Proposal for a Directive of the European Parliament and the Council amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for resecuritisations, and the supervisory review of remuneration policies SEC(2009) 974 final and SEC(2009) 975 final.

measures to influence national private law is significant, even if Member States are under no *obligation* to introduce the contents of such recommendations into national law.

(ii) EU Consumer Law[48]

A range of soft law instruments exists in the consumer law field. These concern: the arbitration of consumer disputes;[49] Commission Recommendations on out-of-court dispute settlements;[50] and Council Resolution on an EC-wide network of bodies for extra-judicial resolution of consumer disputes.[51] A recent study has shown that these measures have had a genuine impact upon the development of such mechanisms at national level in the EU, while acknowledging that gaps remain in awareness and use of the principles under these Recommendations.[52]

(iii) EU Securities Law[53]

Various Recommendations have been adopted by the Committee of European Securities Regulators (CESR)[54] (under the so-called 'Lamfalussy process')[55] and their influence on private parties' practices (even if not necessarily being cited by the courts: according to a 2010 study, there have been two citations in Germany, none in the UK).[56] There has been some inclusion by private parties of points drawn from these CESR Recommendations in their contracts inter se on a case-by-case basis; there is also the possibility that elements from such Recommendations may become relevant when seeking to determine on the facts whether or not there has been a fraud on the market, especially with regard to information disclosure by issuers of securities (yet not, it seems, affecting the definition of 'fraud' itself).[57]

[48] I am grateful to Maud Piers for her suggestions in this area.

[49] Discussed, both generally and in the Belgian context, by M Piers, 'How EU Law Affects Arbitration and the Treatment of Consumer Disputes' (2004–05) 59 *Dispute Resolution Journal* 77.

[50] Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 98/257/EC [1998] OJ L115/31, and Commission Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes 2001/310/EC [2001] OJ L109/56.

[51] Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes [2000] OJ C155/1.

[52] F Alleweldt et al, *Study on the Use of Alternative Dispute Resolution in the European Union* (Civic Consulting et al, for DG SANCO, 2009), http://ec.europa.eu/consumers/redress_cons/adr_study.pdf, esp 120ff.

[53] I am grateful to Jan Hupka for his suggestions in this area.

[54] Since replaced by the European Securities and Markets Authority, on which see www.esma.europa.eu.

[55] Launched in March 2001. See Commission, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, 15 February 2001.

[56] J Hupka, 'Neue Rechtsquellen im europäischen Kapitalmarktrecht und ihre Behandlung durch nationale Gerichte' in C Busch, C Kopp, M-R McGuire and M Zimmermann (eds), *Europäische Methodik: Konvergenz und Diskrepanz europäischen und nationalen Privatrechts: Osnabrücker Tagung 2–5 September 2009. Jahrbuch Junger Zivilrechtswissenschaftler 2009* (Stuttgart, Boorberg, 2010) 291–315.

[57] Ibid.

G. EU Law Requirements Causing Change/Adaptation in National Law (eg Via National Legal Environment Case Law), which then has Consequences for National Law Outside the EU Law Field Due to National (Constitutional) Law Principles of Equivalence/Non-Discrimination

There have been references made by national courts to the Court of Justice under Article 267 TFEU (ex Article 234 EC) involving apparently 'internal situations' with no EU law connection, yet in which EU law is relevant because national constitutional law requires equal treatment of like situations. The national court needs to ensure that the treatment of its own nationals is not less favourable than the treatment that would be accorded to a national of another Member State as a result of the application of EU law.[58] Thus, the EU law answer to an ostensibly hypothetical EU law question ('If this claimant/product were to originate in another Member State, what would EU law require?') is crucial to a national court's answer to a genuine and practical question falling squarely within national law, because of the comparability of the situation of the present claimant with that of a hypothetical 'EU law claimant'. From a parochial perspective, it is notable that the UK does not have such an explicit national constitutional requirement or principle, although one could argue that, by virtue of the House of Lords' judgment in the so-called *Belmarsh* case (named after the prison where the applicant was held), the UK does now have something akin to such a requirement, albeit only insofar as the applicant/claimant is a 'victim' of a human rights violation within the meaning of the European Convention for the protection of Human Rights and Fundamental Freedoms.[59]

Examples of this phenomenon would seem to include, in the field of free movement of goods, *TK-Heimdienst*:[60] the case concerned trade restrictive rules preventing itinerant grocery sales in one Austrian administrative district unless the trader was established in that district. These rules were applied to a trader established in another Austrian administrative district, which was a situation comparable with, for example, a trader established over the border in Germany, Italy, Slovakia, Hungary or the Czech Republic. In competition law, meanwhile, the *Bronner* case may provide an illustration: Bronner had applied to be given access to Mediaprint's distribution system but Mediaprint refused to agree to

[58] On this phenomenon, see the case note by E Spaventa on Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151 in (2000) 37 *Common Market Law Review* 1265.

[59] *A v Secretary of State for the Home Department* [2005] 2 AC 68 ('the *Belmarsh* case'). In the *Belmarsh* case, it was held that to discriminate between UK nationals and others in the use of detention without trial under national anti-terrorism legislation would amount to a disproportionate restriction upon human rights, since there was no rationale for drawing such a distinction. As cynics may have surmised, the UK response to this judgment was to make such detention possible for UK nationals as well, thus ending the discrimination.

[60] Case C-254/98 *TK-Heimdienst* (n 58).

this.[61] Had Bronner been a German claimant, then EU competition law would have applied. Had those rules required that such access be given to Bronner, then in such circumstances, even if Austrian competition law had not been in the same terms as the EU rules, the application of a constitutional equality clause in Austria would have required that similar treatment be accorded to an Austrian claimant in the same situation as Bronner. The Court of Justice has explicitly recognised this reasoning in the *SADC* case:

> 28. At the outset, it must be mentioned that the Italian Government submits that that question is inadmissible since the activities in question in the main proceedings are confined in all respects within a single Member State.
>
> 29. In that regard, it should be pointed out that a reply might none the less be useful to the national court in particular if its national law were to require, in proceedings such as those in this case, that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (see [the] order in Case C-250/03 *Mauri* [2005] ECR I-1267, paragraph 21).[62]

Clearly, the same type of impact could occur by virtue of the operation of one part of the Court's case law on the NLE:[63] the 'practical (im)possibility'/'effectiveness' criterion.[64] If, through this criterion, national law procedures/remedies are found inadequate to secure the enforcement of EU law rights, then it seems that national courts have a duty to fashion an alternative, EU law-compliant (set of) rule(s). Having done so, national courts may then have to face the argument that this outcome would provide better procedures/remedies for the enforcement of EU law rights than for comparable rights under national law. The Court's recent *Uniplex* judgment,[65] concerning the UK's implementation of the EU's Public Procurement Remedies Directive,[66] provides an illustration of how this process might work in the future. Article 1(1) of the Directive requires Member States to adopt the necessary measures to ensure that decisions taken by contracting authorities under the procurement rules may be reviewed effectively and as rapidly as possible. It does not contain any provisions setting out specific time-limits, leaving this to be dealt with at a national level. The UK's implementing rules, the Public Contracts Regulations 2006,[67] provide that:

[61] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- unde Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791. It could be argued that the case better reflects a kind of *renvoi* or conscious parallelism by the Austrian legislator (see below, s III(B)). Again, this shows that there may be overlaps between the categories developed here.

[62] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Calafiori* [2006] ECR I-2941.

[63] The 'equivalence'/'non-discrimination' principle from that case law has the opposite effect, relying as it does upon pre-existing comparable *national* law as the basis for the provision of an equivalent procedure/remedy for the enforcement of EU law rights.

[64] See above, Section II.D.

[65] Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] ECR I-817.

[66] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33 ('Remedies Directive').

[67] Public Contracts Regulations 2006, SI 2006, No 5.

> Regulation 47(7)(b) … [p]roceedings must be brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

Regulation 47(7)(b) mirrors the time-limit for commencing judicial review proceedings, in rule 54.5 of the Civil Procedure Rules (CPR),[68] subject to CPR 3.1(2)(a), which gives the Court discretion to extend time if there is good reason for doing so.

The Court of Justice held, first, that the time limit for commencing such proceedings could only start to run when the applicant knew or ought to have known of the breach of the procurement rules (rather than from the date of the breach itself).[69] Second, the Court of Justice was concerned that the Regulation 47(7)(b) created uncertainty because it seemed possible for an application to be rejected *within* the three-month period if not brought 'promptly'. Insofar as the UK rules gave a domestic court the discretion to dismiss a case within that period for lack of promptness, the Court concluded that the UK had failed to properly implement the Remedies Directive. Third, and consistently with the first finding, the national court's discretion under Regulation 47(7)(b) had to be exercised to allow an applicant to make its claim beyond the three-month limit where that was necessary to ensure that an applicant acquiring knowledge much later benefited from an equivalent limitation period.

