The *Zeitgeist* of the European Court of Justice: The Evolution of the Principle of Direct Effect through the Jurisprudence of the Court and its Consequences for Disapplication of National Laws

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List of Abbreviations

Advocate-General…….	**AG**
Danish Supreme Court……	**DSC**
Directive 2006/123/EC on services in the internal market……	**Services Directive**
European Court of Justice……	**ECJ / Court**
European Economic Community……	**EEC**
European Union……	**EU**
Framework Decision……	**FD**
Italian Competition Authority……	**ICA**
International Covenant of Economic, Social and Cultural Rights…....	**ICESCR**
Member States……...	**MSs**
Regional Administrative Court……	**RAC**
Single European Act……..	**SEA**
Treaty of Rome……..	**EC Treaty**
United Nations Committee on Economic, Social and Cultural Rights.....	**CESCR**

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Chapter 1: Introduction

1. Research Context

"The discussion on direct effect has been a sort of "infant disease" of Community law".[1] "Infant diseases are happily in most of the cases mild diseases, and they have one advantage: once one has gone through them, they leave immunity for a lifetime".[2] With these words dating back to 1983, Judge Pescatore categorized the changes occurring in the doctrine of direct effect as innocuous due to their temporary nature. Direct effect should have quickly settled to become a practical tool of application and integration of European Union ("EU") law into national legal systems. Pescatore's claim dates to the very first decades since the birth of the European Economic Community ("EEC"), which witnessed the first developments of direct effect by the European Court of Justice ("ECJ" or the "Court"). However, the exact impacts of the doctrine of direct effect for national law and its relationship with supremacy of EU law, continue to unfold up to this day. Undoubtedly, direct effect and supremacy of EU law are inextricably linked, influencing each other through the pronouncements of the ECJ. Notwithstanding, whilst forming "the essential characteristics of the Community legal order",[3] it is interesting to note that the ever-evolving relationship between the concept of direct effect and supremacy has become a sort of marginal question in legal literature.[4]

The 1963 *Van Gend en Loos* formula prescribed that the EU, (at the time the EEC), "constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights"[5] and that "Community law (…) not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".[6] Although not explicitly mentioned by the Court, the *Van Gend en Loos* formula assumed the existence of supremacy of EU law over national law,[7] which was enunciated one

[1] Pescatore, P. 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (1983) 177 European Law Review 155.
[2] Pescatore, P. 'The doctrine of "direct effect": an infant disease of Community law' (2015) 135 European Law Review 40(2).
[3] Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] EU:C:1991:490, para 21.
[4] Koch, C. 'The Doctrine of Supremacy of European Community Law as a Condition Precedent for the Doctrine of Direct Effect' (2005) 9 Int'l Trade & Bus L Rev 201, p 201.
[5] Case C-26/62 *Van Gend en Loos* [1963] EU:C:1963:1.
[6] ibid.
[7] *Koch*, see supra note 4, p 213.

year later with *Costa v E.N.E.L.*[8] What is more, *Van Gend en Loos* implicitly characterized the relationship between supremacy and direct effect in a hierarchical way, with supremacy acting as a "pre-condition" for direct effect.[9] Notwithstanding the silence of the EU Treaties[10] with regard to direct effect, supremacy and the relationship tying the two concepts together, *Van Gend en Loos* and *Costa* were complemented by more case-law that ambitiously envisioned far-reaching consequences of both doctrines for domestic law. This initial period of activism by the Court "in the arena of political integration", as Professor Weiler calls it,[11] ensured EU law permeation in national legal systems.[12] The tendency of the Court to expand the two concepts was followed by the inclination of the ECJ in the '80s to partially limit direct effect, giving effect to Union law in alternative ways, such as by enunciating a system of national remedies and by ruling on the possibility for Union law provisions to enjoy certain powers despite their lack of direct effect.

Against this background, recent judgments of the Court from 2019 onwards seem to suggest a new shift, divesting supremacy of some of its essential features and subjecting the availability of national remedies solely to the presence of direct effect. This trend, starting with Case C-573/17 *Popławski*, (hereinafter "*Popławski II*"),[13] has put into question the complex legal panorama governing the characteristics of the relationship between EU and national law. What began in *Popławski II* as a decision on the incompatibility between framework decisions ("FDs") and national provisions, has casted new doubts on the hierarchical relationship following which supremacy exercises a condition precedent[14] for direct effect. *Popławski II,* (together with the following jurisprudence that confirmed the case), considerably limited the

[8] Case C-6/64 *Costa v E.N.E.L.* [1964] EU:C:1964:66.
[9] *Koch*, see supra note 4, p 214.
[10] Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/47; Treaty on the European Union [1992] OJ C 191.
[11] Weiler, J. H. H. 'The least-dangerous branch: a retrospective and prospective of the European Court of Justice in the arena of political integration" in Weiler J. H. H. 'The Constitution of Europe. Do new Clothes have an Emperor? And other Essays on European Integration' (1999) Cambridge University Press, Cambridge, pp 192 – 197.
[12] Figueroa Regueiro, P., V. 'Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives' (2002) Jean Monnet Working Paper 7/02, p 6.
[13] Case C-573/17 *Openbaar Ministerie v Daniel Adam Popławski* [2019] EU:C:2019:530.
[14] As reported by the Legal Information Institute of the Cornell Law School, the term "condition precedent" is commonly employed in contract law, and it refers to a "a condition or an event that must occur before a right, claim, duty, or interests arises."

conditions for disapplication of national conflicting laws, with overarching consequences for the whole doctrine of direct effect and the entire system of EU judicial protection.[15]

2. Research Question

Considering the above-discussed context, the research question guiding this thesis is the following: "To what extent does recent CJEU jurisprudence equate direct effect with disapplication of national conflicting laws and what are the consequences of this approach with regard to supremacy of EU law, especially for judges confronted with issues of incompatibilities between EU and national laws?". To provide an exhaustive answer to this research question, the thesis will address (i) the evolution of the doctrine of direct effect and the implications it bore on the doctrine of supremacy of EU law; (ii) the consequences of direct effect for the remedy of disapplication of national conflicting laws, (which is inextricably linked with supremacy), before *Popławski II* and the development of direct effect in light of recent case-law of the CJEU, starting with *Popławski II* and (iii) the implications of this new interpretation of direct effect for national judges confronted with questions on the disapplication of national conflicting laws.

By assessing each of these tenets, the thesis has two objectives. Firstly, it aims at showcasing that the hierarchical relationship linking supremacy with direct effect has shifted, greatly limiting the operational core of supremacy and expanding the effects and powers of direct effect. Secondly, the thesis intends to demonstrate that within the system of judicial protection and enforcement of EU law, the jurisprudence of the Court follows the *Zeitgeist*[16] of each decade. ECJ judgments have often interpreted the political sense of the time, balancing the wish to ensure EU law permeation into legal systems of Member States ("MSs"),[17] with the need to leave sufficient leeway to national courts to accept and implement such *dicta*. From this perspective, the thesis aims at proving that the interpretation and application of direct effect

[15] Bobek, M. 'Institutional Report: National Courts and the Enforcement of EU Law' in Botman, M. and Rijpma, J. (eds.), 'National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order'. The XXIX FIDE Congress Publications, Vol. 1 (Eleven International Publishing, Den Haag) (2020) pp 66 – 89; Rossi, L. 'Effetti diretti delle norme dell'Unione europea ed invocabilità di esclusione: i problemi aperti dalla seconda sentenza Popławski' (2021) Giustizia Insieme, available at < https://www.giustiziainsieme.it/it/news/123-main/diritto-ue/1517-effetti-diretti-delle-norme-dell-unione-europea-ed-invocabilita-di-esclusione-i-problemi-aperti-dalla-seconda-sentenza-poplawski?hitcount=0>.

[16] The Merriam-Webster Dictionary defines "Zeitgeist" as "the general intellectual, moral, cultural and climate of an era".

[17] Robin-Olivier, S. 'The evolution of direct effect in the EU: Stocktaking, problems, projections' (2014) 12 I-CON 1, p 166.

provided by the Court always find a reasonable explanation when reconciled with the EU historical and political challenges of each decade, from the '60s until today.

3. Structure of the Thesis

Other than this first introductory chapter, the structure of this thesis will comprise of four more chapters, each addressing one the three sections abovementioned. The second chapter will analyze the jurisprudence of the Court that developed the doctrine of direct effect, and group similar cases into two "waves". The first Wave goes from 1963 until 1978, and it comprises of cases such as *Van Gend en Loos, Costa*, *Van Duyn,*[18] and *Simmenthal.*[19] With these rulings, the ECJ displayed considerable enthusiasm in expanding the doctrine of direct effect, which is arguably due to the Court's will to enhance integration of newly created Community norms into national legal systems. The second Wave, running approximately from 1982 until the early 2000s, demonstrated a setback in the ECJ structural and material jurisprudence to give effect to EU law, as exemplified by the case-law of *Ratti*,[20] *Becker*,[21] *Von Colson*,[22] *Marshall I,*[23] *Marleasing*,[24] *Francovich*,[25] *Brasserie du Pecheur*,[26] *Faccini Dori*[27] and *Unilever*.[28] The third chapter will elaborate on the doctrine of invocability, demonstrating how it consolidated from *Unilever* until *Link Logistiek,*[29] before the advent of *Popławski II*. Subsequently, the third chapter will introduce *Popławski II* and further case-law, such as *Sanchez Ruiz*,[30] *BGŻ BNP Paribas*[31] and *Thelen Technopark Berlin,*[32] showcasing the changes that this new jurisprudence has brought to invocability. The fourth chapter will demonstrate

[18] Case 41-74 *Yvonne van Duyn v Home Office* [1974] EU:C:1974:133.
[19] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] EU:C:1978:49.
[20] Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] EU:C:1979:110.
[21] Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] EU:C:1982:7.
[22] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] EU:C:1984:153.
[23] Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] EU:C:1986:84.
[24] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] EU:C:1990:395.
[25] Joined Cases C-6/90 and C-9/90 *Andrea Francovich en Danila Bonifaci en anderen tegen Italiaanse Republiek* [1991] EU:C:1991:428.
[26] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transpor*t, ex parte: Factortame Ltd and others. [1996] EU:C:1996:79
[27] Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] EU:C:1994:292.
[28] Case 443/98 *Unilever Italia SpA v Central Food SpA* [2000] EU:C:2000:496.
[29] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* [2018] EU:C:2018:810.
[30] Joined Cases C-103/18 and C-429/18 *Domingo Sánchez Ruiz and Others v Comunidad de Madrid* (Servicio Madrileño de Salud) and Consejería de Sanidad de la Comunidad de Madrid [2020] EU:C:2020:219.
[31] Case C-183/18 *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) against Bank BGŻ BNP Paribas S.A.* [2020] EU:C:2020:153
[32] Case C-261/20 *Thelen Technopark Berlin* [2022] EU:C:2022:33.

that the changes brought by the *Popławski II* jurisprudence constitute the advent of a new wave in the development of direct effect. This Wave started in 2019 and it is currently unveiling itself. To tackle the consequences of this latest Wave, the fourth chapter will analyze the implications that the new understanding of direct effect has for the duty of national judges to disapply national conflicting laws, and place this latest shift in the wider hierarchical relationship of supremacy and direct effect. Finally, the fifth chapter will conclude the thesis with a summary of the findings of this research as well as some points for further research.

It bears to be noted that all cases will be introduced together with the year of their ruling enacted by the ECJ. This is due to the fact that the Waves corresponding to ECJ jurisprudence are strictly linked to a time variable. Their meaning and implications for Union law have not remained unaltered throughout the changes that EU law underwent, and contextualizing them with a time reference is functional to demonstrate a *Zeitgeist* characterizing the Court's jurisprudence.

4. Relevance of the Topic and Literature Review

As recalled in the introduction, Judge Pescatore claimed that after an initial hustle and bustle, the doctrine of direct effect would have easily found its spot within EU law. Yet, almost 40 years later, the consequences of this ever-evolving theory still gains attention, warranting continuous analyses in view of the metamorphosis of jurisprudence. In this sense, the relevance of this thesis is two-fold.

From an academic perspective, many scholars have already engaged in an analysis of the evolution of direct effect and of its consequences for primacy of EU law. Most of them place the development of these doctrines within the political and legal context of the EU, following the *Zeitgeist* of their time to explain the choices taken by the ECJ in adjudicating disputes. That is the case, for instance, of Enchelmaier,[33] Figueroa Regueiro,[34] Menéndez[35] and Robin-Olivier,[36] who conceptualize the evolutions of direct effect and setbacks thereto as a

[33] Enchelmaier, S. "Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence" (2003) 23 Oxford Journal of Legal Studies 2.
[34] *Figueroa Regueiro*, see supra note 12.
[35] Menéndez, J. "The Past of an Illusion? Pluralistic Theories of European Law in Times of "Crises"" (2018) 3 European Papers 2.
[36] *Robin-Olivier*, see supra note 17.

response to the legal circumstances of each decade. Their commendable work forms the starting point for the development of this thesis, which groups the case-law used by those authors into different legal "Waves", depending on the time. However, this thesis adds a new gusset to the discussion, because it explores whether a new wave in the development of direct effect is occurring, framing its consequences both for supremacy of EU law and for the altered duty of national judges confronted with considerations of direct effect.

