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## **A matter of principle for whom?**

*The CJEU's Development of Principles and the Influential Possibilities of Member States*

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## Abstract

With a legal philosophical focus, this thesis examines the Court of Justice of the European Union's development of principles, using the principles of direct effect and supremacy as examples, and the member states influential possibilities, focusing on the tools of non-referral and submitting observations. The theories of legal interpretivism and legal positivism have been applied, and in order to create a social context, the development of principles and the member state tools have been analysed from the perspectives of legal certainty and democracy.

First, the differences between principles and rules have been studied. To legal interpretivists there is a clear distinction between the two, while for legal positivists, a distinction is not appropriate. The role of principles has then been examined, mainly from the viewpoint of the CJEU. Also, the development of principles, from the perspective of legal interpretivism and positivism, are examined along with its compliance with democracy.

The tools of non-referral and submitting observations have also been examined. Courts may refrain from referring questions to the CJEU if the provisions in question fulfil certain criteria, the most common exempt being the *acte clair* doctrine. When national courts refrain from posing questions to the CJEU, they effectively limit the Court's power to develop principles. Non-referral could therefore be seen as an important tool for national courts. However, it only takes one question from one court for the CJEU to have the possibility to rule on a certain matter. The second tool, to submit observations to the CJEU, is a possibility for member states to argue their favoured interpretation of the Union law and possibly affect the Court's rulings. Even though the incentive might be great, the tool has been scarcely used. In cases where member states do submit observations, the Court does not rule accordingly in a majority of cases.

If one looks at the tools from an efficiency point of view, it is clear that using the non-referral tool is, in theory, very efficient if member states want to influence the development of principles. In practice, though, that is not the case. For the submitting observations-tool, the CJEU infrequently rules in line with the member state interpretation. From that perspective, the effectiveness of the tool might not be as great as the member states might want.

The concept of legal certainty and democracy, from the perspective of legal interpretivism and legal positivism, have been applied to the two tools of non-referral and submitting observations. Concerning legal certainty from a legal interpretivists point of view, the two tools are not in

line with it. For legal positivist, however, the two tools can be seen as in line with legal certainty. On the concept of democracy, the legal interpretivist notion is a strive towards freedom. The non-referral tool is not in line with that notion. Concerning member state observations, the same can be concluded. From a legal positivist perspective, the goal with democracy is unity. In that sense, non-referral could be in line with it since the tool can be used by member states to increase stability and unity within the state. Submitting observations could also be seen as in line with democracy. Both the development of principles by the CJEU and the member states' potential influence through the two tools can thus be seen as in line with the two values, depending on which theory one emanates from.

Keywords: CJEU, principles, legal interpretivism, legal positivism, direct effect, supremacy, non-referral, submitting observations, legal certainty, democracy.

## **Preface and acknowledgment**

A few weeks before I started writing this thesis I was in Italy on holiday. One very hot day was spent in the little lake town of Pesciera del Garda, next to lake Garda. As I was walking by the lakeside I saw a bird disappearing into the blue depths. Little did I know, that sight was going to symbolise the months to come, and the existence of a thesis writer.

Before I let you start reading the actual content, I want to direct my sincerest thanks to a number of people, whose help and input has been more than crucial for me and the mere existence of this thesis.

For steering me into the right tracks, asking the right questions and helping me develop my ideas, I want to thank my supervisor Joachim Åhman. Thank you for your input and for keeping me from fumbling in the dark. Without your advice, who knows where this thesis would have ended up?

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The process of writing a thesis is both challenging and daunting, and I could not have done it without the help and support from my family and friends. Thank you for all the energy you have given me that helped me get through this course. Writing a thesis has actually been almost exclusively great fun thanks to you. To you all, I am eternally grateful! A special thanks to my fellow law students; Anna, Caroline, Jennie, Johanna and Louise. You have been the best support and study-buddies, not just for this course but for the entire duration of our studies. I would like to direct a special thanks to Anna, who spent November and December listening to my rants about legal philosophical theories, discussing intricate EU law matters (that at times only made sense in my head, I am sure), and who proofread this entire thesis. You have been my rock!

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When I write these lines, I have finally risen from the depths and, like the bird in lake Garda eventually did, resurfaced. I have shaken the water out of my feathers and I am ready for my next dive.