The relevance of the *Uniplex* judgment here is that the national rules for bringing an ordinary domestic application for judicial review are in terms essentially identical to those under the UK's regulations implementing the Remedies Directive. While the accommodation of the Court's judgment in UK *procurement* law will be relatively straightforward (partly by a small change to the Regulations to be adopted by the relevant UK minister under secondary legislation, and by partly by the exercise of the judicial discretion provided for in those regulations),[70] the potential impact further afield is less straightforward. Thus, both the issue of the legality three-month time limit itself and the treatment of the 'promptness' requirement have implications for ordinary judicial review, at the very least because such cases may involve fundamental rights questions (thus raising discrimination questions under the *Belmarsh* case and more general questions about access to justice). More generally, the resulting situation may well raise questions of consistency: for example, the UK may choose

[68] For access to the most recent updated version, see www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil.

[69] This was vital to Uniplex, since it had not received a 'debriefing' letter from the NHS Business Services Authority until three weeks after it had been informed that its tender had not been accepted and only after it had requested such reasons for the decision. This time difference took Uniplex's application outside the three-month period from the original decision, yet would have placed it within three months from receipt of the debriefing letter.

[70] One might note, however, that other countries may have more difficulties in accommodating the consequences of the judgment, given that many (perhaps most?) EU Member States' systems might not contain such provisions allowing for the exercise of judicial discretion.

to respond to the judgment simply by making minor amendments to the implementing Regulations, leaving the courts to grapple with whether the logic of the Court's judgment in *Uniplex* should also be applied to ordinary applications for judicial review. This might shift the relevance of knowledge of the grounds for an application from consideration under CPR 3.1(2)(a) (concerning discretionary extension of the time period) to CPR 54.5 (concerning the point from which the time limit starts to run). In practice, the main legal result might be simply that a straightforward three-month time limit might come to apply in future, while in practice such legal shifts may cause public decision-makers to issue reasons for their decisions alongside communicating the results of the formal decisions themselves. This would circumvent the time limit extension problems, but might also impose significant extra costs on some public decision-making bodies.

The *Uniplex* case is a complex example which applies in a mainly public law field. Yet it illustrates nicely the subtle and often difficult implications for national law of EU law rules and principles, combining as it does a harmonising Directive, the application of a judgment of the Court of Justice of the EU, including its NLE case law, and the impact upon areas of national law both directly affected by the EU rule per se and indirectly having to react to the presence of those EU rules within the national legal system more generally.

III. Typology/Taxonomy II: Creation of 'Spillover'-type Situations

Uniplex provides a nice bridge from the identification of those situations where EU law has an impact upon national law and a consideration of which of those situations amount to 'spillovers' of EU law into national law (although, of course, our focus here concerns national private law in particular).[71] In the tentative classification which follows, I would suggest that the impact of *Uniplex* upon UK procurement law contains elements of:

- the direct impact of EU law (ie the proper interpretation of the Remedies Directive with regard to the 'knowledge' question);
- 'pseudo-spillover' from EU law (ie interpretation of national provisions to

[71] Other kinds of spillover could also be envisaged: for example, imagine that a trader in one Member State wishes to sell its produce to a retailer in a second Member State, and that retailer insists that those goods comply with the domestic standards laid down in that second Member State. Where that second Member State's rules go beyond the minimum standards laid down by EU legislation, then a decision by the trader in the first Member State to produce its goods to the standards required by the second Member State could be viewed as a type of 'spillover by contract'. The effect is to extend the practical scope of that second Member State's rules to cover activities undertaken in the first Member State (albeit for the purpose of supplying that second Member State's market demand). No doubt, this scenario is a very common phenomenon in practice across a range of economic sectors.

secure effective enforcement of the rights laid down in the Remedies Directive); and
- 'real' spillover effects from EU law into national law (by virtue of the questions of equivalence and consistency raised for national law on judicial review more generally).

As will become clear from the ensuing discussion, the key distinguishing feature of a true or 'real' spillover is that the influence of EU law is exercised, not directly by virtue of its own claim to normative force, but rather in a more indirect fashion by virtue of its presence within the national legal order. It is this presence which may force national law to react and/or adapt to EU law, or it may encourage actors within the national legal system to adopt EU law ideas, concepts or principles in areas of pure national law (whether via interpretive evolution or express extension).

A. 'Pseudo-Spillovers'

Why is this first category styled only as '*pseudo*-spillovers'? Because, in fact, these are situations where EU law claims to have an impact *directly* upon national private law by virtue of the normative force of its own rules and principles,[72] rather than having an impact or influence by virtue of the presence of its rules/principles alongside others in the national legal order. Such situations may appear to be a spillover effect due to the absence of express EU law provisions claiming to cover a particular subject matter or activity, but the nature of the impact of EU law in such cases is because broader, general EU law principles are combined with express provisions to create EU law's impact.

Examples which fall into this category are the Court's case law on national procedures and remedies (ie the NLE), which has been referred to above.[73] Similarly, the Court's development of Member State liability for sufficiently serious breaches of EU law (under cases such as *Francovich* and *Brasserie du Pêcheur/Factortame (No 3)*) may also be classified under this heading, such liability

[72] This chapter does not propose to involve itself in the ongoing debate concerning the theoretical basis of claims to the supremacy of EU law, nor the related sovereignty and legal pluralism discussion, nor rights-based analyses of the scope and persuasiveness of doctrines of direct effect, indirect effect and the EU case law on national remedies and procedures. Rather, their currently asserted legal implications of these lines of case law (and the ways in which national courts have applied them) are taken as given and then used in the analysis of the *impact* of EU law and its classification.

[73] Furthermore, it should be noted that the most expansive line of case law under this heading has had a tendency, over time, to become incorporated by the EU legislature in later amendments and consolidations of the Directives to which such procedures and remedies have become attached. Thus, Art 6 of Directive 76/207 (n 16) finds its analogous provision in the new Arts 17 and 18 of Directive 2006/54/EC (n 16), albeit that the new text contains significantly more far-reaching obligations on Member States. These new provisions essentially codify the case law of the Court of Justice of the EU on national procedures and remedies under the 1976 Directive (from Case 14/83 *Von Colson* (n 16) onwards) as part of the new legislative framework.

arising by virtue of principles said to be inherent in the structure of the Treaties and the goals of the EU.[74]

B. 'Real' Spillovers

Before embarking upon a more detailed examination of the true targets of this paper, there are two preliminary points which should be borne in mind. First, it is possible that the operation of EU law's impact under the 'pseudo' category could lead to 'real' spillovers. For example, the *Uniplex* case (discussed above) illustrates how the application of the case law on national procedures and remedies (a pseudo-spillover effect) might generate a situation in which *genuine* spillovers will be involved (in the form of the consistent and coherent future application of the 'offending' national law provision to purely national law situations). Second, it is also possible that there could be a cumulation of these 'real' spillover effects in national private law or that there will overlaps between these categories, where one could explain the national law measure/rule in terms of more than one type of spillover, depending upon which of the salient points of any given example the reader might choose to place the stronger emphasis.

(i) Issues Raised Concerning the Coherence/Consistency of Interpretation/ Application of Law as between EU and Purely Domestic Law Questions (ie Juxtaposition)

There are various examples in which the application of EU law within the national legal order may create questions of consistency and coherence with the rules of national law which must exist alongside those EU law rules. Indeed, the cases discussed under Section II.G above provide one strong series of examples of just this phenomenon, utilising national constitutional equality provisions both to highlight the relevant incoherence *and* to provide a legal mechanism to address the inconsistency generated by the presence of the EU law requirement within the national legal order.

Another illustration is provided by the possible impact of Article 3 of the Consumer Sales and Guarantees Directive (CSGD) upon the provisions of German law concerning the interpretation of what it would be 'unreasonable' to require of the seller in terms of extent of outlay to secure performance of a contract of sale of a specific thing.[75] Under Article 3(2) CSGD, with regard to non-conforming goods, 'the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate'; 'disproportionate' in this context means that the costs imposed on the seller are, in comparison with the alternative

[74] Joined Cases 6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357 and Joined Cases C-46 and 48/93 *Brasserie de Pêcheur v Germany and R v Secretary of State for Transport ex parte Factortame (No 3)* [1996] ECR I-1029, respectively.

[75] See Markesinis, Unberath and Johnston (n 40) ch 9, 413–18.

remedy, 'unreasonable'. How much can the seller be required to expend before that cost becomes unreasonable? The answer to this question is in its own terms not necessarily straightforward, but when it must also be juxtaposed with the position under associated provisions of national law then the answer given to the interpretation of Article 3(2) has repercussions for the consistent application of national private law more broadly. In this instance, if the contract price forms the ceiling of what can 'reasonably' be required of the seller in a case involving non-conforming goods, then under the German law of impossibility of performance (which applies at the earlier stage of whether performance is required in the first place) it would make sense to adopt a similar ceiling on such seller's costs.[76] Equally, if the contract price does *not* act as a ceiling for non-conforming goods, then it would be inconsistent to allow the seller to escape the initial obligation of performance on less stringent, impossibility-related grounds.[77] This shows that the interpretation of an apparently minor element of the CGSD may have far-reaching consequences for the German system of remedies for irregularities of performance, even though that Directive clearly did not itself target those other areas of national contract law.