Furthermore, by analyzing recent judgments, the thesis argues that the claims asserted by De Witte,[37] Koch,[38] Lenaerts and Corthaut,[39] Pescatore[40] and Prechal,[41] who argued that supremacy acts as a pre-condition for direct effect, are obsolete. As a matter of fact, that body of literature questioned whether the principle of direct effect has in fact any importance in the disapplication of national conflicting laws.[42] The scholars based their assertions on ECJ jurisprudence where the Court seemed to have entirely skipped over the question of direct effect, disapplying domestic conflicting provisions simply by virtue of supremacy of EU law.[43] However, *Popławski II* and its progeny revived the debate, touching upon complex doctrinal issues such as invocability of exclusion and invocability of substitution[44], and warranting a new analysis on the newly found importance of direct effect for disapplying national conflicting laws. In addition, the analysis performed throughout the thesis provides a perfect example of the claim asserted by Alter[45] who, in the early 2000s, attracted criticism by signaling to the legal community that the Court was too inclined to take advantage of the *lacunae* in the Treaties, using them as an extensive license to fill in gaps.[46] Finally, to outline the causes and

[37] De Witte, B. 'Primacy, Direct Effect and the Nature of the Legal Order' in Grainne De Burca, G., Craig, P. (eds), The Evolution of EU Law, 2nd ed, Oxford, Oxford University Press, 2011, 323-362.
[38] *Koch*, see supra note 4.
[39] Lenaerts, K., Corthaut, T. 'Of birds and hedges: the role of primacy in invoking norms of EU law' (2006) 287 European Law Review 31(3).
[40] *Pescatore*, see supra note 1; *Pescatore*, see supra note 2.
[41] Prechal, S. 'Does Direct Effect Still Matter?' (2000) 37 CML Rev 1047; Prechal, S. 'Direct Effect Reconsidered, Redefined and Rejected' in J M Prinssen and A Schrauwen (eds), Direct Effect—Rethinking a Classic of EC Legal Doctrine (Europa Law, 2002) 15.
[42] ibid.
[43] The jurisprudence is listed in Chapter 3, Section 1 "The Case-law confirming Unilever".
[44] *Lenaerts and Corthaut*, see supra note 39, p 291.
[45] Alter, K., J., 'Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe' (Oxford University Press, 2001), p 185.
[46] *Enchelmaier*, see supra note 33, p 287.

implications of the recent shift in the understanding of direct effect, the thesis integrates the work of scholars such as Bobek,[47] Miasik and Szwarc[48] and Rossi.[49]

The practical relevance of this research is also key. If the increasing importance of direct effect becomes inversely proportional to the power accorded to supremacy of EU law, the availability of national remedies such as disapplication of conflicting national laws might become more difficult. As a result, national judges confronted with incompatibilities between national and EU law without direct effect would, at best, be quite puzzled by the recent shift in the CJEU's practice. In the worst-case scenario, they might apply national laws despite their conflict with EU law, increasing legal fragmentation in the EU.

5. Methodology

The methods used to conduct this research will be library-based, relying on scholarly articles and digests of EU law available via WorldCat or Google Scholar. Part of the thesis will also be compiled by taking into account the CJEU's jurisprudence, therefore much will be spent on the analysis of case-law and of the opinions of Advocates General ("AG"). This way, the thesis aims at furnishing the reader with a thorough answer that incorporates both descriptive and analytical elements of the discussion on the evolution of direct effect. In terms of methodologies, both the historical method, (retracing the developments of the law by placing its evolution in a historical context), and the meta-legal method, (assessing current developments from a theoretical perspective), will be used.

[47] *Bobek*, see supra note 15.
[48] Miasik, D., Szwarc, M. 'Primacy and direct effect – still together: Popławski II' (2021) 571 Common Market Law Review 58.
[49] *Rossi*, see supra note 15.

Chapter 2: The Development of Direct Effect

Chapter 2 will showcase the development that direct effect underwent from its conceptualization with *Van Gen den Loos* in 1963 until the case-law dating to the early 2000s. The Chapter will introduce the theory of "Waves", discuss the jurisprudence of the so-called first and second Waves, and contextualize each of the two periods by placing them in the historical and legal context where they developed.

2.1 A Theory of "Waves"

A theory of Waves does not come in as an easy title after the world has been shocked by the advent of COVID-19. However, it serves as a metaphor to explain the influence that the complex creation of direct effect, based on a path of preliminary rulings, has brought into EU law. A stone thrown into the water creates capillary waves which move away from where the rock landed, affecting the whole stretch of water. Just as a stone thrown into a pond produces effects both close and far from its epicenter, similarly national judges' referrals – often concerning relatively small-scale domestic cases – resulted in far-reaching consequences for doctrines upon which the EU Treaties remain silent today. This similitude is perhaps even more relevant since, as this chapter will demonstrate, the first two Waves are distinguished by the advent the Single European Act (or "SEA"),[50] in 1986.

To play along the metaphor of waves, there is an Italian way of saying reading that "you discovered hot water". It has the same meaning as the English saying "to reinvent the wheel", and it bears a sarcastic connotation with respect to situations where one believes to have reached a great truth which was already obvious to the majority. Along these same lines, this thesis does not claim authorship over the conceptualization of the ECJ's jurisprudence into different "phases". Several authors do indeed divide the work of the Court among different stages,[51] where the ECJ has, overtime, interpreted *lacunae* in the Treaties as a license to fill in gaps.[52] As contended by Professor Enchelmaier, the ECJ has frequently acted under the assumption that, although the Treaty did not say that European law created certain rights, "it did not say that European law *did not* create them".[53] In order to understand the innovative

[50] Single European Act [1987] OJ L 169/1.
[51] *Menéndez,* see supra note 35, p 627.
[52] *Enchelmaier*, see supra note 33, p 287.
[53] ibid.

elements brought by *Popławski II* and its subsequent case-law to the theory of direct effect and supremacy, it is useful to retrace the theoretical genesis and evolution of direct effect.

2.2 The Pre-SEA Wave

The first wave of ECJ jurisprudence may be conceptualized as the pre-SEA phase. A selection of the case-law pertaining to this phase consists of – in chronological order – *Van Gend en Loos*,[54] *Costa*,[55] *Van Duyn*,[56] and *Simmenthal*,[57] and it concerns the creation of the doctrine of direct effect and of its characteristics. This phase is characterized by a great structural and material interventionism by the ECJ which, by interceding with national courts, succeeded to create legal doctrines that were not present in the founding instruments of the EEC.[58]

2.2.1 Enthusiasm for Direct Effect

In this context, the first seminal judgment is *Van Gend en Loos*,[59] one of the most essential cases of EU law. *Van Gend en Loos* revolutionized the subject of international law resulting – arguably intentionally – into overarching consequences for the whole body of EU law. Under international law, citizens may rely on treaty provisions and invoke them before national courts in so far as said provisions have been firstly adopted or transformed into national law.[60] The process of adoption or transformation depends on whether the legal system of the State at stake follows a monist or dualist theory of integration of international law into national law.[61] The Treaty of Rome (or "EC Treaty"),[62] the 1957 founding instrument of the EEC, did not specify whether the relationship between national law and Community norms should have been monist or dualist, leaving a scattered environment among MSs. By following a teleological interpretation,[63] in 1963 with *Van Gend en Loos* the ECJ solved this issue through the creation of the doctrine of direct effect, whereby a provision of Community law could directly spur legal effects in a MS, giving rise to rights and obligations that would be

[54] *Van Gend en Loos*, see supra note 5.
[55] *Costa v E.N.E.L.*, see supra note 8.
[56] *Yvonne van Duyn v Home Office*, see supra note 18.
[57] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, see supra note 19.
[58] *Koch,* see supra note 4, p 208.
[59] *Van Gend en Loos*, see supra note 5.
[60] Spaak, T. 'Kelsen on Monism and Dualism' in Novakovic, M. (ed) Basic Concepts of Public International Law: Monism & Dualism (Faculty of Law University of Belgrade, 2013) p 323.
[61] ibid.
[62] Treaty establishing the European Economic Community [1957] OJ C 325.
[63] *Figueroa Regueiro*, see supra note 12, p 8.

enforceable in national courts without the need for adoption or transformation.[64] The doctrine of direct effect was initially enunciated through the *dictum* that EU law constitutes a new legal order,[65] and the features of direct effect were further refined by subsequent case-law. To grasp the utmost scope of this ruling, it is useful to resort to the analysis carried out by AG Toth in Opinion 1/91 on the creation of the European Economic Area.[66] AG Toth held that the creation of direct effect allowed external legal provisions to automatically integrate into national laws; it guaranteed the full and autonomous application of Community law across all MSs; it created substantive rights and obligations for individuals by making them subject to Community law together with MSs, and it enhanced individuals' legal protection vis-à-vis matters of Community law by guaranteeing them access to the national courts and remedies.[67]

The overarching influence of direct effect, paired with the wide scope of application of the EC Treaty, (which included fields of competences normally relegated to the domains of national law), resulted in a clash between many domestic laws and Community law.[68] As with the doctrine of direct effect, the EC Treaty was also silent on the issue of hierarchy between Community law and national law. Under international law, it is normally the constitutional rules of a country which determine whether international agreements can take precedence over national law,[69] and in this respect EU MSs have very different rules. For instance, Koch reported that whilst the Dutch Constitution provides supremacy to international law, the Italian Constitution accords supremacy on the basis of reciprocity and – albeit irrelevant now – the British Constitution adopts a dualist approach requiring transformation of international treaties into national law.[70] Luckily, no comparative analysis needs to be made because the ECJ developed its own rule concerning priority of Community law over national law, which in the opinion of AG Toth forms one of the two essential foundations of "Community law as a supranational legal system".[71] One year after the enunciation of direct effect, the ECJ took the opportunity to pronounce itself on the doctrine of supremacy of Community law in *Costa*.[72] Whilst the Court had already referred to supremacy of EU law as an *obiter dictum* in *Van Gend en Loos* by articulating that States had limited their sovereign rights to enter into the

[64] *Koch*, see supra note 4, p 203.
[65] *Van Gend en Loos*, see supra note 5.
[66] *Opinion 1/91*, see supra note 3.
[67] ibid, para 168.
[68] *Koch*, see supra note 4, p 208.
[69] Hartley, T.C. 'The Foundations of European Community Law' 4th edn, (Oxford University Press, 1998) p 191.
[70] *Koch*, see supra note 4, p 208.
[71] *Opinion 1/91*, see supra note 3, para 168.
[72] *Costa v E.N.E.L.*, see supra note 8.