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Natalie Schwarz

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## Abbreviations

art Article

CFR Charter of Fundamental Rights of the European Union

CJEU Court of Justice of the European Union

EEC European Economic Community

EU European Union

Euratom Treaty Establishing the European Atomic Energy Community

Sieps Swedish Institute for European Policy Studies

TEU Treaty of the European Union

TFEU Treaty on the Functioning of the European Union

# 1. Introduction

## 1.1. *Background, or once upon a time*

The concept of principles is a well-established topic within the philosophy of law. It is common practice that national and international courts refer to principles in their rulings. The study of principles has been referred to by von Bogdandy and Bast as a “well-established way to deepen the understanding of a legal subject.”<sup>1</sup> The same scholars have also proclaimed principles to “form the epicentre of a legal scholarship striving for autonomy and searching for a disciplinary proprium behind the multifariousness of norms and judgments.”<sup>2</sup> Furthermore, they emphasise that principles “strengthen the role of courts vis-à-vis politics.”<sup>3</sup> It would therefore be safe to presume that principles play an important role within the judicial practice.

The concept of judge-made principles is, however, a more intricate matter. It is news to no one that courts themselves have developed principles throughout history in their rulings. A well-known example is the principle that one should not benefit from one’s own wrongdoing, established by the New York Court of Appeals in the *Riggs v Palmer* case from 1889.<sup>4</sup> The practice of creating principles as a court could though, according to some scholars, be characterised as judicial activism, hence a judicial chore not as accepted as a mere reference to already politically established principles.<sup>5</sup> There are frames which courts should stay within, and for judges to create principles might count as being more than just “*la bouche qui prononce les paroles de la loi*”.<sup>6</sup>

The practice of establishing and developing principles is not limited to national courts, as it can also be found on the international arena. The Court of Justice of the European Union (CJEU or ‘the Court’) has throughout the history of the European Union (EU or the Union) been developing principles in its rulings. These principles have helped shape and define the competence and scope of the EU and CJEU. The most important principles are the principle of direct effect and the principle of supremacy. Scholars like Groussot have inter alia pointed out

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<sup>1</sup> von Bogdandy, A., Bast, J., *Principles of European Constitutional Law* (2<sup>nd</sup> rev. ed., Oxford, Hart, 2010) p. 11.

<sup>2</sup> *Ibid.*, p. 12.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Riggs v Palmer*; 115 N.Y. 506, 22 N.E. 188 (1889).

<sup>5</sup> See *infra*, note 9.

<sup>6</sup> Kolb, R., ‘Principles as Sources of International Law (with Special Reference to Good Faith)’ (2006) 53:1 *Netherlands International Law Review*, 1, p. 2, referring to Montesquieu, C-L., *L'esprit Des Lois* (Paris: Garnier Freres, 1851), liv. XI, Cap. VI.

the extraordinary influence that the Court has, through its development of said principles, on the development of Union law.<sup>7</sup>

With principles like direct effect and supremacy having such an immense influence on the entire EU and its member states, it is important to examine what chances member states have on influencing the CJEU's development of principles. This because the establishing and developing of principles affect the entire *aquis* fundamentally and the fact that principles might be equating to law, making member states bound by something that they might not agree on. Also, as Dowrick expressed it, “[t]o leave [principles] out of an analysis of EC law into its elements would be like leaving oxygen out of an analysis of air.”<sup>8</sup>

## 1.2. *Aim, or the meaning of it all*

This thesis has three targets. First, to examine the legal interpretivist and legal positivist views on principles – what they are, how they are created and how their creation conforms with the theories' notions of democracy – and connect that to the CJEU's development of the principles of direct effect and supremacy. Second, to scrutinise the member states' possible influence on the CJEU's process to develop principles, especially the principles of direct effect and supremacy, through the preliminary reference procedure, focusing on the tools of non-referral and submitting of observations. Third, to apply the concepts of legal certainty and democracy, from the legal interpretivist and legal positivist point of view, on the tools of non-compliance and submitting observations. The aim is, through contributing with the aforementioned, to provide a deeper understanding for the reader concerning the CJEU's development of principles and member states' influential possibilities.