Given their careful, interlocking design, code-based systems of national private law are, perhaps, most clearly susceptible to this kind of coherence-based reasoning, although there is no reason in principle why similar dissonances might not both be identified and addressed under a common law system of private law. This point is further demonstrated by considering the potential impact of the wording of Article 3(2) of the UCPD, which provides that: 'This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.' This formulation does not prevent the possibility of friction between adjacent areas and possible interactions between UCPD provisions and underlying domestic laws. We can consider two possible examples. First, there is the question of whether the provisions of the UCPD will feed into the construction of contracts when analysed under the general law of contract, even in the absence of specific private law actions by which individual consumers could enforce those rules. Will this only occur, if at all, in a de facto fashion, in that the fear or the result of regulatory enforcement will lead to such practices being avoided in future? *Or* is there greater potential for a de jure spillover via the judicial implication and/or construction of contract terms in the light of such prohibitions? Insofar as national systems would in any case imply that appropriate standards of 'professional diligence' would be part of the contract terms (Articles 2(h) and 5(a) UCPD),[78] it may be that references to the

[76] See eg U Huber, 'Die Schadenersatzhaftung des § 275 Abs 2 BGB neuer Fassung' in I Schwenzer and G Hager (eds), *Festschrift für Peter Schlechtriem zum 70 Geburtstag* (Mohr Siebeck, Tübingen, 2003) 521, 545.

[77] See eg C-W Canaris, 'Die Behandlung nicht zu vertretender Leistungshindernisse nach § 275 II Abs 2 BGB beim Stückkauf' [2004] *Juristen Zeitung* 214, 217.

[78] A 'standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.'

UCPD will be at best of a confirmatory nature, but the point is worth bearing in mind. As for the second example, one might envisage definitional overlaps and interactions between the UCPD and pre-existing national law rules: if particular behaviour by a business amounted to an aggressive or coercive practice according to the UCPD, would that raise questions about whether it might be said to amount to duress or undue influence in, for example, English contract law? This suggestion might be thought far-fetched, given the relatively restrictive doctrine of duress in English law,[79] but in the absence of specific rights for private parties to enforce the provisions of the UCPD it is not inconceivable that such a suggestion might be made by an aggrieved consumer seeking some kind of remedy in an English court.

(ii) Explicit Renvoi Techniques Employed by National Law (Typically in National Primary or Secondary Legislation, Although One Could Envisage Such a Development via Judicial Action) for the Interpretation/ Application of Domestic Law, where that Domestic Law Is Based Upon, or Parallel to, EU Law

One method for effecting such *renvoi* involves the conscious use or copying of terms of art from EU law into national law, such as the use by the UK's Civil Aviation Authority of the term 'package' from the Package Travel Directive in its own bonding scheme for travel agents selling flights. Under the Package Travel Directive, the scope of the term 'package' is significant in defining the scope of application of the measure's provisions. In *Club-Tour*[80] the Court of Justice of the European Union held that the term 'package' used in Article 2(1) of the Directive must be interpreted as including holidays organised by a travel agency at the request and according to the specifications of a consumer or a defined group of consumers.[81] Further, the term 'pre-arranged combination' of tourist services was interpreted by the Court so as to include combinations put together at the time when the contract is concluded between the travel agency and the consumer.[82] The Court followed the Opinion of Advocate General Tizzano, who, inter alia, had invoked a pro-consumer rule of interpretation: where there was doubt as to the correct interpretation of the Directive, that interpretation ought to prevail which ensured that 'the consumer has the broadest protection possible'.[83] The extensive reading of the term 'pre-arranged' to include combinations of services put together in a travel agency at the request of the consumer means that such travel agencies have to take out insurance to cover the risk of insolvency, as required under Article 7 of the Directive.

In the English case of *The Queen (on the application of The Association of*

[79] See, generally, Peel (n 27) paras 10-002–10-011.

[80] Case C-400/00 *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido* [2002] ECR I-4051.

[81] Ibid, para 16.

[82] Ibid, para 20.

[83] Ibid, Opinion of AG Tizzano, para 21.

British Travel Agents Ltd) (ABTA) v Civil Aviation Authority (CAA), The Secretary of State for Trade and Industry[84] the courts had to address the interpretation of the Package Travel Directive. This was mainly due to the fact the UK's regime for issuing Air Travel Organisers' Licences (ATOLs)[85] was amended in 2003 to include a definition of 'package' which was intended to align with that drawn from the Package Travel Directive and used in the UK's rules implementing that Directive.[86] Indeed, the very motivation for aligning the two regimes was to prevent travel agents from evading the indemnity provisions (which would apply under both the 1992 Regulations and the 1995 ATOL Regulations) by various devices relating to splitting or unbundling the contracts relating to different aspects of a holiday. This provides a fascinating illustration of the spillover effects that originate from an EU directive but which may encourage the (re)alignment of purely national rules to ensure coherence with the national implementation of the EU rules.[87] The Court of Appeal in the *ABTA* case cited extensively from the Court of Justice's judgment in *Club-Tour* and pointed out that there was nothing in the UK's implementing regulations to prevent UK courts from following the expansive approach taken in *Club-Tour*:[88] regulation 2(1)(c)(ii) of the 1992 Regulations specifically provides that 'the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions … shall not of itself cause it to be treated as other than pre-arranged', and while this did not imply that such requests will *always* lead to pre-arrangement, it is clear that this does not prevent the Regulations from being applied in accordance with *Club-Tour*.[89]

In the UK, the careful formulation of the reformed competition law regime provides a strong, broad illustration of this approach, both in general in the structure of the competition rules (essentially copying wording and concepts directly from Articles 101 and 102 TFEU into the prohibitions laid down in Chapters I and II (respectively) of the Competition Act 1998 (CA 1998)) *and* in the use of a dedicated *renvoi* clause in section 60 of the 1998 Act (the 'governing principles clause').[90] In essence, section 60 seeks to ensure that, so far as possible and taking into account any relevant differences, the interpretation and appli-

[84] *The Queen (on the application of The Association of British Travel Agents Ltd) (ABTA) v Civil Aviation Authority (CAA), The Secretary of State for Trade and Industry* [2006] EWHC 13 (QB (Admin)) [2006] ACD 49; overturned by the Court of Appeal in *R (on the application of ABTA) v Civil Aviation Authority* [2006] EWCA Civ 1299 ('the *ABTA* case').

[85] The Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995, SI 1995, no 1054.

[86] The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992, no 3288.

[87] On this, see further, A Johnston and H Unberath, 'Law At, To or From the Centre? The European Court of Justice and the Harmonisation of Private Law in the European Union' in F Cafaggi (ed), *The Europeanization of Private Law. Collected Courses of the Academy of European Law* (Oxford University Press, Oxford, 2006) ch 5.

[88] *ABTA* (n 84) para 20, per Chadwick LJ.

[89] Compare, however, DTI, *The Package Travel Regulations—Question and Answer Guidance for Organisers and Retailers* (November 2006; available at www.dti.gov.uk/files/file35634.pdf) Question 5.

[90] For discussion, see generally PJ Slot and A Johnston, *An Introduction to Competition Law* (Oxford, Hart Publishing, 2006).

cation of UK competition law follows the same approach as that taken under EU competition law.

Various other cases which have reached the Court of Justice of the EU via the Article 267 TFEU procedure have involved similar questions.[91] Yet it should be pointed out that, in closely interconnected areas of law, the use of the *renvoi* technique may also bring with it rather more unexpected questions of interpretation. The example used here may well be a scenario which is a hybrid of the 'juxtaposition' and '*renvoi*' types: for it, we return to the operation of section 60 of the UK's CA 1998 and the relationship between competition law and the common law, specifically covenants in restraint of trade. To provide the context, we must note that it is possible that cartels and other anti-competitive collusive practices with a European dimension may find themselves subject to investigation by both the Commission and the OFT simultaneously. In such a situation, conflicts may arise between these authorities' competences to apply competition law. According to the Court, such a conflict must be resolved by reference to the rule that the Community law competence takes priority. This principle has now been enshrined in Article 3(2) of Regulation 1/2003/EC.[92] On the basis of its Article 3(1), when applying the UK's CA 1998 Chapter I prohibition to agreements, concerted practices and decisions of trade associations that affect trade between Member States, the OFT and the UK courts (including the Competition Appeal Tribunal) are obliged to apply Article 101 TFEU (ex Article 81 EC) as well. This may not lead to a UK-level decision or judgment that prohibits an agreement which does not breach Article 101(1) TFEU or which can be accepted on the basis of Article 81(3) TFEU. Similarly, agreements that satisfy the criteria laid down by the various EU block exemption regulations cannot be prohibited at UK level. The starting point for this priority rule is clear, but its application in practice can sometimes be trickier.