Community legal order,[73] it is only with *Costa* that the ECJ took the opportunity rule on the doctrine of supremacy of EU law. In *Costa*, the Court maintained that by creating the Community, MSs had limited their own sovereign rights, producing a body of law which "binds both their nationals and themselves",[74] and that the "transfer by States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".[75] Although supremacy is distinct from direct effect, the two doctrines are inextricably linked: the combination of supremacy of Community law and direct effect meant that States were finally bound by new obligations, and that individuals could enjoy new rights vis-à-vis MSs whose domestic laws, even if enacted later than those adopted by the Community, could not derogate from.[76]

Further case-law pertaining to the first wave enhanced the conditions for a Community norm to enjoy direct effect. The jurisprudence that followed determined many of the different characteristics of both direct effect and supremacy of EU law, and it has been extensively discussed in literature.[77] However, this thesis will only focus on those gussets which are functional to describe the ambitious approach adopted by the ECJ to expand the concepts of direct effect and supremacy. As with *Van Gend en Loos* in 1963, in 1974 with *Van Duyn* the ECJ similarly followed a teleological interpretation to hold that EU legal instruments which required national implementation could also have direct effect, specifying that directives which were not implemented, (or implemented wrongly), by MSs could enjoy direct effect starting from the time of expiry of the implementation period.[78] The reason for the Court to fill in gaps and expand the doctrine of direct effect is especially clear in *Van Duyn,* where the ECJ explicated the characteristics of direct effect through what Dashwood has described as the "effectiveness objective".[79] In *Van Duyn,* the Court held that precluding individuals from

[73] ibid.
[74] *Costa v E.N.E.L.*, see supra note 8.
[75] ibid.
[76] *Rossi*, see supra note 15.
[77] For further readings, see Tas, S. 'Defrenne v SABENA: A Landmark Case with Untapped Potential' (2021) 6 European Papers 2.; Schermers, G. H. 'The European Court of Justice: Promoter of European Integration' (1974) 22 Am J Comp L 444; Chalmers, D., Barroso, L. 'What Van Gend en Loos stands for' (2014) 12 International Journal of Constitutional Law 1.
[78] *Yvonne van Duyn v Home Office*, see supra note 18, para 12.
[79] Dashwood, A. 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?' (2017) 9 Cambridge Yearbook of European Legal Studies 9, p 85.

relying on certain acts which require MSs to pursue a specific conduct would be incompatible with the binding effect attributed to directives by virtue of Article 249 of the EC Treaty, (now Article 288 of the Treaty on the Functioning of the European Union),[80] as it would weaken the effect of Community law.[81]

Finally, in 1978 in *Simmenthal* the ECJ crystallized the effects of supremacy for national courts confronted with conflicting national laws. The Court held that it was the duty of national courts to apply Community law in its full extent, refraining from applying any conflicting provisions of national legislations even where the latter had been adopted subsequently to the Community law provision at stake.[82] The ECJ reiterated that Community law had to be "fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force"[83], stating that being a source of rights and duties for those affected by it, Community provisions also affected national courts whose task was to protect the rights conferred upon individuals by Community law. In addition, in *Simmenthal* the Court made clear mention of the "effectiveness objective", holding that the "effectiveness of legal obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty"[84] would be impaired if national courts were to recognize the legal effects of national legislative measures incompatible with the provisions of Community law.[85]

Therefore, in *Simmenthal* the ECJ formally accorded to supremacy of Community law the power to render inapplicable all national conflicting provisions, to take precedence in MSs' legal orders and to preclude MSs from adopting future incompatible laws.[86] Some authors recognize in *Simmenthal* the completion of the "supremacy" project implicitly began with *Van Gend en Loos*, delineating an "autonomous vertical Community rule of conflicts" whereby any provision of Community law, (even administrative case decisions), could overrule any form of national law, (even general principles of a constitutional character).[87]

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[80] *TFEU*, see supra note 10, art 288.
[81] *Yvonne van Duyn v Home Office*, see supra note 18, para 12.
[82] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, see supra note 19, paras 16 – 18.
[83] ibid, para 14.
[84] ibid, para 18.
[85] ibid.
[86] ibid, para 17.
[87] Hofmann, H. 'Conflicts and Integration - Revisiting Costa v ENEL and Simmental II' in Azoulai, L.; Maduro, M. (eds.) 'The Past and Future of EU Law; The Classics of EU Law Revisted on the 50th Anniversary of the Rome Treaty' (2010) Hart Publishing (Oxford), p 62.

2.2.2 Underlying Reasons for the Expansion of Direct Effect

In the pre-SEA Wave the Court played a minor role in the Community decisional process, leaving some leeway to the political organs of the EU.[88] However, as detailed by the case-law previously analyzed, it greatly intervened in the "post-decisional phase"[89], creating doctrines which would make the outcomes of the decision-making process stick around. As aptly put by Professor Weiler, the message was something along the lines of "you are free to bargain but agreements reached must be respected".[90] The steps taken by the ECJ in the pre-SEA wave appear very ambitious considering that, although direct effect completely overstepped the need for implementation by national law, the legal order of the Communities strictly relied on cooperation of national courts to respect the rulings of the ECJ. The confidence of the Court in enacting audacious rulings may be explained through the historical and legal context of the time.

The Luxembourg Accord, reached in 1966 to foil the "Empty Chair Crisis"[91], granted MSs veto powers on Community decision-making over topics deemed to be of "very important national interest(s)".[92] Thus, MSs' reception of the ECJ's doctrines was quite positive because they had little to fear: they could have still pulled the emergency break in a wide array of situations, as the formula of "very important national interest(s)" was ambiguously defined.[93] Thanks to the Luxembourg Accord, MSs retained complete control on decision-making, making the design of the institutional structure of the Community such that MSs would *de facto* be the sole authors of the same supranational law that bound them. In other words, while obeying Community law MSs were actually obeying themselves,[94] with little incentive to deviate from the same obligations they had unanimously adopted. This explains what Weiler defines as the "peaceful reception of the erosion of the enumerated competences principle" which characterized the Community from the mid 1970s to the mid 1980s.[95]

[88] *Figueroa Regueiro*, see supra note 12, p 9.
[89] *Weiler*, see supra note 11, p 201.
[90] ibid.
[91] For further readings, see Caraffini, P. 'De Gaulle, the "Empty Chair Crisis" and the European Movement' (2015) 7 Perspectives on Federalism 2.
[92] Bulletin of the European Communities No 3, March 1966, EU Commission – Working Document, p 9.
[93] ibid.
[94] *Menéndez*, see supra note 33, p 629
[95] *Weiler*, see supra note 11, p 39.

As for the reasons motivating the ECJ to enact iconoclastic rulings, the strategical nature of jurisprudential choices pertaining to the pre-SEA Wave is understandable when contextualized in the '60s, at the dawn of creation of the Community. As contended by Professor Rossi, on one hand these courageous rulings were inspired by the will to let citizens enjoy the benefits conferred by Union law despite the lack of MSs' transformation of Community norms into national law.[96] On the other hand, she also suggests the existence of a "sanctioning" intent by the ECJ against the MSs that implemented directives wrongly, or did not implement them at all.[97] In fact, the Community was first and foremost propelled by the realization of the internal market. Since the creation of the single market was based on directives, and infringement procedures did not yet grant the possibility to apply pecuniary sanctions, (this option only appeared in 1992 with the Maastricht Treaty),[98] issues of implementation had to be on the agenda of EU institutions at the time, whether that was made explicit or not. Enunciating the existence of direct effect had indeed created a way to indirectly sanction MSs, incentivizing citizens to surveil the compliance of their MSs with EU law.[99]

2.3 The SEA Wave

The second phase experienced in the development of direct effect is embodied by the SEA Wave. It displayed a setback in the activism of the ECJ to advance direct effect, and the cases pertaining to this period, *Ratti*,[100] *Von Colson*,[101] *Marshall I,*[102] *Marleasing*,[103] *Francovich*,[104] *Brasserie du Pecheur*,[105] *Faccini Dori*[106] and *Unilever*,[107] served to build up the notion of "invocability".

2.3.1 A Setback in Direct Effect

In 1979, with *Ratti*, the ECJ limited the application of direct effect by holding that the Community norm that was invoked needed to be sufficiently precise and unconditional to enjoy

[96] *Rossi*, see supra note 15.
[97] *Rossi*, see supra note 15.
[98] Treaty on the European Union [1992] OJ C 191, art 171.
[99] *Rossi*, see supra note 15.
[100] *Criminal proceedings against Tullio Ratti*, see supra note 20.
[101] *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, see supra note 22.
[102] *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, see supra note 23.
[103] *Marleasing SA v La Comercial Internacional de Alimentacion SA,* see supra note 24.
[104] *Andrea Francovich en Danila Bonifaci en anderen tegen Italiaanse Republiek,* see supra note 25.
[105] *Brasserie du Pêcheur*, see supra note 26.
[106] *Paola Faccini Dori v Recreb Srl*, see supra note 27.
[107] *Unilever Italia SpA v Central Food SpA*, see supra note 28.

direct effect.[108] In *Ratti* the Court also developed the so-called "estoppel argument", by holding that a MS which had not implemented the measures prescribed by a directive within the required period of time, could not rely on its own failure to avoid acting upon the obligations required by the directive.[109] In addition, in 1982 in *Becker* the Court rationalized the power of directives to become operational from the deadline for their implementation. The Court held that, even though they are not directly applicable and do not automatically become part of national law upon adoption, directives may produce similar effects to regulations after the time limit for their implementation has expired and the State has not implemented them properly.[110] Altogether, *Ratti* and *Becker* enhanced the effect of directives, (albeit in a much more limited fashion than the activist approach used by the Court during the pre-SEA Wave), whilst ensuring that MSs would not obtain a legal advantage from their own defaults.[111]

The ECJ also introduced a system of remedies to give effect to unimplemented directives through the "back-street". The Court ensured that EU law would be observed by, firstly, prescribing the obligation to interpret national laws in conformity with EU law and, secondly, by holding the State accountable for its breaches of EU law. The first remedy corresponds to consistent interpretation, and in *Von Colson* and *Marleasing* the ECJ formally enunciated the requirement of national courts to interpret domestic law in "light of the wording and purpose" of EC law,[112] including for what concerned unimplemented directives. In 1990, with *Marleasing* the Court held that, firstly, an unimplemented directive could be relied on to influence the interpretation of domestic law in disputes between individuals, (as the obligation to interpret national law in conformity with the directive holds true irrespective of whether their provisions have direct effect), secondly, the ECJ ruled that this was so even if national law had been adopted before the directive.[113] The Court qualified this remedy as "inherent in the Treaty system", since it was not intended to sanction the State but, rather, it was connected to the principle of supremacy of EU law and loyalty.[114] In addition, in *Marleasing* AG Van Gerven qualified the remedy of consistent interpretation as deriving directly from the doctrine of

[108] *Criminal proceedings against Tullio Ratti*, see supra note 20, para 23.
[109] ibid, para 22.
[110] *Ursula Becker v Finanzamt Münster-Innenstadt*, see supra note 21, para 23; Craig, P., De Burca, G. 'EU law: Text, Cases and Materials' Sixth Ed. Oxford University Press (2015) p 203.
[111] *Dashwood*, see supra note 80, p 86.
[112] *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, see supra note 22, para 26; *Marleasing SA v La Comercial Internacional de Alimentacion SA,* see supra note 24, para 7.
[113] *Marleasing SA v La Comercial Internacional de Alimentacion SA,* see supra note 24, paras 8 – 12.
[114] Case C-105/03 *Criminal proceedings against* [2005] EU:C:2005:386, para 42.

supremacy.[115] The remedy of consistent interpretation has been limited in so far as it would not impair the principles of legal certainty, non-retroactivity and the prohibition of *contra legem* interpretations.[116]

With *Francovich* in 1991, the ECJ prescribed a third and final remedy in the form of State liability, to be used where consistent interpretation and direct effect were not available.[117] By holding that "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible,"[118] the Court ruled on the possibility for individuals to obtain compensation from the State where national law conflicted with EU law. The rationale underpinning this remedy implied that whilst failure to implement a directive might have not resulted in direct effect *per se* due to the lack of the direct effect-criteria, its unimplemented nature surely amounted to "some effect", giving rise to a right for individuals to convert their "missed" benefit into damages for loss.[119] In other words, although the lack of direct effect did not allow individuals to rely specifically on the rights granted by the unimplemented directive, certain "residual rights" still existed to obtain relief for the benefits that citizens should have enjoyed but could not claim due to the State's failure to implement the EU law provisions.

Initially, the conditions prescribed by the ECJ to claim compensation were (i) whether the unimplemented directive intended to confer rights upon individuals; (ii) whether its content was sufficiently precise and, finally, (iii) whether there was a causal link between lack of implementation and the damage that this failure had caused.[120] Naturally, this remedy was largely unpopular among MSs, whose dormant non-compliance had been suddenly awoken by many pecuniary claims. It is probably due to this reason that, in 1996, with *Brasserie du Pecheur,* the ECJ added a further criterion to the possibility to obtain redress by defining that State liability occurred in instances of a "sufficiently serious breach".[121] Sufficiently serious breaches are characterized by, *inter alia*, considerations similar to those of direct effect, such

[115] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] EU:C:1990:395, Opinion of AG Van Gerven, para 9;
[116] Case C-294/16 *PPU JZ v Prokuratura Rejonowa Łódź - Śródmieście* [2016] EU:C:2016:610 para 33.
[117] *Andrea Francovich en Danila Bonifaci en anderen tegen Italiaanse Republiek*, see supra note 25.
[118] ibid, para 33.
[119] *Figueroa Regueiro*, see supra note 12, p 11.
[120] *Andrea Francovich en Danila Bonifaci en anderen tegen Italiaanse Republiek*, see supra note 25, para 40.
[121] *Brasserie du Pecheur*, see supra note 26, para 51.

as whether the norm at stake was sufficiently clear, and the degree of discretionary power it had left to national or supranational authorities.[122] The principle of State liability sits oddly with the system of national remedies to indirectly give effect to EU law. In view of the strict conditions governing State liability claims, an individual seeking to rely on an EU law norm would firstly attempt at invoking direct effect rather than State liability. However, if the requirements to claim State liability are similar to those of direct effect, where the norm at stake does not enjoy direct effect, it will neither be relied upon by individuals directly before national courts nor will it form the basis for a State liability claim. This ambiguity in the system of national remedies shows that direct effect and State liability do not complement each other but, rather, that State liability risks becoming a redundant and impractical remedy.