The differences between UK and EU competition law in this area are, in practice, usually of no real importance. The substantive norms involved are essentially the same. The national courts will always have jurisdiction in such cases and the OFT is usually competent to deal with such anti-competitive practices. Nevertheless, there are situations in which the division of competences does matter. For example, there are subtle differences between the EC and UK systems concerning exemptions from the prohibition on anti-competitive agreements, alongside the possibility of criminal law sanctions for breach of the UK provisions in the form of the cartel offence under sections 188–91 of the Enterprise Act 2002.[93]

[91] See eg Joined Cases C-297/88 and 197/89 *Dzodzi v Belgium* [1990] ECR I-3763, Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Onder-nemingen Amsterdam 2* [1997] ECR I-4161, and the discussion (and criticism) by S Lefèvre, 'The Interpretation of Community Law by the Court of Justice in Areas of National Competence' (2004) 29 *European Law Review* 501.

[92] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('Regulation 1/2003/EC').

[93] See, further, Slot and Johnston (n 90) 230–34 and the references cited therein.

To these differences, one should add the parallel existence of the common law doctrine that has long permitted the courts to intervene to declare void any contract or covenant that operates in restraint of trade.[94] This raises an important definitional question of whether or not the common law in this area counts as national 'competition law' for the purposes of Regulation 1/2003/EC. This is a further potential illustration of the impact that the application and enforcement of primary EU Treaty rules (as implemented by EU regulations) may have upon the application of long-established national private law rules.

This question of the interface between restrictive covenants and EU competition law[95] was considered in the *Days Medical* case,[96] although only obiter as the facts which led to the litigation arose before the entry into force of the relevant EU Regulation. The court in *Days Medical* took the view that the common law rules could not be applied to invalidate a restrictive contract or covenant where that agreement fell within the scope of what was then Article 81 EC (now Article 101 TFEU) but was not prohibited by it, either because it fell within a relevant exemption therefrom or else was not found to have an anti-competitive effect.[97]

However, the story does not end there. The provisions of Regulation 1/2003/EC may have a further influence upon national law when we consider the interpretation of the relationship between *national* competition law and restrictive covenants. Under section 60 CA 1998, the UK authorities and courts are required to interpret national competition law consistently with the EU provisions unless there are relevant differences between the two systems.[98] This provision intends to secure the consistent application of the substance of the UK rules, in line with the EU competition law provisions: in this manner, the compliance burden imposed upon undertakings should be reduced, since any uncertainty as to whether particular conduct falls under EU or UK competition law should not produce any change in the substance of the applicable competition law provisions.

True, there is a marked absence of any UK law equivalent of the exclusionary rule in Article 3(2) of Regulation 1/2003/EC, which might suggest that no similar

[94] On which see, generally, JD Heydon, *The Restraint of Trade* Doctrine, 3rd edn (Sydney, LexisNexisButterworths, 2009); M Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto, Carswell, 1986); RP Whish, *Competition Law*, 3rd edn (London, Butterworths, 993) ch 2; Peel (n 27) paras 11-062–11-109; and C Goodwill, A Kammerling and C Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (London, Sweet and Maxwell, 2010).

[95] MC Lucey, 'Unforeseen Consequences of Article 3 of EU Regulation 1/2003' (2006) 27 *European Competition Law Review* 558.

[96] *Days Medical Ltd v Pihsiang Machinery Co Ltd* [2004] EWHC 44 (Comm), [2004] 1 All ER (Comm) 991.

[97] See Peel (n 27) paras 11-062ff on covenants, English law and its relationship with EU and UK competition law.

[98] See s 60(1) CA 1998: 'The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned) questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.' On this, see Slot and Johnston (n 90) 32–35 and the references cited therein.

exclusionary effect should be found under national competition law—ie the fact that a particular practice falls within the scope of the rules of the CA 1998 should not preclude the possibility that other, stricter national law could claim to cover the same practice. However, any approach to this question must, it is submitted, also consider the reliance by UK competition law under the CA 1998 upon the 'parallel exemption' regime under its own Chapter I prohibition.[99] This regime is one of the more ingenious and practically significant devices introduced by the CA 1998, providing a mechanism which allows UK law to take advantage of the substance of EU block exemption regulations even in situations falling wholly under UK law. Under section 10 CA 1998, a so-called 'parallel exemption' (section 10(3) CA 1998) from the application of the UK competition rules is afforded to undertakings by allowing any agreement that benefits from an EC block exemption regulation also to rely upon its substance to be exempted from the Chapter I prohibition under UK law (namely where it does not have an effect upon trade between Member States). Following the recent reforms to the UK regime for vertical agreements,[100] section 10 CA 1998 assumes even greater importance, allowing undertakings to rely upon important block exemption regulations concerning vertical restraints (Regulation 2790/1999/EC) and technology transfer agreements (Regulation 772/2004/EC).

This regime may have consequences for the interpretation of the relationship between the UK's CA 1998 and the established law on restrictive covenants: if the restrictive covenants rules were still applicable to an agreement that could benefit from the parallel application of, say, the block exemption Regulation for vertical agreements, then this would undermine the clear objective of the UK regime to secure substantively identical results under UK and EU competition law, thus easing the compliance burden for undertakings. It is thus submitted that it is arguable that in these circumstances, it would not be inappropriate to apply a version of the exclusionary rule laid down by Regulation 1/2003/EC so as to prevent the application of the common law on restrictive covenants where that would render void an agreement that would otherwise have been acceptable under the parallel exemption regime. In this way, the existence of the exclusionary principle in EU competition law has an impact upon the proper interpretation of the national UK competition law regime, and upon the relationship between that national regime and pre-existing rules of national private law. In the terms adopted in this paper, this result is achieved by a combination of the *renvoi*-type of spillover with a version of the juxtaposition type.

Typically, the general idea here is to ensure consistency of interpretation and application by national courts and authorities of provisions which are essentially identical in nature (EU and national law). From the Court's perspective, this is important to avoid later divergences in the interpretation and application of EU law. For example, if a national system were to develop its own interpreta-

[99] See Slot and Johnston (n 90) 65–66.
[100] On which see ibid, 97–100.

tion of an EU law concept but in the context of purely *national* law provisions and proceedings, then it would be highly likely to apply the same interpretation to the application of EU law, as and when the latter issue arose.[101] This could lead to fragmentation in the application of EU law. From the national system's perspective, meanwhile, such co-ordinated interpretation is desirable to ease the regulatory and compliance burdens on those parties enforcing and/or subject to these prima facie identical rules.

At the same time, it should be emphasised that such spillovers will not necessarily cause different national legal rules and principles within an otherwise harmonised field to coalesce, let alone secure a coherent framework of private law at the domestic level.[102] For example, compare the results reached in the English and French case law on 'compensation' for commercial agents on termination of the agency relationship. The UK's implementation of the remedies provisions of the Commercial Agents Directive may provide an example of *renvoi* under this heading, albeit one that uses terms included in an EU Directive even though that Directive itself does not define or specify them. Thus the *actual* reference made by the UK rules might better be seen as a de facto reliance upon the national systems from which the two concepts of compensation (France) and indemnification (Germany) in the agency field were drawn. Under those circumstances, the relevant spillover effect is derived from the national system whose provisions inspired the formulation adopted in the Directive, before being transmitted into the legal systems of other Member States by the medium of the Directive itself. The UK case law up to *Lonsdale v Howard & Hallam Ltd*[103] could easily be read in this light, with some courts[104] drawing directly upon the French practice in their attempt to determine what 'compensation' should cover in this context. The appellate judges in *Lonsdale*, however, took their own distinctive domestic approach to the question (perhaps surprisingly without pursuing a reference to the Court of Justice on the question).[105] In the Court of Appeal, Moore-Bick LJ (with whose judgment the other members of the court concurred) was careful to start the analysis by ascertaining the precise nature of the damage that the agent suffers on termination of the agency relationship. The identifiable loss is said to be 'the loss of the agency business and goodwill that the agent would have

[101] The Art 267 TFEU case law is replete with references to this overriding concern. See eg Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECR 1191 and Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

[102] On this topic, see J Smits, 'The Complexity of Transnational Law: Coherence and Fragmentation of Private Law', TICOM Working Paper 2010/01, available at http://ssrn.com/abstract=1538187.

[103] *Lonsdale v Howard & Hallam Ltd*, Court of Appeal: [2006] EWCA Civ 63, [2006] 1 WLR 1281, [2006] ICR 584; House of Lords: [2007] UKHL 32, [2007] 1 WLR 2055.

[104] See *King v T Tunnock Ltd*, 2000 SC 424; although it should be noted that other courts preferred to examine all the circumstances in an attempt to make a 'fair and proportionate award': *Tigana Ltd v Decoro Ltd* [2003] Eu LR 189.