Simultaneously, the creation of the estoppel doctrine had formalized the debate between vertical and horizontal direct effect.[123] Vertical direct effect stems from the relationship between individuals and a MS, and it allows individuals to invoke a provision of Union law against the State.[124] Horizontal direct effect stems from the relationship between individuals, and it allows individuals to invoke a provision of Union law against another individual.[125] The distinction between vertical and horizontal disputes presents a conceptual difficulty in the application of direct effect: whilst it is reasonable to allow citizens to rely on direct effect and hold the State accountable for failure to implement a directive, the same is not so immediate in situations between private individuals, who bear no guilt for the lack of action by their MSs in implementing a directive. Otherwise, allowing individuals to sue each other for not respecting the provisions of an unimplemented directive which enjoys direct effect, would amount to penalize citizens for complying with their national law which, albeit conflicting with Union law, is fully in force in their MS.

In 1986 with *Marshall* the ECJ brought an end to all claims of directives relied upon by an individual against another, ruling that "the binding nature of a directive (…) exists only in relation to each Member State to which it is addressed. (…) [Thus] a directive may not of itself impose obligations on an individual and a provision of a directive may not be relied upon

[122] ibid, para 56.
[123] *Figueroa Regueiro*, see supra note 12, p 10.
[124] EurLex, 'The direct effect of European Union law' available at <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=LEGISSUM%3Al14547> (accessed 23 June 2022).
[125] ibid.

as such against such a person".[126] Subsequently, although in a rather subtle manner, the ECJ attempted at enlarging the concept of "State" to continue affirming direct effect, including in its definition public administration,[127] administrative authorities,[128] bodies subject to the authority or control of the State,[129] or even organizations governed by private law to whom the State has delegated the performance of a task in the public interest.[130] This considerably increased confusion on the instances where a private party is acting as a public authority, to an extent that Figueroa Regueiro argues that the estoppel argument has no more value today.[131]

The ruling in *Marshall* was expressly confirmed in 1994 with *Faccini Dori*, where the ECJ categorically ruled out the possibility to invoke unimplemented directives in horizontal situations.[132] In the *Faccini Dori* ruling, the Court rationalized the inapplicability of direct effect in horizontal disputes by holding that "the effect of extending that case-law [on direct effect] to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations".[133] Aside from rejecting horizontal direct effect, scholars have recognized the cardinal nature of *Faccini Dori* in the contribution it provides to the division of competences-question: recognizing horizontal direct effect to directives would have blurred the distinction between directives and regulations, amounting to the Community *de facto* autonomously granting itself the power to bind individuals in respect of areas of legislation where it had not been allocated this competence.[134]

In 2000 with *Unilever*, the ECJ formally recognized another characteristic of direct effect-lacking directives. In *Unilever*, the Court held that individuals may rely upon the inapplicability of a national technical regulation which does not comply with a directive in horizontal situations.[135] Whilst the ECJ reiterated that directives may not be invoked in horizontal situations since they do not create rights or obligations for individuals, it clarified that this does not impair the "ousting" power they enjoy in cases of conflict between national

[126] *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, see supra note 23, para 48.
[127] ibid, para 49.
[128] Case 103/88 *Costanzo* [1989] EU:C:1989:256, paras 30 – 31.
[129] Case C-188/89 *A. Foster and others v British Gas plc.* [1990] EU:C:1990:313, para 18.
[130] ibid, para 35.
[131] *Figueroa Regueiro,* see supra note 12, p 10.
[132] *Paola Faccini Dori v Recreb Srl*, see supra note 27, para 24.
[133] ibid.
[134] Betlem, G. 'Medium Hard Law - Still No Horizontal Direct Effect of European Community Directives after Faccini Dori' (1995) 1 Colum J Eur L 469, p 479.
[135] *Unilever Italia SpA v Central Food SpA,* see supra note 28.

laws and EU law. By holding that the directive at stake did not "in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it",[136] the ECJ shed light on a new trait of unimplemented directives, ruling that directives render national laws obsolete whilst avoiding the conferral of rights to individuals. Scholars match this case with the rise of the doctrine of invocability of exclusion,[137] where direct effect-lacking directives may be invoked in vertical or horizontal disputes to disapply conflicting national laws, leaving a legal "void" which shall be filled by national legal provisions rather than by the directive itself.[138]

2.3.2 Underlying Reasons for a (Partial) Limitation of Direct Effect

Even though the SEA Wave presents novelties in the elaboration of the doctrine of direct effect, this phase focused on the doctrine of direct effect by elaborating its boundaries. Whilst the ECJ still took up the cudgels of Community law, it is unarguable that this period witnessed the tendency to limit direct effect by defining what characteristics provisions must display in order to enjoy it (*Ratti*), by enunciating a system of national remedies to give effect to Union law through the "back-street" (*Von Colson*, *Marleasing* and *Francovich*), or by categorically excluding horizontal direct effect (*Marshall I* and *Faccini Dori*). As contended by some authors, the development of the doctrine of direct effect pushed the EC Treaty very far, and national courts were starting to doubt the competence creep increasingly exercised by the Community.[139] In addition, the predominant political climate characterizing the mid-'80s definitely increased the tension at the intergovernmental level: the Single European Act, signed in 1986, represented the end of veto power. The newly-drafted Article 100A of the EC Treaty prescribed the passage to qualified-majority voting[140] and, although some Foreign Ministers hurried up to reassure their governments that the Luxembourg Accord-veto would remain available as a last resort measure,[141] Article 100A later became universally recognized as the default procedure for adopting most internal market legislation.[142]

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[136] ibid, para 51.
[137] *Figueroa Regueiro,* see supra note 12, p 16.
[138] *Craig and De Burca*, see supra note 111, p 219.
[139] *Weiler*, see supra note 11, p 195.
[140] *Treaty on the European Union*, see supra note 99, art 100a.
[141] Weiler, J. H. H. 'The transformation of Europe' in Weiler J. H. H. 'The Constitution of Europe. Do new Clothes have an Emperor? And other Essays on European Integration' (1999) Cambridge University Press, Cambridge, p 66.
[142] ibid.

Menéndez argued that the end of veto power resulted in the removal of a key to indirect national democratic legitimacy into supranational law.[143] As a result, the issue of competences had become more pressing than ever: the decision of whether a MS would retain certain competences was suddenly at the mercy of other governments through qualified-majority voting, with no emergency break to pull in case one single State would fear for the retainment of some of its competences. In response, certain national courts had begun to limit some of the core elements of the relationship between EU and national law, with supremacy and direct effect being at the forefront.[144] In this sense, the ECJ had to balance out national discontent by establishing firm boundaries that would reassure MSs' concerns, as it had done in *Faccini Dori*. Otherwise, cooperation with national courts might have been impaired. By acting as a protector of MSs' competences against the perceived threat of Union law infiltration into their legal systems, the Court cleverly found a middle ground that would comfort MSs while preventing national courts from undermining EU law. As a matter of fact, even if much meeker in its approach, the ECJ unarguably attempted to give effect to EU law through the "back-street", be it via a system of remedies, (*Von Colson*, *Marleasing* and *Francovich*), or by differentiating between the exclusionary and substituting powers of a directive (*Unilever*). That is why case-law such as *Ratti* and *Faccini Dori* may co-exist in the same Wave with *Unilever*, as they display the Court's tendency to please MSs' through a stick-and-carrot approach.

It is hoped that altogether these passages not only demonstrate that the Court has been pivotal in the creation of Union law, but also that its jurisprudence often accorded with the political needs of the time. In particular, the combined effect of *Van Gend en Loos* and *Costa* allowed a considerable expansion of EU law through an evolution based on the dialogue between national courts and the ECJ via preliminary rulings.[145] Subsequently, the enunciation of a system of national remedies, the rejection of horizontal direct effect and the rise of the doctrine of invocability permitted a gentler infiltration of EU into national legal systems. However, the significance of the doctrine of direct effect today needs to be revised, especially in view of the doctrine of invocability and its interlinkages with supremacy of EU law.

[143] *Menéndez,* see supra note 35, p 641.
[144] ibid, p 632.
[145] *Robin-Olivier*, see supra note 17, p 166.

Chapter 3: The Doctrine of Invocability before and after *Popławski II*

The third chapter will present the crystallization of the doctrine of invocability in respect to direct effect, and compare it with the new approach of the ECJ adopted from Case C-573/17 *Popławski* ("*Popławski II*") onwards.[146] In particular, Chapter 3 will introduce the case-law that consolidated the *Unilever* doctrine, it will present the doctrine of invocability of exclusion and invocability of subsitution, it will introduce *Popławski II* and demonstrate how this case departs from previous doctrine and, finally, it will analyze the case-law confirming *Popławski II*. These passages serve to set the foundations for the claim that the ECJ's jurisprudence is currently experiencing the advent of a new Wave, thanks to which the powers of direct effect and its implications for national legal systems have been increased at the expense of supremacy of EU law.

3.1 The Case-law confirming *Unilever*

The impact brought by *Unilever* is salient to understand the consequences of *Popławski II.* Importantly, the jurisprudence characterizing the period between the 2000s and 2018 does not represent a new wave, because the *dicta* of the Court simply consolidated the doctrine of invocability. Yet, this section will provide a selection of what is considered to be relevant case-law in this respect, in order to substantiate the analysis which follows on invocability of exclusion and substitution.

As previously seen, *Unilever* formalized the possibility for EU law instruments without direct effect to enjoy a sort of "ousting power" vis-à-vis national conflicting laws. To set the context of *Unilever*, it is important to mention that that case was immediately preceded by *WWF* where, in 1999, the ECJ ruled that depriving *in principle* individuals of the right to rely on a directive would be incompatible with the latter's binding character.[147] The ECJ added that the binding character of a directive prescribing a certain conduct by the MS concerned would be undermined if such directive could not be used as a "benchmark" to review the State's

[146] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13.
[147] Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] EU:C:1999:418, para 69.

margin of discretion in implementing said conduct.[148] The paragraph makes no mention of direct effect and, admittedly, the directive at stake in *WWF* did enjoy direct effect. Yet, the wording "in principle" seems to support the thesis following which, before embarking on any sort of analysis on direct effect, a binding directive always produces some minimal effects which impact national law.

After *Unilever*, in 2007 with *Frigerio*[149] and in 2016 with *Pöpperl*[150] and *Martínez Andrés and Castrejana López*,[151] the Court also assumed that where an "interpretation of national law in conformity with EU law is not possible, the national court must fully apply EU law". However, differently from *Unilever*, in three abovementioned cases the EU law provisions at stake did enjoy direct effect, and the judicial economy of the Court meant that no separate analysis needed to be conducted for norms lacking direct effect. Yet, this case-law must have borne a connection with the reasoning employed in *Unilever*, as both *Unilever* and all three cases formed the basis for the ECJ to unequivocally confirm the existence of an "ousting" power for direct effect-lacking directives in 2018 with *Link Logistiek*.[152] In *Link Logistiek*, the Court was requested to interpret a provision of a directive to determine whether the national law at stake violated it. Despite declaring that the provision of the directive in question did not enjoy direct effect,[153] the Court ruled that the directive was still capable of resulting into disapplication of national laws by virtue of its binding nature, and of the principle of sincere cooperation[154] enshrined in Article 4(3) of the TEU.[155]

3.2 Invocability of Exclusion and Invocability of Substitution

The jurisprudence pertaining to the period from 2000 until 2018 consolidated the formula adopted in *Unilever*. As provided in Chapter 2, scholars match *Unilever* with the formalization of the doctrine of invocability. The principle of invocability, deriving from the French jurisprudence "invocabilité"[156], prescribes the power of a norm to be invoked by individuals

[148] *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others*, see supra note 134, para 60.
[149] Case C-357/06 *Frigerio Luigi & C.* [2007] EU:C:2007:818, para 28.
[150] Case C-187/15 *Joachim Pöpperl v Land Nordrhein-Westfalen* [2016] EU:C:2016:550, para 45.
[151] Case C-184/15 and C-197/15 *Martínez Andrés and Castrejana López* [2016] EU:C:2016:680, para 50.
[152] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* [2018] EU:C:2018:810.
[153] ibid, para 56.
[154] ibid, para 57.
[155] Consolidated Version of the Treaty on European Union [2012] C 326/15, art 4(3).
[156] *De Witte*, see supra note 37, p 330.

before national courts which are under the obligation to apply it.[157] Already in 2000, AG Léger in *Linster* introduced a conceptual distinction between "invocabilité d'exclusion" and "invocabilité de substitution".[158] The creation of this doctrine spurred from the realization that many directives, despite not conferring rights to individuals, could serve as the basis for reviewing the legality of an action of MSs where individuals would be capable to show sufficient interest in the review outcome,[159] (for instance, in *CIA Security International*, a directive was used as a standard for review of a national obligation to notify technical standards).[160]

As elucidated by Professor Rossi, the doctrine of disapplication of a national conflicting norm involves two logical steps: firstly, the norm shall be excluded since it is incompatible with EU law; secondly, it shall be substituted by the latter.[161] Importantly, whilst the second passage presumes the first, the opposite is not true.[162] The two passages are based on different principles: whilst excluding national norms on the basis of their conflicting nature with EU law draws its fundamentals from supremacy of EU law, judgments such as *Unilever* and *Link Logistiek* demonstrate that substitution of said national norms by EU law forms the very essence of direct effect. As substitution conceptually follows exclusion, it is safe to assume that while only some EU law norms, (those enjoying direct effect), can result into invocability of substitution, all EU law norms can give rise to invocability of exclusion, (since all EU law is hierarchically superior to national law because it enjoys supremacy). Therefore, a graduated scale using the criteria of *Ratti* as a benchmark, (the clearness, preciseness and unconditionality test), determines whether a norm of EU law is capable of excluding, or also substituting, national conflicting laws.

From this perspective, it appears that supremacy is hierarchically superior to direct effect, since it forms a condition precedent for direct effect to exist. In fact, if it is correct that invocability of substitution needs clear, precise and unconditional norms of EU law, it is also safe to assume that the lack of these three criteria does not deprive directives of their "ousting" power. Whilst some directives may not be sufficiently clear, precise and unconditional to

[157] ibid.
[158] Case C-287/98, *Linster* [2000] EU:C:2000:3; Opinion of AG Léger para 57.
[159] Hilson, C., Downes, A. 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 ELRev 121, p 124.
[160] Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] EU:C:1996:172.
[161] *Rossi*, see supra note 15.
[162] ibid.

confer rights upon individuals, they still enjoy a certain degree of "strength" resulting in the disapplication of national laws stemming from their supremacy, (similarly to the effect that they produce through State liability in making MSs accountable for failure to transpose directives into their national legal systems).[163] Therefore, where national law conflicts with a directive, individuals are still able to benefit from it despite the fact that the directive is not supposed to confer any rights – a characteristic which some scholars have defined as "minimal justiciability".[164]

The "minimal justiciability" feature applied to EU law derives many of its features from the notion of "minimum core content" of human rights law.[165] This concept is frequently utilized in the assessment of socioeconomic rights,[166] and it comprises of a "floor" of minimum rights below which governments may not go, regardless of the specific economic conditions of a State.[167] In General Comment No.3 to the International Covenant of Economic, Social and Cultural Rights ("ICESCR"), the United Nations Committee on Economic, Social and Cultural Rights ("CESCR") held that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party".[168] Otherwise, if the ICESCR would be "read in such a way as to not establish such a minimum core obligation, it would be largely deprived of its *raison d'être*".[169] The recognition of a specific issue as a "right" means that it can form the basis for a claim before a court, which renders the matter "justiciable".[170] Whilst this discussion belongs to the realms of international human rights law, it is submitted that a similar reasoning has been clearly employed by the ECJ when deciding on the justiciability of EU law. As a matter of fact, *Unilever* and the case-law confirming it clearly demonstrated that even though directives that do not enjoy direct effect do not confer rights to individuals, they do allow for disapplication of national conflicting

[163] See also Chapter 2, Section 3a on *Andrea Francovich en Danila Bonifaci en anderen tegen Italiaanse Republiek*.
[164] Simon, D. 'Le système juridique communautaire' (1998) Puf Droit p 312.
[165] Fisher, A. 'Minimum Core and the Right to Education' (2017) The World Bank Legal.
[166] Thielbörger, P. 'The "Essence" of International Human Rights' (2019) 6 German Law Journal 20, p 935.
[167] ESCR-Net, 'Minimum Core Obligations' available at <https://www.escr-net.org/resources/minimum-core-obligations#:~:text=Governments%2C%20no%20matter%20what%20level,%2C%20social%2C%20and%20cultural%20rights.> (accessed 7 June 2022).
[168] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23, (1990) para 10.
[169] ibid.
[170] EurWORK, 'Justiciability of EU Law' (2010) Eurofund available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/justiciability-of-eu-law>.

laws.[171] This is most likely due to the same "effectiveness objective" re-iterated in *Van Duyn,* where the Court held that divesting directives all of their invocability power would have amounted to depriving them of their binding effect[172] or, in other words, of their *raison d'être.*

In short, whilst it would be incorrect to define directives lacking direct effect justiciable in their entirety, it is accurate to sustain that their "minimal justiciability" results in some consequences for domestic laws that conflict with them. This is what some of the authors cited in the literature review of this thesis claimed:[173] for instance, Prechal questioned whether direct effect would still matter since it had been gradually broadened up until giving rise to the doctrine of invocability.[174] Figueroa Regueiro went so far as to assert that the effects of EU law provisions in domestic legal systems could "no longer be explained by the *summa divisio* of provisions with and without direct effect",[175] calling for a more nuanced distinction based on the gradation of "justiciability" of each EU law norm at stake. In accordance with these claims, the doctrine of invocability, as it stood with *Unilever* and further case-law, determined whether a national conflicting norm would need to be excluded or substituted by EU law by using a test relating to the fulfilment of the conditions for direct effect. Yet, the following section will demonstrate that *Popławski II* has rendered the doctrine of invocability, (and even more so the discussions on "justiciability"), obsolete.

3.3 Case C-573/17 *Popławski*[176]

In this context, *Popławski II* sits oddly with its predecessors, as it disregards the distinction between invocability of exclusion and substitution. This section will introduce the facts and judgment of the case, showcasing its inconsistencies with previous jurisprudence.

3.3.1 Facts and Judgment

Popławski II concerns a preliminary ruling requested by a Dutch national court to the ECJ. In particular, the national court found an incompatibility between the national Law on

[171] *Unilever Italia SpA v Central Food SpA,* see supra note 28, para 51.
[172] *Dashwood*, see supra note 80.
[173] See Section 4 on "Relevance of the Topic and Literature Review", specifically supra note 37 and 38.
[174] *Prechal*, see supra note 41, p 1050.
[175] *Figueroa Regueiro,* see supra note 12, p 19.
[176] Please note that Case C-573/17 *Popławski II* has already been discussed by the author of this thesis in a case-note for the purpose of the course on Judicial Protection of the European Union. Whilst this research explores the effects of *Popławski II* in a different legal context, to elucidate the facts and judgment of the case the author has resorted to much of the analysis already conducted in her case-note.

surrender and the Law on the mutual recognition and enforcement of custodial and suspended sentences enacted by the Netherlands,[177] and the European Arrest Warrant as regulated by FD 2002/84[178] and FD 2008/909[179]. In 2015, a Dutch domestic court had already referred to the ECJ questions on the compatibility between its national law and FD 2002/84.[180] In response, the ECJ had ruled that Dutch law was incompatible with EU law,[181] and that the Dutch court was under a duty to interpret their domestic law in light of EU law as much as possible.[182] Nonetheless, once getting down to business, the national court had found itself in an impasse: had it interpreted national law consistently with FD 2002/84, it would have interpreted its national law *contra legem*,[183] (one of the main limitations to consistent interpretation). However, applying its conflicting national laws would have resulted into the domestic court disregarding the duty to consistent interpretation and, more importantly, sincere cooperation. Therefore, the national court asked the ECJ whether, *inter alia*, it should have disapplied its national provisions implementing the FD at stake, since interpretation could not lead to an outcome in conformity with the FD's objectives.[184]

In its answer, the ECJ started by reiterating that EU law enjoys primacy over national law. Based on this, the Court reminded that MSs are not only required to give full effect to EU provisions, but also to avoid undermining EU law through national conflicting laws.[185] The ECJ also recalled that consistent interpretation requires national courts to interpret their laws in conformity with EU requirements to the greatest extent possible and, where national law cannot be aligned with Union law, domestic judges should set national conflicting provisions aside. However, the ECJ also held that the principle of supremacy of EU law should not undermine the distinction between provisions with direct effect and those without it.[186] Where an EU rule does not have direct effect and it conflicts with national law, it is not possible to

[177] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, paras 12 – 15.
[178] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190.
[179] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327.
[180] Case C-579/15, *Openbaar Ministerie v Daniel Adam Popławski* [2017] EU:C:2017:503.
[181] ibid, para 24.
[182] ibid, para 43.
[183] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, para 83.
[184] ibid, para 34.
[185] ibid, para 54.
[186] ibid, para 60.

rely on supremacy to disapply the domestic law. To reach this conclusion, the ECJ cited a series of case-law, such as *Napoli*[187] or *Indėlių ir investicijų draudimas and Nemaniūnas*.[188]

In the case of *Popławski II*, whilst both FDs are binding on MSs, the Court recalled that neither of them has direct effect. Although whilst MSs are not required to set aside national conflicting laws solely on the basis of the FDs, their binding character still calls for national authorities to interpret national law in light of FDs' text and purpose as much as possible, consistently with the principles of legal certainty and non-retroactivity, and the prohibition of *contra legem* interpretation.[189] The ECJ also ruled that to ensure FDs' effectiveness, national courts should change case-law which interprets national law in a manner incompatible with the FDs' objectives. Thus, the Dutch national court could not claim the impossibility to interpret national law consistently with Union law if that impossibility was due to the fact that the national provisions had been interpreted in a manner inconsistent with EU law in previous cases.[190] If, on the other hand, interpretation of national law in conformity with EU law proved impossible due to the limitation of *contra legem* interpretation, the ECJ held that the referring court should have interpreted legislation as to ensure at least a compatible solution with FD 2002/584.[191]

Therefore, the ECJ ruled that supremacy of Union law does not require national courts to disapply a provision of national law incompatible with a FD, since FDs do not have direct effect. However, national authorities are required to interpret national law to the greatest extent possible in conformity with EU law, to ensure that the outcome is compatible with the objective pursued by FDs.

3.3.2 Departure from the Previous Doctrine

The ruling of the Court is hard to reconcile with the canonical division of invocability of exclusion and invocability of substitution which had characterized previous case-law. In 2019 with *Popławski II*, the Court categorically held that EU law in itself is not a sufficient ground to set aside national conflicting laws.[192] Put differently, there is no obligation to

[187] Case C-595/12 *Loredana Napoli v Ministero della Giustizia* [2014] EU:C:2014:128, para 50.
[188] Case C-671/13 *Indėlių ir investicijų draudimas and Nemaniūnas* [2015] EU:C:2015:418, para 60.
[189] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, paras 75 – 76.
[190] ibid, para 79.
[191] ibid, para 85.
[192] ibid, para 62.

disapply a domestic provision solely because it conflicts with a EU law provision that does not enjoy direct effect. In its reasoning, the Court clearly disregarded *Link Logistiek,* as well as all the case-law that preceded it, subjecting the ousting power of Union law to the presence of direct effect and reducing the role of supremacy of EU law to the obligation of consistent interpretation.

In addition, the case-law which *Popławski II* draws its conclusions from does not add to the soundness of the judgment: in fact, both in *Napoli* and *Indėlių ir investicijų draudimas and Nemaniūnas* the directives at stake were directly effective, and judges were not formally confronted with the question of what would have happened in case of lack of direct effect. One may find comfort in the idea that *Popławski II* only referred to FDs. Nonetheless, the reasoning employed by the ECJ relied on systematic arguments that relate to the totality of the EU legal system, paving the way for its applicability to several EU acts which do not possess direct effect.[193] As a matter of fact, the case-law confirming *Popławski II* clearly demonstrates that this rationale applies to a wide array of EU law instruments other than FDs.

3.4 The Case-law confirming *Popławski II*

Despite the jurisprudence confirming the judgment also linked, in an apparently biunivocal manner, invocability of exclusion and direct effect, the enactment of *Popławski II* did not particularly alarm the legal and academic community, and many authors carried out analyses on the case solely with regard to European criminal law.[194] Admittedly, whilst *Unilever* was ruled upon in the context of the internal market, (where the Union enjoys exclusive competences[195] and the ECJ has always been particularly active in the creation of new legal doctrines), *Popławski II* touched upon national sensitive issues such as criminal law and national security, and it is sensible to assume that the Court's approach would be much less intrusive into domestic legal systems.

[193] *Bobek*, see supra note 15, p 63.
[194] Wahl, T. 'CJEU: Executing MS Must Ensure Enforcement of Foreign Custodial Sentences against Residents' (2019) eucrim, available at <https://eucrim.eu/news/cjeu-executing-ms-must-ensure-enforcement-foreign-custodial-sentences-against-residents/>; Ouwekerk, J. 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 97.
[195] *TFEU*, see supra note 10, art 3(b).