[105] Or perhaps not: Case C-456/04 *Honyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-02879 afforded some discretion to Member States concerning the method for calculating compensation in this context; see, further, Lord Hoffmann's judgment in the House of Lords in *Lonsdale* (n 103) paras 16–20.

enjoyed had [that] relationship not come to an end; damages should accordingly reflect the value of this business at the date of termination'.[106] This method was preferred to that adopted in the French practice, because the French approach failed to make any 'reasoned attempt to ascertain the true extent of the agent's loss'.[107] In the House of Lords, Lord Hoffmann (with whom the rest of their Lordships concurred) delivered a speech in which the Court of Appeal's judgment was upheld and in which further detailed guidance was given on the assessment of such agent compensation on termination of the agency (the minutiae of which need not concern us here). The firm approach taken by the House of Lords here in developing a distinctively domestic approach[108] to this question ensures that the practical results for agents in different Member States may well differ significantly.[109]

(iii) Extension (Again, Typically via Primary/Secondary National Legislation, Although Not Necessarily Limited To This) of EU Law-mandated Protection or Rights to Cover under National Law Persons/Areas Beyond What Is Required by EU Law

This idea of extending the application of EU rules to cover purely national law situations has also been called 'supererogatory implementation';[110] it has often been relied upon to try to secure coherence between the EU rules and the pre-existing national private law, and thus of private law as a whole within the domestic legal order.[111] Various examples of this approach can be found in Member State 'over'-implementation of the EU's harmonisation directives:

[106] B Parker, 'Compensating Commercial Agents' (2006) 65 *Cambridge Law Journal* 502, 503. Moore-Bick LJ's method for identifying the value of this business seems to view the agent's entitlement as a share of the goodwill in the business built up by his labours, which he saw as 'a species of property'. This method has myriad knock-on consequences, including rendering any reliance upon notions of mitigation of loss irrelevant, and relegating various questions as to the quality of the agent's performance and the duration of the agency to no more than aspects of the assessment of the valuation of the agency business. Assessment of this value at the date of the termination of the agency relationship has the other difficulty of leading to negligible compensation where the agency involved is of a fixed-term nature and has expired due to the passage of time (ibid, 504). Moore-Bick LJ's judgment here seems to focus upon 'preventing the unjust enrichment of the principal through its receiving the goodwill generated by the agent "free of charge"' (ibid, 504).

[107] Ibid, 503.

[108] And one which has not met with universal approval: see eg, for criticism, L Macgregor, 'Compensation for Commercial Agents: An End to Plucking Figures from the Air?' (2008) 12 *Edinburgh Law Review* 86; and, for cautious praise, A McGee, 'Termination of a Commercial Agency—The Agent's Rights' [2011] *Journal of Business Law* 782.

[109] A point emphasised by both Macgregor (n 108) and S Saintier, 'Final Guidelines on Compensation of Commercial Agents' (2008) 124 *Law Quarterly Review* 31; and note the words of Staughton LJ in the earlier cases of *Page v Combined Shipping and Trading Co* [1997] 3 All ER 656, 660: the two purposes of the Commercial Agents Directive are 'first[, the] harmonisation of the law of Member States … so that people compete … on a level playing field … the second objective is one which appears to be a motive of social policy, that commercial agents are a down-trodden race, and need and should be afforded protection against their principals'.

[110] S Leible, 'The Approach to European Law in Domestic Legislation' (2003) 4 *German Law Journal* 1266, 1268.

[111] See Smits (n 102) 9.

eg the Hungarian Civil Code now contains provisions concerning the protection of 'micro'-sized enterprises under the implementation of EU Directives concerning consumer law. This scope of protection goes beyond the concept of the 'consumer' laid down in the relevant EU Directives. The scenario at issue in the *Leur-Bloem* case[112] is another illustration of such extension of an EU law set of rules (there, concerning the tax treatment of cross-border mergers) to cover internal situations (purely domestic mergers) as well.

A subtly different illustration is provided by the UCPD and national implementation concerning enforcement and remedies going beyond what the UCPD *requires*. Under Article 11(1) of that Directive, it is clear that provision must be made either for 'legitimately interested' persons or organisations to take legal action against unfair commercial practices *or* for them to be able to bring such practices before an administrative authority which must be able either to decide on such complaints or itself to initiate legal proceedings against those practices. In many Member States, this has meant that implementation has been limited to *regulatory* oversight and enforcement (eg, in the UK, by the OFT); yet national systems are able to adopt a right for private parties to enforce the UCPD rules via essentially private law(-style) remedies. This option has already been taken up in Ireland,[113] and the UK government is currently consulting the English and Scottish Law Commissions on whether to take advantage of this option, in the interests of increasing the clarity and effectiveness of these rules in their protection of consumers from such unfair commercial practices.[114]

Tentatively,[115] a further possible illustration of such an extension may be taking place in the influence of the EU's Community Trade Mark Regulation[116] (CTM Regulation) on the interpretation of the EU's Trade Marks Directive and,[117] particularly interestingly for our purposes, associated *national* practices used in the application and enforcement of the substantive rules under that Directive. Given the *national* basis for intellectual property (IP) rights (prior to

[112] Case C-28/95 *Leur-Bloem* (n 91).

[113] See s 74(2) of the Consumer Protection Act 2007.

[114] See Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices: A Joint Consultation Paper* (Law Commission Consultation Paper No 199, Scottish Law Commission Discussion Paper No 149, April 2011). See, most recently, Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Commission Consultation Paper No 332, Scottish Law Commission Discussion Paper No 226, 28 March 2012).

[115] I am deeply indebted to Graeme Dinwoodie for our discussions on this nascent, but fascinating, topic, which he has discussed (in his remarks at the conference 'European Methods and Interactions in the Field of Intellectual Property Law' (Jesus College, Oxford, 7–8 January 2012)) under the heading of 'vertical coherence' between EU and (sometimes harmonised) national law in the trade marks field.

[116] Originally, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1993] OJ L11/1; now codified in Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) [2009] OJ L78/1.

[117] Originally, First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1, now codified in Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version) [2008] OJ L299/25.

the advent of the CTM Regulation and the Regulation on the Community Design Right),[118] the internal market harmonisation programme focused on addressing trade barriers created by difference in national *laws*; the Regulations, by contrast, aimed to address trade restrictions which were the result of different national *rights* (whose territorial basis might per se compartmentalise national markets) by creating *uniform*, EU-level regimes for EU trade mark and design rights. However, the coexistence of these two sets of rules has implications for both the harmonisation Directives and for the national regimes charged with their application. Clearly, where the same wording is used for a concept under both the harmonisation Directives and the Regulation, there is at least prima facie a strong argument for the Court of Justice adopting a common interpretation of such terms to ensure coherence in the use of the term across those instruments.[119] However, the recent Opinion delivered by Advocate General Bot in the *IP Translator* case shows that the impact of the CTM Regulation may extend further: by virtue of the need for the CTM Regulation to provide a complete trade mark *system* at the EU level, it made provision (unlike the Directive) for various procedural and some substantive (like dilution) elements.[120] Thus, the different practices of the UK Registrar of trade marks and the EU's Office for Harmonisation in the Internal Market (OHIM, essentially, the EU IP office) had led to a reference for a preliminary ruling which focused on whether, under the Trade Marks Directive, the UK Registrar should be required to adopt the approach taken by OHIM under the CTM Regulation in identifying the (class of) goods or services for which trade mark protection was sought. Advocate General Bot started his analysis by examining the principles in the CTM Regulation—even though the case substantively concerned the Directive *and* even though the Directive itself was silent on the particular question at hand—asserting that the definition of a common approach under the two instruments was essential, since they were based on common basic principles and given that the two regimes may interact.[121] Although the Opinion ultimately rejected the approach adopted by OHIM as being appropriate as the uniform method to employ,[122] there is clear potential for his line of reasoning to extend—as a matter of the application of *EU law* and by virtue of the presence of both harmonising and unifying EU legislation in the same basic area of substantive law—the application of EU law concepts into fields of national law.[123] The approach of the Court of Justice in its judgment is to be awaited with no little interest.

[118] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1.

[119] See eg Case C-482/09 *Budějovický Budvar v Anheuser-Busch*, Judgment of 22 September 2011, paras 28–37.

[120] Case C-307/10 *Chartered Institute of Patent Attorneys v Registrar of Trade Marks*, Judgment of 19 June 2012, Opinion of AG Bot. The Commission, OHIM and 11 Member States lodged observations in this case (see para 31 of the AG Opinion).

[121] Case C-307/10 *Chartered Institute of Patent Attorneys* (n 120) Opinion of AG Bot, paras 37ff.

[122] Ibid, paras 86–97. See now the judgment of the Grand Chamber of the Court of Justice in this case (nyr, 12 June 2012).

[123] A question which follows on from this discussion, and one which will require investigation, is whether there are other areas in EU law where such interpretive dynamics might be predicted.

(iv) Adoption of EU Law Concepts/Techniques to Apply Beyond the Scope of EU Law, Changing the Original Position/Approach Under National Law

By virtue of the nature of this category, such developments will often take place through court judgments or, indeed, the possibility of such evolution may be strongly rejected by the judiciary. On the latter point, the treatment of groups in English corporate law seems, outside of the requirements of EU law, resolutely to have resisted any such spillover influences thus far, the courts holding to the principle that separate legal personality must be respected.[124] This is in contrast to the principles of EU competition law (see, for example, cases such as *ICI* and *Viho Europe*):[125] in UK cases under this heading, the courts have been prepared to apply the notion of a 'single economic unit' to such groups of companies, indeed often in a creative fashion.[126]

An excellent illustration of the former point, meanwhile, is provided by the English courts' slow adoption of purposive techniques of legislative interpretation.[127] Traditionally, when interpreting a statute, the English courts have taken the view that the 'general proposition that it is the duty of the court to find out the intention of Parliament … cannot by any means be supported'.[128] This general impression is supported by various commentators. As Cross stated in the first edition of his *Statutory Interpretation* in 1976, the judge's task is to 'give effect to the ordinary or, where appropriate the technical meaning of the words in the general context of the statute'.[129] In 1978, Kahn-Freund underlined that '[n]or is teleological interpretation … used in Britain. A re-interpretation of a legislative text so as to adjust its effect to technical and social change … is hardly conceivable in Britain'.[130] Of course, as a matter of EU law it has been clear, at least since

Possible areas might include: the energy sector (via ACER practice); the financial and securities sector (via the evolution of the ESMA's practice); and food safety law (via the European Food Safety Authority's role). No doubt, others will emerge over time.

[124] One outlier is provided by the judgment of Lord Denning MR in *DHN Food Distributors v Tower Hamlets London Borough* [1976] 3 All ER 462, but the case has been heavily criticised (*Woolfson v Strathclyde* 1978 SLT 159) and confined to its context (*Adams v Cape Industries plc* [1991] 1 All ER 929, 1019) by subsequent judgments.

[125] Case 48/69 *ICI v Commission* [1972] ECR 619; and Case T-102/92 *Viho Europe v Commission* [1995] ECR II-17, upheld on appeal: Case C-73/95 P, [1996] ECR I-5436.

[126] See *Provimi v Aventis Animal Nutrition* [2003] EWHC 961, [2003] ECC 29, discussed in Slot and Johnston (n 90) 295–98. One question which arises is whether the UK courts will adopt a similar approach to purely domestic competition law cases: given s 60 of the Competition Act 1998, there seems to be no reason in principle to expect them to deviate from the reasoning in *Provimi* in a purely national competition law case.

[127] For an outline, see Usher (n 11) 254–57. See, further, S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Tübingen, Mohr-Siebeck, 2001).

[128] *Magor and St Mellors Rural District Council v Newport Corporation* [1952] AC 189, per Lord Simonds.

[129] R Cross, *Statutory Interpretation* (Butterworths, London, 1976) 43.

[130] O Kahn-Freund, 'Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation', in M Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Leiden, Sijthoff, 1978) 137, 157. One might argue with this claim, for example, in the context of formalities for the transfer of

Von Colson,[131] that UK courts are required to interpret national law in the light of the wording and purpose of the relevant EU rules (the so-called doctrine of 'indirect effect' or 'consistent interpretation'),[132] but we are here concerned with the question of whether this has had any spillover effects in national law.

Perhaps unsurprisingly, Lord Denning MR was among the first judges in the UK to espouse the desirability of adopting what he called the 'European method', showing an eloquent awareness of these differences in approach in *Bulmer v Bollinger SA*.[133] For our purposes, his judgment in the Court of Appeal in *Buchanan & Co v Babco Shipping Ltd*[134] is of interest. The case involved the interpretation of the Convention on the Contract for the International Carriage of Goods by Road 1956, which was in issue by virtue of the UK's Carriage of Goods by Road Act 1965 (enacted to give force of law to the 1956 Convention), rather than what was then EEC law. The Court of Appeal unanimously proceeded to construe the Convention, not as if it were an English statute, but by reference both to the French text of the Convention and to any decisions of other national courts (in the event, there was none in the latter category), with the result that the plaintiffs were held entitled to recover the sums claimed: had the traditional English interpretive approach applied, the plaintiffs would have gone away empty-handed.[135] On appeal, however, the House of Lords rebuffed this interpretive approach.[136] Nevertheless, even in cases outside the EU law field it soon became clear that the tide was turning (albeit slowly), as shown by *Bank of Scotland v Grimes*,[137] in the private law field, and *Smalley v Crown Court,*

real property and the Statute of Frauds 1677 and its successor provision, s 53 of the Law of Property Act 1925. See eg *Rochefoucauld v Boustead* [1897] 1 Ch 196.

[131] Case 14/83 *Von Colson* (n 16).

[132] One might query here whether the UK courts were already at least open to purposive interpretation when it came to the interpretation of national law where that national law had been enacted or was relied upon to ensure that the UK met its international obligations: see eg *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116.

[133] *Bulmer v Bollinger SA* [1974] Ch 401, 425ff.

[134] *Buchanan & Co v Babco Shipping Ltd* [1977] 3 All ER 1048

[135] It should be pointed out that, as A Jolowicz noted at the time in 'Some Practical Aspects and the Case for Applied Comparative Law' in M Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Leiden, Sijthoff, 1978) 237, 253, the Court of Appeal's approach proceeded on the assumption that the substance of the Convention *and* the ancillary rules in other national systems were in 'virtually identical' terms. The reason for the difficulties under the combination of English law and the Convention (via the Carriage of Goods by Road Act 1965 Act) was due to the operation of s 85 of the Customs and Excise Act 1952, which required duty to be paid on goods stolen while held in bond. Thus, the Court of Appeal's approach to construing the Convention in a purposive manner to protect the plaintiff might well have been entirely superfluous, not to say misleading, in other national systems. As Jolowicz wrote, 'I do not know whether [the rules were identical in other countries] or not … but what does seem clear is that no one at any stage even thought it necessary to try to find out' (ibid). On this issue of national courts consulting the law of other EU Member States when interpreting and applying the law (both of EU origin and in contiguous national law areas), see A Johnston, 'Instances and Analysis of Feedback in the Loop-flow between EC Law and National Private Law: Some Tentative Insights for Comparative and European Community Lawyers' in O Remien (ed), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht* (Tübingen, Mohr-Siebeck, 2008) 235, 263–65 and 272–73.

[136] *Buchanan & Co v Babco Shipping Ltd* (n 134) esp 1053, per Lord Wilberforce.

[137] *Bank of Scotland v Grimes* [1985] 2 All ER 254.

Warwick,[138] in criminal law. Meanwhile, in a case on the interpretation of double-taxation treaties in the context of both UK law and EU law, the House of Lords adopted an explicitly purposive interpretive approach to the construction of Article 10 of the relevant double-taxation treaty. As Lord Nicholls noted, 'Article 10, like all documents, must be interpreted purposively.'[139] Indeed, the constitutionally significant judgment[140] of the House of Lords in *Pepper v Hart*[141]—which allows courts to make reference to parliamentary material (particularly *Hansard*) in construing obscure or ambiguous legislation—seems to be based entirely upon such purposive ideas of interpretation.[142] While subsequent courts have not been over-zealous in their reliance upon *Pepper v Hart*, there are many clear and high-profile examples of its application in purely national law situations: for our purposes, the tort case of *Mirvahedy v Henley*[143] provides a clear illustration within our field of private law.[144] Their Lordships were directed to a number of extracts from *Hansard* during the passage of the Bill that led to the 1971 Act, and counsel also made extensive reference to the Law Commission's views in its report and draft bill that presaged the Bill that eventually went before Parliament.[145]

The expanding use of the purposive interpretive approach by the UK courts is also an example of a *systemic* form of spillover effect,[146] which can perhaps be contrasted with the individual *substantive* examples canvassed in the preceding sections. The potential significance of this point is the ability of such systemic effects to exercise an influence across the whole domestic legal system, even in the absence of any interaction with specific EU law rules within that system. Instead, such effects become institutionalised within the recipient national system and can exercise influence over the approach taken to purely national law questions (as well as, perhaps, making that system more receptive to the outcome of similar interpretive exercises when applied to EU law provisions by the Court of Justice).

[138] *Smalley v Crown Court, Warwick* [1985] 1 All ER 769, 779.

[139] *Pirelli Cable Holding NV v Inland Revenue Commissioners* [2006] UKHL 4, [2006] STC 548, para 13. See also ibid, para 105, per Lord Walker.

[140] See eg A Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 *Law Quarterly Review* 98.

[141] *Pepper v Hart* [1993] All ER 42.

[142] See ibid, 64, per Lord Browne-Wilkinson, with whose speech the majority in their Lordships' House concurred.

[143] *Mirvahedy v Henley* [2003] UKHL 16, [2003] 2 AC 491.