However, the judgment was immediately followed by three cases where the ECJ repeated the formula established in *Popławski II,* holding that national courts were under a duty to set aside national law conflicting with EU law provisions enjoying direct effect.[196] Yet, the cases did not relate to direct effect *per se*, as they mostly concerned the interpretation of the Aarhus Convention,[197] the TEU[198] and the European Union Charter of Fundamental Rights.[199]

Subsequently, in March 2020 with *BGŻ BNP Paribas* and *Sanchez Ruiz*, (which relate to, respectively, a FD and a framework agreement), the ECJ confirmed the impossibility to disapply national conflicting laws in the absence of direct effect.[200] One might still reckon that these cases are isolated examples where the Court disregards its previous jurisprudence by virtue of the special instruments at stake. Nonetheless, the very recent judgment of *Thelen Technopark Berlin,*[201] (which related to Directive 2006/123/EC on services in the internal market, or "Services Directive" directly linked to one of the four freedoms of the EU internal market),[202] should demonstrate that change is in the air, and that the advent of a new Wave through the *Popławski II* formula is not some sort of "cry wolf" that limits its consequences to instruments being phased out such as FDs.[203]

In 2022 with *Thelen Technopark Berlin*, the Court was confronted with the question of whether national law could be disapplied by virtue of its conflict with the provisions – allegedly endowed with direct effect – of the Services Directive.[204] To respond to the question posed by the German national court, the ECJ firstly affirmed that national courts are bound by the principle of supremacy of EU law to interpret national law in conformity with EU law, in so far as this duty does not result into a *contra legem* interpretation of domestic law.[205] Since it

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[196] Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* [2019] EU:C:2019:626, para 73; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* [2019] EU:C:2019:982, para 161; Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* [2019] EU:C:2019:1114, para 42.
[197] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (2001) 2161 UNTS 447.
[198] *TEU*, see supra note 139.
[199] Charter of Fundamental Rights of the European Union [2007] C-303/1.
[200] *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) against Bank BGŻ BNP Paribas S.A.*, see supra note 29; *Domingo Sánchez Ruiz and Others v Comunidad de Madrid*, see supra note 28, para 119.
[201] *Thelen Technopark Berlin*, see supra note 30.
[202] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376.
[203] EU Monitor, 'Framework decision', available at <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu> (accessed 23 June 2022).
[204] ibid, para 23.
[205] ibid, para 28.

was impossible to interpret the national provision in conformity with Union law, the ECJ followed the *Popławski II* formula by holding that that "a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect".[206] In the case at hand, the provisions of the directive at stake were sufficiently unconditional and precise, yet the applicant sought to invoke them in a horizontal dispute, depriving them of direct effect.[207] As a result, the ECJ held that the national court was not required to disapply national conflicting law solely on the basis of EU law provisions that did not enjoy direct effect, confirming what its previous ruling in *Popławski II*.[208]

Popławski II drew its rationale from the idea that the principle of supremacy should not blur the distinction between provisions with or without direct effect,[209] and in a similar fashion in *Thelen Technopark Berlin* the ECJ ensured that the doctrine of supremacy did not trump the prohibition of horizontal direct effect for directives. Along the same lines as *Faccini Dori* in 1994, it seems that the ECJ is seizing the opportunity to render judgments that focus more on the issues of competences than on the specifics of each case. Therefore, just as in *Faccini Dori* directives were unequivocally deprived of horizontal direct effect not to blur the distinction between directives and regulations, (which rotated around different fields of competences), in *Popławski II* and *Thelen Technopark Berlin* the ECJ ensured that direct effect-lacking provisions do not affect national laws, to guarantee that only those instruments explicitly adopted when the Union has the competence to do so will have consequences for MSs' laws.

Chapter 3 analyzed the *Unilever* jurisprudence, it delineated the doctrine of invocability, it assessed *Popławski II* and, finally, it presented the case-law consolidating *Popławski II.* Whilst before *Popławski II* the disapplication of national conflicting laws depended on supremacy of EU law, the *Popławski II* jurisprudence made disapplication conditional upon the presence of direct effect, *de facto* expanding the powers of the doctrine of direct effect. Although this change seems to be, intuitively, at the benefit of Union law, this choice is increasingly protective of national legal systems, and it proves problematic from several points of view, as the following Chapter will demonstrate.

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[206] *Thelen Technopark Berlin*, see supra note 32, para 33.
[207] ibid, paras 35 – 37.
[208] ibid, para 33.
[209] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, para 60.

Chapter 4: The Post-SEA Wave

The fourth Chapter will determine that the new case-law forms the advent of a new Wave within ECJ jurisprudence. To do so, the Chapter will demonstrate the hierarchical superiority vested in supremacy versus direct effect before *Popławski II*, it will illustrate the altered duty for national courts confronted with questions on the incompatibility between national law and EU law and, finally, it will provide the reasons for the development of this last Wave.

4.1 Before *Popławski II*: Supremacy as a Condition Precedent to Direct Effect

To recap, the pre-SEA Wave and the SEA Wave, albeit at different speeds, equipped EU law with a high degree of power to permeate in national legal systems. Integration of Union law into national legal systems was advanced by the Court from the 1960s up until 2018, notwithstanding the SEA Wave enhanced direct effect through the "back-street". Simultaneously, the jurisprudence of the Court made it evident that supremacy and direct effect, while going hand-in-hand, co-existed – at least until *Popławski II* – through a hierarchical relationship, where supremacy was a pre-condition for direct effect. Whilst supremacy and direct effect are already assessed in Chapter 3, it is useful to review their implications to demonstrate the effects of *Popławski II.*

As direct effect would be meaningless if there was no doctrine of supremacy to apply it in practice, it is safe to assume that supremacy acted, at least until *Popławski II,* as a pre-condition for the functioning of direct effect. Without supremacy direct effect would have resulted in the uneven application of EU law: as held in Chapter 2,[210] the constitutions of MSs differ in terms of the status they accord to international law over domestic law. At the time of *Van Gend en Loos*, the constitutions of Germany and Italy, (two of out the six MSs of the Community), were modelled on the basis of the dualist system and, by virtue of the *lex posterior derogat priori* principle, national legislation adopted in a later time would have prevailed over Community law. In these countries, characterized by a dualist system, national

[210] See also Chapter 2, Section 2a.

courts could have chosen to apply their domestic law over Community law, leaving individuals impotent to invoke their direct effect-equipped rights granted by Community law.[211]

Koch reported that, although avoiding enunciating it,[212] the ECJ itself had assumed the existence of supremacy when pronouncing itself on direct effect for the first time. By holding that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights"[213], the Court had set the foundations to rule, one year later, that the limitation of sovereign rights willfully undertaken by MSs meant that domestic law could not override Community law.[214] AG Romer, who delivered an Opinion in *Van Gend en Loos*,[215] reasoned that it could have not been the intention of the Court to formulate a doctrine that would produce uneven consequences among MSs, especially in the field of customs law and in view of the primary aim of the Community itself to bring about market integration.[216] The doctrine of supremacy would therefore act as a condition precedent to direct effect, setting the basis for the latter's practical application. It appears that after *Popławski II*, this relationship has shifted. By rejecting the duty to disapply national conflicting laws in the absence of direct effect, the Court is substantially negating the hierarchically superior character of supremacy. The following section will demonstrate this by analyzing the new duties for judges after *Popławski II.*

4.2 After *Popławski II:* the Altered Duty for National Judges

In *Popławski II*, AG Sánchez-Bordona clearly stated that denying the ousting effect of conflicting national law by virtue of provisions of EU law lacking direct effect would amount to "purely and simply allowing the Member States to undermine the requirement that framework decisions be applied uniformly within the European Union and the principles of mutual trust and recognition".[217] As previously seen in Chapter 2, the system of national remedies still envisions State liability where it is not possible to use consistent interpretation or disapply national conflicting laws. However, the conditions to trigger State liability are quite

[211] *Koch,* see supra note 4, p 214.
[212] ibid, p 216.
[213] *Van Gend en Loos*, see supra note 5.
[214] *Costa v E.N.E.L.*, see supra note 8.
[215] Case C-26/62 *Van Gend en Loos* [1963] EU:C:1963:1, Opinion of AG Romer.
[216] ibid, para 24.
[217] Case C-573/17 *Openbaar Ministerie v Daniel Adam Popławski* [2019] EU:C:2019:530, Opinion of AG Sánchez-Bordona, para 116.

stringent, and they accord a much less favorable treatment to citizens than the all-encompassing doctrine of supremacy of EU law, (which prioritizes all instruments of EU law over national law). Furthermore, in a case such as *Popławski II*, there is no applicant that would claim State liability, as Mr. Popławski did not want to be extradited from the Netherlands and benefitted from the incorrect application of Union law. In a situation such as the one of *Popławski II*, disapplication and State liability are impossible to apply, and the only desirable road left for national judges would be to embark into an analysis of domestic law as to consistently interpret it with Union law. Luckily, in the case of *Popławski II* consistent interpretation was possible,[218] but in many other instances that might not be the case.

In summary, it is useful to resort to the analysis conducted by Professor Rossi on the altered *modus operandi* that national judges need to adopt when conducting analyses over the issue of national laws conflicting with EU law.[219] Firstly, domestic courts will attempt at interpreting national law consistently with EU law. If the judge has doubts on the content of a norm of EU law, they will be able to refer a question to the ECJ for a preliminary ruling procedure,[220] provided that certain conditions are met.[221] If the norm is sufficiently clear to the judge, yet a consistent interpretation would impair legal certainty, determine or aggravate criminal responsibility or be *contra legem*, the national court might refer a question on the interpretation of national law to its own constitutional or supreme court, if such a possibility is contemplated by the national legal system.[222]

If providing a consistent interpretation to national law is impossible, a national judge will need to embark on an analysis of the relationship between EU law and domestic law. By virtue of *Popławski II*, this conflict is by no means inevitably resolvable through recourse to the doctrine of supremacy of EU law and the disapplication of the national conflicting law.[223] In fact, the national judge will need to verify whether the provision of EU law at stake has direct effect and, if so, they will disapply the national conflicting law. If the Union law provision does not possess direct effect, (which the judge will once again be able to verify through a

[218] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, para 108.
[219] *Rossi,* see supra note 15.
[220] *TFEU,* see supra note 79, art 267.
[221] Case 283/81 *Cilfit and Others* [1982] EU:C:1982:335.
[222] Garlicki, L. 'Constitutional courts versus supreme courts' (2007) 5 International Journal of Constitutional Law 1, p 48.
[223] Dougan, M. 'Primacy and the Remedy of Disapplication' (2019) 1 Common Market Law Review 56, p 1462.

preliminary ruling procedure), no requirement exists as per *Popławski II* on the disapplication of national law.

Where the norm of EU law does not enjoy direct effect and the national provision may not be interpreted consistently with EU law, national judges will need to reconciliate the ruling of *Popławski II* with their duty of loyalty,[224] following which national courts must "make direct and complementary contributions to the working out of a decision".[225] The refusal by judges to enforce EU law provisions might also breach the principle of equivalence,[226] on the basis of which a national legal system may not afford EU law-based rights a less favorable protection than the one accorded to equivalent rights rooted in national law.[227] These principles will find crucial application in the immediate future since it is highly likely for national judges to breach them.

In fact, if consistent interpretation leads to a *contra legem* interpretation of national law, national judges might refrain from aligning national law with EU law even though that would comply with their duty of loyalty and respect the principle of equivalence rooted in Union law. National judges will be mindful of the fact that a far-fetched interpretation of national law risks overstepping the separation of powers among the judiciary and legislative branch, with the latter possibly requiring the former's interpretation to be declared unconstitutional by the national constitutional or supreme court.[228] Therefore, where consistent interpretation proves forced, it is far more probable that domestic courts will stay the proceedings and ask their own constitutional or supreme courts to offer guidance in this regard.[229] If the EU law provision at stake does not enjoy direct effect and the national law provision conflicts with EU law, the constitutional or supreme court could then provide an *erga omnes* ruling that suppresses said national conflicting law.[230] In any event, much of this choice is left to the discretion of the national court, with all the risks that this entails for cohesion of Union law.

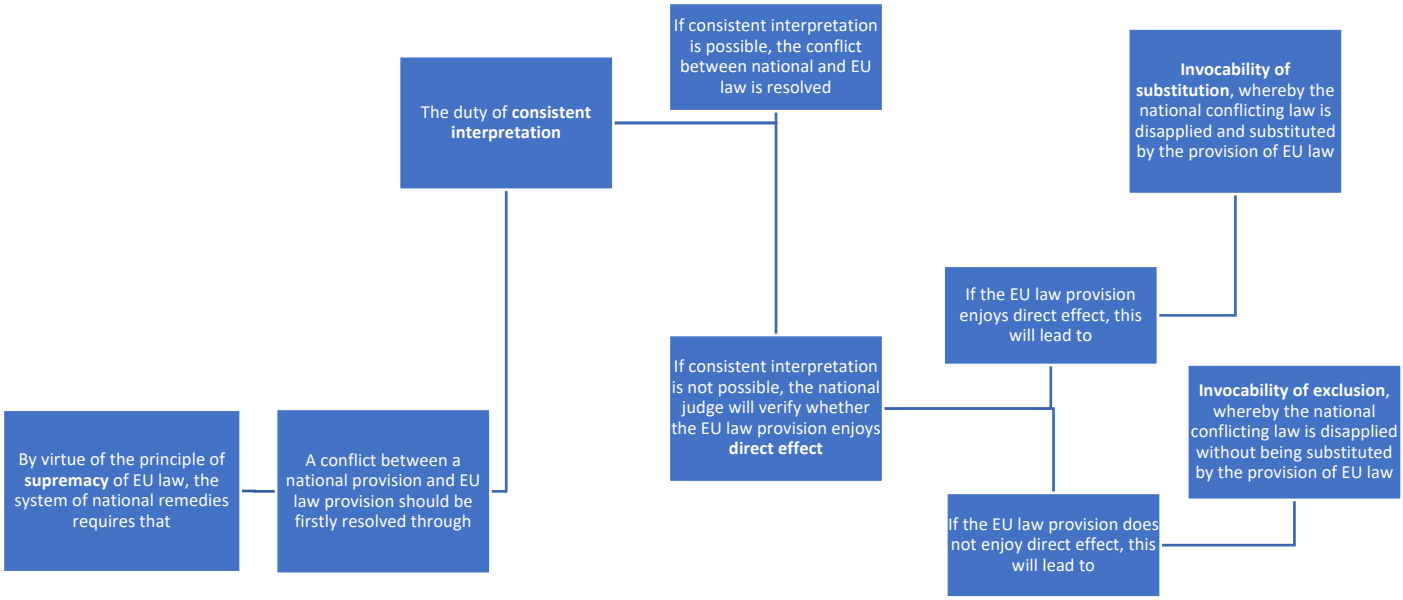
[224] *TEU*, see supra note 141, art 4(3).
[225] Case 16/65 *Schwarze* [1965] EU:C:1965:117.
[226] *Rossi*, see supra note 15.
[227] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] EU:C:1976:188, para 6.
[228] *Rossi*, see supra note 15.
[229] ibid.
[230] *Rossi*, see supra note 15.

If these two remedies prove inapplicable, that is to say where the national conflicting law cannot be consistently interpreted with EU law and the relevant provision of EU law does not possess direct effect, the domestic law will survive and retain its priority over EU law, leaving the individual applicant with the remedy of State liability. It will then rest on the national judge to provide reparation in the form of damages to the intended beneficiaries of the Union law.

Before providing further examples and discussing the reasons for this trend, it is sensible to observe the results of this shift for the relationship between supremacy and direct effect. The following hierarchy charts attempt at demonstrating this shift in a graphic way.

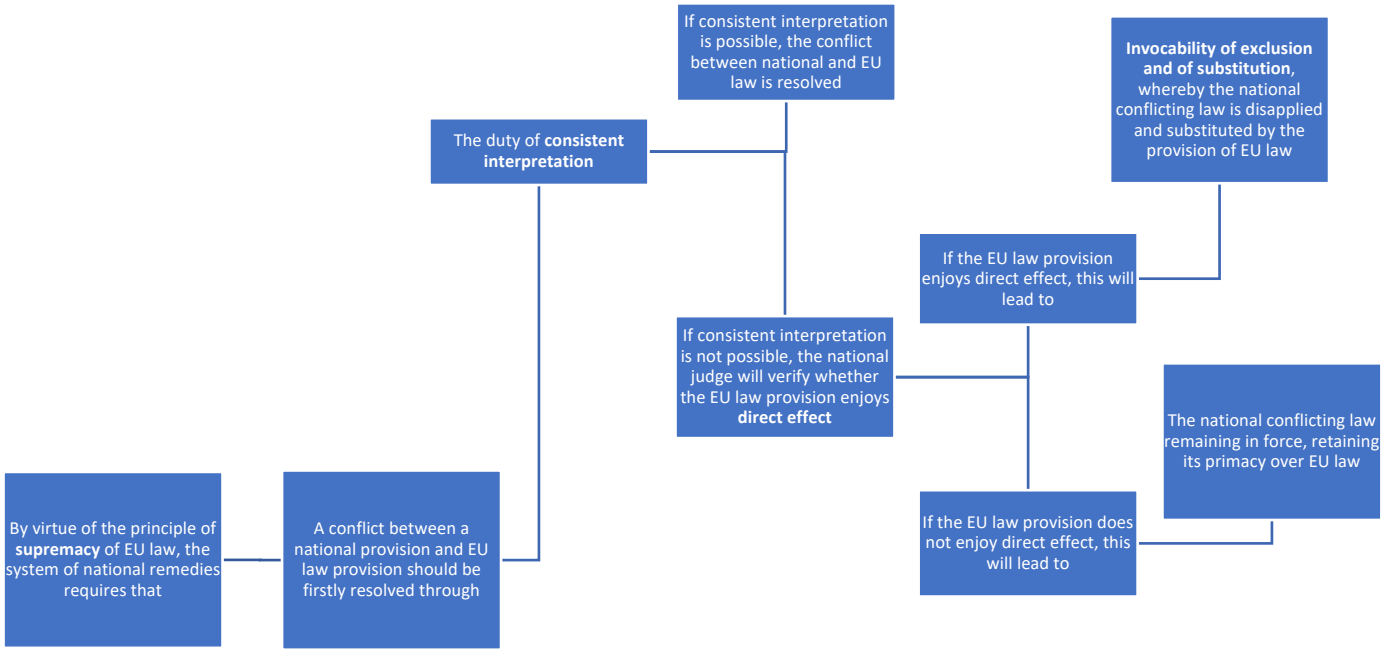
The impact of *Popławski II* on the system of national remedies in cases where a judge is confronted with a national law that conflicts with EU law

Figure 1 "Before *Popławski II*"



It appears that the presence of direct effect does not affect the possibility to disapply national conflicting laws, since the doctrine of invocability of exclusion exists by virtue of supremacy of EU law.

Figure 2 "After *Popławski II*"



It appears that the presence of direct effect affects the possibility to disapply national conflicting laws, regardless of supremacy of EU law.

Whether the Court actually intended to re-build the hierarchy between direct effect supremacy may not yet be ascertained, and the hierarchy charts inserted above still do place supremacy at the very origin of all powers enjoyed by EU law. Yet, in so far as a norm does not have direct effect, the very essence of supremacy of EU law, (the prevalence over national law), is erased.

4.2.1 The Principle of Legal Certainty

The Court has often re-stated that the remedy of disapplication should be seen as a last resort measure.[231] Therefore, a national judge confronted with an incompatibility between national and EU law will, firstly, try to resolve this tension through consistent interpretation by interpreting national law consistently with EU law. The duty of consistent interpretation is not limitless: as reminded both by the Court and AG Sánchez-Bordona in *Popławski II*, the

[231] *Dougan*, see supra note 223, p 1462.

principles of legal certainty and non-retroactivity and the prohibition of *contra legem* interpretations are all to be taken into account when interpreting national law in light of EU law. In *Popławski II* consistent interpretation would have not determined or aggravated criminal liability,[232] nor would it have impaired the principle of legal certainty.[233] The only problem called into question was the alleged *contra legem* nature of an interpretation of Dutch law in line with the FDs, which the Court circumvented through a skillful analysis providing an alternative interpretation to domestic law.

Notwithstanding this, if consistent interpretation and direct effect both result impossible, national judges will have to force interpretations of domestic law that are either *contra legem*, or in disregard of EU law provisions, fragmenting national reception of Union law and resulting into more infringement procedures in view of States' failure to fulfil their obligation of sincere cooperation.[234] The unavailability of these two remedies risks increasing the instances of wrongful application of EU law and undermine the principle of legal certainty, (it being understood that State liability, the only national remedy left in these situations, provides relief to the individual applicant seeking damages, rather than ensuring coherence of the law).

Legal certainty is probably the most impacted principle by *Popławski II*. Yet, even before divesting supremacy of its "disapplication" power with *Popławski II*, incompatibilities between Union law and national law were not practically resolvable only through supremacy. Even if the "operational core" of supremacy rested in its power to trump national conflicting laws,[235] enforcing supremacy by disapplying national laws amounted to Union law producing retroactive effects impairing the principle of legal certainty, questioning the validity of past administrative or judicial decisions and undermining the principle of *res judicata*.[236] Overtime, the ECJ had addressed these challenges by recognizing some limits to the disapplication of national laws: as provided by Dougan, the Court distinguished between a model of centralized jurisdiction from one of decentralized jurisdiction.[237] Under centralized jurisdiction, the Court would introduce some compulsory limits on the remedy of disapplication, such as the imposition of temporal limitations on its own interpretation of Union law.[238] Under

[232] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, para 83.
[233] *Opinion of AG Sánchez-Bordona*, see supra note 217, para 122.
[234] *TFEU*, see supra note 81, art 258; *TEU*, see supra note 157, art 4(3).
[235] *Dougan*, see supra note 223, p 1466.
[236] ibid, p 1470.
[237] ibid, p 1471.
[238] *Dougan*, see supra note 223, p 1471.

decentralized jurisdiction, the ECJ would rely on national courts to impose limits on disapplication of national laws if authorized to do so by their domestic legal system and, always, subject to scrutiny by the Court itself.[239] This "mixed" model of dealing with disapplication of national laws reflected the inevitable reliance by the ECJ on national legal systems.

With *Popławski II,* the ECJ has perhaps acknowledged this problem of legal certainty by repeatedly holding that national courts are not required "solely on the basis of EU law"[240] to disapply their national conflicting laws. On one hand, this pronouncement limits the instances of disapplication by requiring that the EU law provision at stake has direct effect. On the other hand, the usage of the adverb "solely" seems to suggest that the burden of deciding whether to disapply national law and the related considerations of legal certainty, are shifted to national legal systems, partially freeing the ECJ from its duty to oversee national courts. Altogether, the principle of legal certainty has arguably been inadequately addressed by the Court in *Popławski II*, and in this respect the following section discusses a newly filed reference for a preliminary ruling where a national court found itself confronted with a similar issue on disapplication, to demonstrate that the ECJ has not ensured the feasibility of this altered duty for national judges.

4.2.2 Underlying Reasons for Direct Effect acting as a Watershed

Within the specific context of *Popławski II,* some scholars have attempted at rationalizing the Court's decision by reminding that final judgments are the result of a compromise between judges who have different views on the relationship between supremacy and direct effect.[241] That is certainly true, but it still remains that this turbulent change of direction sits oddly with the past decisions of the Court, where similar tensions within collegial tribunals existed too. It is difficult to dispute that we are not facing a new Wave within the jurisprudence of the Court, considering the great normative powers that the ECJ had accorded to EU law in previous times. Since the Treaty of Lisbon has not undergone changes, no underlying reasons can be found within blackletter law. Yet – although it clearly is not the case of the Netherlands, whose domestic court referred questions in *Popławski II* – we are unarguably witnessing turbulent times, especially with regard to the rejection by national courts of supremacy of EU law.

[239] ibid, p 1474.
[240] *Openbaar Ministerie v Daniel Adam Popławski,* see supra note 13, paras 63, 64, 68, 71.
[241] Haket, S. 'Popławski II: A Half-Hearted Embrace of Hierarchical Supremacy' (2020) 1 Review of European Administrative Law 1.

The case-law that has made the news mostly comes from the Polish Constitutional Tribunal[242] and the German Federal Constitutional Court[243] where, respectively, TEU provisions were found to be unconstitutional and a decision of the ECJ was considered *ultra vires*. Nonetheless, there are other instances that display the current tendency of national courts to reject supremacy of EU law. In *Ajos*[244] the Danish Supreme Court ("DSC") found that the obligation on national courts to set aside domestic laws conflicting with the EU law principle of age discrimination would violate the legal certainty principle for private contracting parties.[245]

The DSC referred questions to the ECJ, asking whether EU law principles could override national law upon which private individuals had relied.[246] Predictably, the ECJ held that national courts had a duty to interpret national law in line with EU law principles, disapplying domestic provisions if necessary.[247] When the case returned to the DSC, the latter found that an interpretation of its national law in line with EU law would have been *contra legem*, and ruled that although the ECJ was the body competent to determine the content and the direct effect of a provision of EU law,[248] it ultimately rested on national courts to choose the effect that this decision had for national law.[249] Specifically, the DSC ruled that "the question whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union",[250] explicitly rejecting the principle of direct effect of EU law and, consequently, supremacy.