[144] For discussion, see S Deakin, BS Markesinis and A Johnston, *Markesinis & Deakin's Tort Law*, 7th edn (Oxford, Oxford University Press, 2012) 532–36.

[145] However, a number of their Lordships explicitly found them not to have been helpful in divining the proper approach to s 2(2). See *Mirvahedy v Henley* (n 143) Lord Slynn, para 60, Lord Hobhouse, para 65, Lord Scott, para 102 and Lord Walker at paras 158–60, either due to their lack of clarity, to changes wrought to the Law Commission's proposals or due to apparent misunderstandings in some of the statements made by Ministers to Parliament during the passage of the Bill.

[146] I am grateful to Sebastian Martens for discussions on this topic.

IV. Theorising Spillover Impacts: Some Constitutional Dimensions

This chapter is part of ongoing research into these questions of spillover effects, so this section will, of necessity, raise a variety of potential questions that cannot, as yet, be answered either conclusively or in great detail; however, the topics addressed briefly below concern various matters of potential significance to the clearer understanding of spillover effects, and their significance, in the future. One which cannot be addressed in detail here concerns the analysis of spillovers in the light of EU integration theory. Both neo-functionalist and multi-level governance accounts may yet prove to be of assistance in analysing and explaining the development of the impact of EU law in this area, or at least may facilitate a dialogue between lawyers and political scientists concerning the process of EU (legal) integration.[147]

A. Spillovers as EU 'Competence Creep'?

This issue of competence creep is likely to be more relevant to some types of spillover than others: after all, insofar as EU legislation requires significant changes to be made to the substance of domestic law, it is inevitable that significant wider changes may be necessary in order to accommodate such changes within the domestic legal order.[148] Further, where the spillover occurs by virtue of a rational national *choice* to extend the application of EU law (particularly via the *extension* or *renvoi* methods discussed above in Sections III.B(iii) and III.B(ii), respectively), then it seems artificial to allege that this expanded scope of coverage for the substance of EU law rules and concepts should be criticised with the (sometimes emotive) language of 'competence creep'.

However, neither is the notion of such creep irrelevant in the context of spillovers. First, a proper appreciation of likely spillover effects may need to be fed back into any sensible analysis of the key EU law preconditions for the exercise of EU legislative competence: subsidiarity and proportionality. This is relevant because, on the one hand, it provides the proper context for an appreciation of

[147] For helpful overviews of neo-functionalist governance, see B Rosamond, *Theories of European Integration* (Basingstoke, Macmillan, 2000) ch 3; and A Niemann with PC Schmitter, 'Neofunctionalism' in A Wiener and T Diez (eds), *European Integration Theory*, 2nd edn (Oxford, Oxford University Press, 2009) ch 3. As for multi-level governance systems, they can be described as one involving 'overlapping competencies among multiple levels of governments and the interaction of political actors across those levels'. G Marks et al, 'Competencies, Cracks and Conflicts: Regional Mobilisation in the European Union' (1996) 29 *Comparative Political Studies* 167. See, generally, I Bache and M Flinders (eds), *Multi-level Governance* (Oxford, Oxford University Press, 2004), esp S George, 'Multi-Level Governance and the European Union', ch 7.

[148] See JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, also published (with additions) in JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999) ch 2.

the likely impact of any proposed EU legislation upon national law and, on the other, it may highlight potential difficulties in leaving certain goals to be achieved by the Member States acting on their own.

Second, where the national accommodation of particular EU provisions is easy to foresee when an EU legislative proposal is being developed (particularly where national delegations emphasise the extent of possible difficulties which they might face as a result of the wording or scope of a given proposed provision), then it is possible to view the EU-level knowledge of such inevitable national changes as using the EU legislative process to achieve results which will partly be effected by those purely domestic, 'accommodating' amendments to the national legal landscape.

Third, it may serve to inform more careful interpretation of the terms actually used in EU legislation. The example of the Commercial Agents Directive discussed above (Sections II.B and III.B(ii)) shows that the failure to define the full consequences of a particular term ('compensation') under the Directive can lead to a conclusion that this matter has clearly been left to Member States' national legal systems.[149] Yet in the interpretation of other EU instruments,[150] the Court of Justice has shown itself willing (even predisposed?) to expand the impact of, for example, a Directive, even in the absence of specific wording addressing the associated national procedures or remedies used to achieve the Directive's substantive goals.

B. Implications for Judicial Role(s) and Practice?

(i) Looking to the Court of Justice of the EU for Guidance?

One way in which the Court of Justice might provide national courts (and, indeed, legislators) with guidance on how to address such situations might be through the development of General Principles of European Civil/Private Law. This is this subject of Martijn Hesselink's contribution in this volume,[151] and so I will not endeavour to analyse this interesting, difficult and controversial topic here.

It is possible that the Optional Instrument envisaged under the proposed European Sales Law Regulation[152] has the potential to make an interpretive contribution in this regard, perhaps in a fashion comparable to the use of the EU's Charter of Fundamental Rights[153] between its adoption in 2000 and its

[149] As held in the *Honyvem* case (n 105) and relied upon by Lord Hoffmann in *Lonsdale* (n 103).

[150] See above Sections II.D and II.E; further examples can be seen in the Court's case law interpreting the Unfair Terms in Consumer Contracts Directive, see n 12, discussed in Johnston and Unberath (n 87) 180–85.

[151] See MW Hesselink, 'The General Principles of Civil Law: Their Nature, Role and Legitimacy' in this volume.

[152] European Commission, Proposal of 11 October 2011 for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final.

[153] Originally, see [2000] OJ C364/1; see now [2010] OJ C83/389. By virtue of Art 6 TEU, the Charter now has the same legal status as the Treaties.

more recent acquisition of legally binding status after the entry into force of the Treaty of Lisbon in late 2007. Thus, it might be used as a kind of soft law, acquiring interpretive influence through references made to it by the European courts in the development of more general EU law approaches to such questions of private law, as and when they arise under binding EU instruments (eg consumer law Directives and other legislation) or as part of the evolution of the Court's NLE case law when national remedies and systems of private law have an impact upon the effective enforcement of EU law rights.[154]

(ii) Looking to Other National Legal Regimes?

Where EU concepts (whether embodied in legislation or possibly developed under the banner of General Principles of Civil/Private law) have been based upon or derived from Member State legal systems other than the English, actors in the national legal system may gain guidance from practice under those other systems. The Commercial Agents Directive and the notions of indemnity and compensation (based upon the German and French systems, respectively) have been discussed above; another example might be drawn from the field of the Trade Marks Directive,[155] where the inclusion within the notion of 'likelihood of confusion' of the idea of a 'likelihood of association',[156] as laid down in its Articles 4(1)(b) and 5(1)(b), is derived from the practice under the Benelux system (although it should be noted that such references to the origins of the 'association' term have been made, and dismissed as unhelpful in those English cases where the issue has arisen).[157]

Where there are other Member States with greater range and/or depth of decisional practice than our own, this may provide an opportunity to learn about potential issues, problems and solutions.[158] At the same time, there is clearly a need to take great care in appreciating the context of such decisions and prac-

[154] For this in the Charter context, see Case T-54/99 *max.mobil Telekommunikations Service v Commission* [2002] ECR II-313, paras 48 and 57 for the first CFI reference; and see Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, para 38, for the first use thereof by the Court of Justice.

[155] Directive 2008/95/EC (n 117).

[156] See ibid, Recital 11, which includes the notion of association within the question of whether there is a 'likelihood of confusion'.

[157] For a discussion of the Benelux system, see C Gielen, 'Harmonisation of Trade Mark Law in Europe: The First Trade Mark Harmonisation Directive of the European Council' (1992) 14 *European Intellectual Property Review* 262, who discusses the drafting history and, in particular, the confusion/association issue in the light of Benelux law. See ibid, 266–67. See also *Wagamama v City Centre Restaurants* [1995] FSR 713, where Laddie J rejected reliance upon what he styled 'Chinese whispers' as to the origin and meaning of the Directive. For discussion, see W Cornish and D Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th edn (London, Thomson Sweet and Maxwell, 2007) paras 18-94ff, esp 748, fn 9.

[158] Eg the application of the defence of contributory negligence under English law on negligently inflicted psychiatric injury is a little-developed area, whereas German law has relatively broad experience of such issues: for discussion, see *Greatorex v Greatorex* [2000] 1 WLR 1976 (where German law was cited to Cazalet J by counsel for the Motor Insurers' Bureau) and BS Markesinis, 'Foreign Law Inspiring National Law: Lessons from *Greatorex v Greatorex*' (2000) 59 *Cambridge Law Journal* 386 (where the US and German material is analysed).

tices from other Member States' systems, both in a practical and a legal-systemic sense. We must avoid the risks of learning the wrong lessons, or bastardising a potentially useful lesson by over- or under-doing the analysis: comparative law's experience may be of use here. One might perhaps cite the use of the 'transferred loss' argument by Robert Goff LJ in his judgment in the English Court of Appeal in *The Aliakmon*,[159] which drew explicitly upon German reasoning, yet also ran the risk of importing other assumptions from the legal context which may not necessarily obtain in our own system. Indeed, in a later judgment,[160] Lord Goff (as he had become) abandoned the transferred loss argument, stating that he had not used the term 'with any great accuracy'; instead, their Lordships fashioned an alternative approach to the question at hand.[161] All of this suggests that, while such avenues have long been familiar to comparative lawyers, courts are reluctant to traverse them in many cases; nevertheless, the particular context and demands of harmonising EU law, and concomitant spillover effects, may yet lead to such approaches being employed in some areas in the future as a source of guidance (or inspiration) for national courts.