Aside from courts that openly challenge the principle of supremacy of EU law, there are also examples of national judiciaries which, despite their renown international cooperation with

[242] Trybunał Konstytucyjny, *Case K 6/21* (2021).
[243] BVerfG, *Neue Juristische Wochenschrift 1647 (2020) – PSPP II* (2020).
[244] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* [2016] EU:C:2016:278.
[245] Krunke, H., Klinge, S. 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' (2018) 3 European Papers 1, p 158.
[246] *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, see supra note 244, para 17.
[247] *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, see supra note 244, para 37.
[248] *Krunke and Klinge*, see supra note 245, p 161.
[249] Petersen, N., Chatziathanasiou, L. 'Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law' (2021) DG for Internal Policies, p 33.
[250] Højesteretm *Case 15/2014* (2016).

the ECJ and associated limitations on national sovereignty,[251] are finding it hard to comply with the latest jurisprudence enacted by the Court. In this regard, the Italian judiciary, generally considered "EU integration-friendly"[252], has just posed interesting questions to the ECJ which will inevitably demonstrate the will of the Court to consolidate its *Popławski II* jurisprudence, or unequivocally depart from it.

In May 2022, the Regional Administrative Court ("RAC") of Lecce, Italy, has been confronted with an incompatibility between EU law and national provisions. Between 2020 and 2021, several Italian municipalities issued extensions for beach concessions running up to 2035, which is allowed under Italian law. However, the Italian Competition Authority ("ICA") found that a fifteen-year extension directly conflicts with the Services Directive,[253] which had never been properly implemented by Italy. As a consequence, the ICA enacted injunctions against the municipal authorities. Some of the municipalities involved decided to withdraw concessions and, as a result, they were sued by the trade associations of all private parties who had obtained these concessions. In November 2021, the Italian Council of State annulled all extensions due to their conflict with EU law, requiring the Italian legislature to enact a law that would comply with the Services Directive. Whilst the Italian Senate is currently discussing the newly-drafted law, the ongoing claims brought by trade associations are currently being dealt with by the judiciary, and in May 2022 the RAC of Lecce was one of the first courts to render a decision on the matter.

In *AGCM v Comune di Ginosa*,[254] the RAC decided to stay the proceedings and refer questions to the ECJ. Specifically, since the Italian legislature had only formally transposed the Services Directive, (postponing at a later time the adoption of concrete acts), the RAC asked the ECJ whether certain provisions of the Directive are clear, precise and unconditional enough to give rise to direct effect.[255] In addition, if it is established that the Services Directive does not enjoy direct effect and provided that consistent interpretation of domestic law is not

[251] *Petersen and Chatziathanasiou*, see supra note 249, p 37.
[252] ibid, p 29.
[253] *Services Directive*, see supra note 202.
[254] Tribunale Amministrativo Regionale per la Puglia Lecce - Sezione Prima, Ordinanza sul Ricorso No. 599/2021 (2022).
[255] Giuzio, A. 'Balneari, Corte Ue deciderà su proroga concessioni e direttiva Bolkestein' (2022) Mondo Balneare, available at <https://www.mondobalneare.com/balneari-tar-lecce-rinvia-a-corte-ue-decisione-su-proroga-concessioni-al-2033/#:~:text=Questa%20mattina%2C%20infatti%2C%20il%20Tar,concessioni%20demaniali%20marittime%20al%202033>

possible, the RAC questioned whether disapplying national conflicting laws through invocability of exclusion would impair the principle of legal certainty.[256] If legal certainty appears to be undermined, the RAC also asked the ECJ whether national judges should instead proceed and apply national conflicting laws, even at the risk of contravening their duties under EU law and, possibly, become subject to infringement proceedings.[257] It is noteworthy that in its preliminary reference to the ECJ, the RAC made explicit mention of *Popławski II*, recalling that the Case has considerably reworked the doctrine of direct effect and the principle of invocability of exclusion and that, as a consequence, disapplication of national conflicting has been excluded in the absence of direct effect.[258] This latest case demonstrates that, despite its efforts to reconcile its case-law with the obligations incumbent on national judiciaries, the shifting jurisprudence of the ECJ has not provided sufficiently feasible methods for national judges to comply with their duty of loyalty and, simultaneously, fulfill their role in ensuring legal certainty.

To understand this new Wave by the Court, it is important to contextualize this case-law with the ongoing trend by national judiciaries to challenge EU law. Menéndez identified some of the reasons for this last tendency adopted by national courts in the subsequent overlapping crises that have hit the EU since 2007, whose consequences are mostly recognizable now, during the early '20s of the 21st century.[259] The financial, economic and fiscal crises starting in 2007, (whose repercussions are felt up until today), have showcased the fundamental tensions laying at the very core of the EU, especially as a result of the SEA-Wave,[260] warranting to name of this period as the "post-SEA Wave". By ending veto power yet purporting to speed up the realization of the single market, the Union expected all MSs to be willing to cooperate at all times, even though their concerns could be easily overtaken by the majority. Weiler expressed this through an eloquent passage in his collection of essays: "A 'single European market' is a concept which still has the power to stir. But it is also a 'single European market'. It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicised choice of ethos, ideology, and political culture: the culture of the 'market'. It is also a philosophy, at least one version of which – the predominant version – seeks to remove barriers to the free movement of factors of

[256] ibid.
[257] ibid.
[258] *Ordinanza sul Ricorso No. 599/2021*, see supra note 254, p 14.
[259] *Menéndez,* see supra note 35, p 635.
[260] ibid, p 644.

production, and to remove distortion to competition as a means to maximize utility. The above is premised on the formal equality of individuals".[261]

The analysis by Weiler entailed, following Menéndez, that the "dangerous mismatch between the high sounding rhetoric of European citizenship and the meagre reality of what was actually established in the Treaty of Maastricht" would sooner or later result into a further fragmentation of public power.[262] It is plausible to assume that the ECJ seems more and more tamed vis-à-vis MSs, refusing to render strong judgments that invigorate the power of the Union and of its laws in the face of MSs. Whilst the Court seems to progressively play by the rules of "let sleeping dogs lie", (perhaps still listening to the echo of a certain Referendum held in 2016), national judges overstep the fundamentals of EU law at their own convenience. Yet, the decision of the ECJ to judicially enhance MSs' autonomy by limiting the formal properties of EU law, which emerges from this debate as increasingly disciplined, makes some of the core powers of Union law almost delusional. As contended by some scholars, "the time has come when Brussels (as a bureaucratic structure or as a political idea) is no longer popular among populations and governments of Member states, and the ECJ is no longer peacefully accepted as the sole arbitrator of disputes of competence between the community and the member states."[263] Despite its apparent non-involvement with the political process, the judiciary branch is understandably tainted with political considerations, and litigation both affects and is affected by the social debate.[264] By considering the developments in the Union and the subsequential jurisprudence ruled by the ECJ, it can be confidently held that the judicial organs of the EU have followed and continue to follow the *Geist* of their times, taking into account the political spirit of each decade and carefully calibrating their weight on the integration of EU law into national legal systems.

Whether by adopting a teleological reasoning[265] as in *Van Gend en Loos*, or a more iconoclastic approach as in *Popławski II*, as Alter already argued in 2003, the Court uses the gaps left by the Treaties as a license to create new doctrines and dismantle them at its own convenience.[266] The initial concern of the Court, that is to say to enhance the power of direct

[261] Weiler, see supra note 141, pp 89 – 90.
[262] *Menéndez,* see supra note 35, p 650.
[263] *Figueroa Regueiro,* see supra note 12, p 16.
[264] Burgers, L. 'Should Judges Make Climate Change Law?' (2020) 9 Transational Environmental Law 55, p 74.
[265] *Enchelmaier*, see supra note 33, p 287.
[266] *Alter*, see supra note 45.

effect, (going hand in hand with supremacy), revealed a sort of quest for "consistency" of EU law. To the extent that a national measure was found to not be consistent with EU law, it would not be applied. This reasoning did not call into question whether the EU law measure at stake was capable of conferring rights over individuals, it simply mattered that it was EU law.[267] With the post SEA-Wave, we are witnessing a new phenomenon. It is still true that, to the extent that a national measure is inconsistent with EU law, it will similarly not be applied, but the Court has considerably decreased instances of inconsistency by making disapplication conditional upon the presence of direct effect.

To summarize, Chapter 4 has demonstrated that the jurisprudence of the ECJ appears to be undergoing a new Wave. The reasons for the existence of this so-called "post SEA-Wave" may be deciphered if the Court's case-law from 2019 onwards is inserted in the social and political context of the present. As argued by certain scholars, the tensions generated by the entry into force of the SEA would predictably result in a rigidity among MSs, affecting the image of EU law and calling into question the acceptance of the ECJ's rulings by national judiciaries. The final Chapter will conclude by providing a summary of the analysis conducted so far and suggestions for further research.

[267] *Dougan*, see supra note 223, p 1501.

Chapter 5: Conclusions

By detailing the developments of direct effect throughout the decades, this thesis has assessed the extent to which recent ECJ jurisprudence equates direct effect with disapplication of national conflicting laws. This question warrants an exhaustive answer for several reasons. For starters, the ongoing shift in the interpretation of direct effect has not yet been thoroughly discussed in academia, creating a gap in legal literature for whoever wishes to embark on this research. On a more practical level, if the availability of the remedy to disapply national conflicting laws is subjugated to the existence of direct effect, national judges will face additional difficulties in re-aligning domestic law with EU law, caught in the crossfire between forcing interpretations of national law or failing to observe their duty of loyalty vis-à-vis Union law.

By analyzing the evolving principle of direct effect through case-law by national courts and the ECJ, the thesis has demonstrated that the current Wave of jurisprudence displayed by the Court separates considerations of direct effect from supremacy of EU law for the purpose of solving conflicts between national and Union law, depriving supremacy of its operational core which lays in the disapplication of national conflicting laws.[268] To reach this conclusion, this research has provided an assessment of the evolution of direct effect as well as the causes thereof; it has zoomed into the doctrine of invocability as developed by the ECJ; it has discussed the developments brought by *Popławski II* and the implications that these developments had, respectively, for the doctrine of invocability and for the duty of national judges.

Furthermore, this research has coupled each trend followed by the ECJ in its case-law with the political *Geist* of the time, demonstrating that the Court has assumed more or less proactive roles in its judicial interpretations of the law depending on the political atmosphere characterizing each transformative phase of the EU, from the Community of 1957 to the Union of today. From the Treaty of Rome up until the adoption of the SEA, the ECJ enacted very audacious rulings constituting the essential character of Community law. From the entry into force of the Treaty of Maastricht until the Treaty of Lisbon, the ECJ slowed down its expansion of Union law powers, ensuring legal permeation of EU law into national legal systems through

[268] *Dougan*, see supra note 223, p 1466.

the "back-street". The period going from the Lisbon Treaty until 2018 did not introduce drastic changes to the Court jurisprudence, mostly consolidating what had already been previously held. Yet, the problems related to the increasing constitutionalization of the Union showed their consequences later in time, starting to become reflected by the ECJ's jurisprudence from 2019 onwards. The post SEA-Wave currently happening clearly displays an attentive reconstruction of the relationship between Union law and domestic laws through potentially more "abrasive terms".[269]

More studies need to be carried out with regard to the reaction that EU institutions are currently displaying vis-à-vis political and social trends. In addition, further strains of research should focus on the legal vacuums that will be created as a result of the post-SEA Wave, where legally binding and enforceable EU law provisions are incorrectly applied, if applied at all. The problem of legal gaps should be explored and delimited, in order to understand its specific concerns and what precise risks a refusal to both set aside national conflicting law and grant supremacy to EU law entails.[270] The question of legal certainty, which is directly linked to this sort of future research, is another topic that warrants an attentive analysis, should the *Popławski II* jurisprudence consolidate.

Admittedly, enforcement of EU law relies to a large extent on the will of national judiciary to cooperate with the ECJ, therefore giving more room to national courts is not necessarily adverse for the functioning of the Union. One of the main lapels demonstrated by this thesis is also that the architecture built to create the doctrine of direct effect needs a strong collaboration between national judges and the ECJ. This collaboration is not only indispensable to apply direct effect day-to-day, but also to model and define the doctrine itself.[271] However, national judiciaries should be mindful of the increasing role that the ECJ is voluntarily allocating to them, remembering that "with great power comes great responsibility", especially vis-à-vis the duties of loyalty and sincere cooperation. In any event, it remains that the essence of the single market prescribes that citizens must be able to rely on the full and even application of EU law throughout all the territory of the EU. Whilst the EU shall be *united in diversity*, it is hoped that diversity will not take the connotations of isolated, self-contained national regimes. To return to the metaphor of the rock thrown into a pond, *Popławski II* impacted direct effect, creating a

[269] *Dougan*, see supra note 223, p 1462.
[270] ibid, p 1460.
[271] *Rossi*, see supra note 15.

powerful ripple that may affect the whole doctrine of supremacy of EU law. It remains to be seen whether sufficient jurisprudence will furnish this Wave with ever-lasting consequences for Union law.

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