(iii) Guidance for the Court of Justice of the EU

One way in which the national legal systems can contribute to providing guidance for the Court of Justice is in the willingness of national courts to *send* references for a preliminary ruling under Article 267 TFEU.[162] Sometimes, this may be the only way in which to enrich the Court's experience of the range of issues faced by national legal systems in the incorporation and implementation of EU law. The loss of various opportunities to contribute to the evolution of EU law on various topics can be seen in a number of the lines of English case law discussed in this chapter (eg concerning commercial agency: Sections II.B and III.B(ii) above) and elsewhere.[163]

Another method that might be employed under this heading is the frequency and quality of a Member State's governmental institutions' *interventions* in cases

[159] *Leigh & Sillivan Shipping v The Aliakmon Shipping Co (The Aliakmon)* [1986] AC 785. For discussion, see Deakin, Markesinis and Johnston (n 144) 157–73; and Markesinis and Unberath (n 40) 303ff. See, generally, H Unberath, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Oxford, Hart Publishing, 2003) esp 123–28.

[160] *Alfred McAlpine Construction v Panatown* [2001] 1 AC 518, 557.

[161] For discussion, see Deakin, Markesinis and Johnston (n 144) 155–57 and Unberath (n 159) ch 8.

[162] On these questions under English law generally, see *R v International Stock Exchange ex parte Else* [1993] 1 All ER 1042 and *R v Minister for Agriculture, Fisheries and Food ex parte Portman Agrochemicals* [1994] 3 CMLR 18. For general discussion, see T de la Mare and C Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011) ch 13.

[163] Eg the Unfair Terms in Consumer Contracts Directive (n 12). Cases such as *Office of Fair Trading v Abbey National* [2009] UKSC 6, [2010] 1 AC 696, suggest themselves. See Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29 and *A v National Blood Authority* [2001] EWHC 446 (QB), [2001] 3 All ER 289.

before the Court of Justice.[164] Such activities may offer the Court differing points of view on the matter at hand, as well as perspectives on the difficulties that arise within various national settings, thus informing the Court's performance of its interpretive function with a richer understanding of the meaning and implications of EU law provisions when applied in context.[165]

C. National Constitutional Implications—The UK Example

(i) The Role of National Parliaments in the Implementation of EU Law into National Law

In assessing the potential significance of spillover effects for national parliaments, much will depend upon specific national constitutional arrangements and how they operate vis-à-vis EU law and its incorporation in the national legal order. In the UK, for example, the vast majority of implementation of EU law takes place in secondary legislation promulgated by the relevant Minister, under the auspices of section 2(2) of the European Communities Act 1972. This process relies upon the interest and diligence of Members of Parliament and the House of Lords in scrutinising such use of these delegated legislative powers before granting their approval (or at least not expressing their collective disapproval) of the secondary legislation so promulgated. While such scrutiny is perhaps variable in its depth and quality, perhaps an appreciation that such implementing rules could themselves generate potentially far-reaching spillover effects might further focus the minds of those scrutinising such measures adopted under section 2(2). Of course, whether the time, resources and expertise needed to perform this function is always available in the relevant committees is another matter.

(ii) Section 2(2) Itself

This provision allows the relevant Minister to make rules for the purposes of: (a) 'implementing any EU obligation of the United Kingdom … or … enabling any rights enjoyed … to be exercised'; and (b) 'dealing with matters arising out of or related to any such obligation'. The precise scope of this provision was at issue in *Oakley Inc v Animal Ltd*: at first instance,[166] a challenge was brought against the use of section 2(2), focusing specifically upon exactly what the government may do when implementing an EU measure (there, the Design Rights Directive).[167] Argument centred on the use of that provision to adopt national measures which

[164] For statistics and analysis, see M-PF Granger, 'When Governments Go to Luxembourg: The Influence of Governments on the Court of Justice' (2004) 29 *European Law Review* 3.

[165] On such national contributions to this EU 'discourse', see de la Mare and Donnelly (n 162) 378–81.

[166] *Oakley Inc v Animal Ltd* [2005] EWHC (Ch) 210 and EWHC (Pat) 419.

[167] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L 289/28, implemented by the Registered Designs Regulations 2001, SI 2001, no 3949.

were not *mandated* by an EU obligation. Ultimately, this was overturned on this point by the Court of Appeal,[168] but it has led to a number of comments on the constitutional implications of this implementation method.[169] Indeed, such matters are now even reaching the national press.[170] It seems that spillover effects as defined in this paper, although sometimes possibly falling within the scope of section 2(2)(a) (where they concern 'enabling any rights … to be exercised'), will usually fall to be analysed under section 2(2)(b) of the 1972 Act.

One might wonder whether the judgment of the Supreme Court in *Ahmed v Secretary of State for the Home Department* will also have implications for the future use of section 2(2) ECA 1972 by the executive, both generally and specifically in addressing spillover effects.[171] In *Ahmed* the seven-judge panel (with Lord Brown dissenting on one point) ruled that two Orders in Council adopted under the United Nations Act 1946 should be quashed as being ultra vires the powers granted to the executive by section 1 of the 1946 Act. The Justices in the majority were careful to stress that measures which would impose restrictions upon individual rights required Parliamentary primary legislative approval and could not be effected by the executive under such delegated legislative powers. While the *Oakley v Animal* case did not, perhaps, reach the extremes of interference with individual rights highlighted by *Ahmed*, the general point concerning the relationship between Parliament and the executive chimes more consistently with the view taken in *Oakley* by the judge at first instance than that of the Court of Appeal. Thus, it may be that the incorporation of spillover effects in such implementing measures, alongside other potential uses of section 2(2) of the 1972 Act, may yet lead to such constitutional questions being asked again in the near future.

V. Conclusions

So, one might ask: why should we care about spillover effects, their identification and proper categorisation?

First, an understanding of spillover effects can aid in the careful analysis of, and make a contribution to, the EU legislative process and the relevant legal instruments used (particularly Directives). An appreciation of the need generally to consider such spillover effects should aid Member States (and MEPs) during negotiations in highlighting and discussing the (sometimes inevitable) spillovers

[168] *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337.

[169] See eg M Howe, '*Oakley Inc v Animal Ltd*: Designs Create a Constitutional Mess' (2006) 28 *European Intellectual Property Review* 192.

[170] See eg P Johnston, 'Who Will Defend Our Free Speech?', *Daily Telegraph*, 2 April 2007.

[171] *Ahmed v Secretary of State for the Home Department* [2010] UKSC 2, [2010] 2 WLR 378, discussed by A Johnston and E Nanopoulos, 'The New UK Supreme Court, the Separation of Powers and Anti-terrorism Measures' (2010) 69 *Cambridge Law Journal* 217.

that may eventuate. Thinking about these phenomena may also inform lobbying efforts at both national and EU level (and co-ordination between national parties, bodies, associations, etc): spillovers thus have ex ante implications for the EU legislative process.

Second, there is a set of impacts which spillovers may have after the conclusion of the EU legislative process for any given measure. Spillover effects may have *constitutional* consequences: from the foregoing discussion, it seems that spillover effects may have (sometimes significant) implications for the performance of the judicial function, at national and EU levels, and in shaping their interaction and co-operation. Similarly, spillover effects may in some contexts have consequences for the analysis of EU competence, the pursuit of accountability at the EU (and national) level and, thus, for the scrutiny of decision-making processes and outcomes, particularly with regard to national implementation decisions.

There is also potential for *systemic* influences derived (at least in part) from EU law's impact upon national practice (as the example of the UK courts' adoption of the purposive interpretive approach, discussed above, shows) to have more far-reaching effects upon the national legal system, even in purely national law situations.

Spillovers may also have other implications, including an effect upon substantive law. Various actors within the legal system—including legal advisers (both qua adviser and qua lobbyist), individual private parties, the judiciary and executive/administrative bodies)—will need to take the implications of spillover effects into account in the performance of their functions. There is a need to take account of these (potential) spillover effects, predicting their likely incidence and implications under existing and new EU legal instruments and provisions. These insights concerning spillovers might be applied to encourage new (national) legal developments (whether by judicial evolution or legislative/executive reform) or to lobby against their adoption/extension/use. Either way, forewarned is forearmed.