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<sup>7</sup> “It is indicative of the extraordinary influence that the Court of Justice has had on the development of Community law that the main principles which define the constitutional structure of the Community are not provided for expressly in the Treaty but were discovered by the Court by an inductive process. This applies in particular to the principles of primacy and direct effect, which in the Court's own language form the essential characteristics of the Community legal order.” Groussot, X., *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?* (Lund, Xavier Groussot, 2005), p. 15, note 40, referring to Tridimas, T., *The General Principles of EU Law* (2<sup>nd</sup> ed., Oxford, Oxford University Press, 2006); On that note, see also Hartley, “[a] common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine be revealed” Hartley, T., *The foundation of European Community* (8<sup>th</sup> ed., Oxford, Oxford University Press, 2014), p. 81-82.

<sup>8</sup> Dowrick, F. E., ‘A model of the European Communities' Legal System’ (1983) 3:1 Yearbook of European Law, 169, p. 219.

To clarify, the questions that are going to be answered are: How does legal interpretivists and legal positivists define the concept of principles? Is the CJEU's development of principles in line with the concept of democracy, according to legal interpretivist and legal positivists? How does the member state use the tools of non-referral and submitting observations in order to influence the CJEU's development of principles, and how effective are they? Are the tools of non-referral and submitting observations in line with legal certainty and democracy, according to legal interpretivists and legal positivists?

### 1.3. *Scope and limitations, or everything but this*

For the purpose of this thesis, it has been necessary to include several limitations. First, this text will not discuss whether the action of creating principles is within the competence of the Court, or if it is to be considered judicial activism.<sup>9</sup>

Second, only member states' influence on judge-made principles will be examined. A further limitation concerning which principles to examine has also been necessary to include, in order for the scope of the thesis not to be too broad. The thesis will use the principles of direct effect and supremacy as examples. They were chosen for several reasons. They were both created and developed by the CJEU (which is the type of principles that this thesis focuses on), they are the two undisputedly most important principles in the EU legal order,<sup>10</sup> and it is quite impossible to only chose one of them since they are like two sides of the same euro coin. They are habitually considered in conjunction, and will be in this thesis as well.

Third, only two theories will be applied; legal interpretivism and legal positivism. There are numerous other theories that would be possible to apply on this topic, however, since the focal point is principles, it seemed the most logic to choose these two.<sup>11</sup> Within those theories, there are several scholars with their own interpretation and orientation. In order for the thesis not to

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<sup>9</sup> Many scholars have addressed this topic, see for example Rasmussen, H., *On law and policy in the European Court of Justice. A comparative study in judicial policy making* (Dordrecht, Martinus Nijhoff Publishers, 1986); Pollicino, O., 'Legal Reasoning of the Court of Justice in the Context of Principle of Equality between Judicial Activism and Self-Restraint' (2004) *German Law Journal*, 283; Dawson, M., de Witte, B., Muir, E., (eds.) *Judicial activism at the European Court of justice* (Cheltenham, Edward Elgar, cop, 2013) Davies, G., 'Activism Relocated. The Self-restraint of the European Court of Justice in Its National Context' (2012) 19:1 *Journal of European Public Policy*, 76; Lenaerts, K., 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36:5 *Fordham International Law Journal*, 1302.

<sup>10</sup> They are e.g. classified as being defining characteristics of EU law by de Witte; de Witte, B., 'Direct Effect, Primacy, and the Nature of the Legal Order' in Craig, P., de Búrca, G., (eds.) *The evolution of EU law* (2<sup>nd</sup> ed., Oxford, Oxford University Press, 1999), p. 324; For a deeper discussion, see *infra*, section 1.4.3.

<sup>11</sup> See *infra*, section 1.4.2.

digress more than necessary, Dworkin has been chosen as the main representative for the legal interpretivist theory, and H. L. A. Hart for the legal positivism, due to their prominence in the field.

Fourth, even though the chosen tools in section three not only concern legal matters, but also political ones, this is not to be seen as an interdisciplinary thesis. Also, it is important to note that the tools under scrutiny by no means are the only tools for member states to use, there are both other judicial and political tools available.<sup>12</sup> The choice to focus on the preliminary ruling procedure, and the tools that it brings, was mainly due to it being one of the most important instruments for communication between the Court and the member state.<sup>13</sup> Even though there has been countless books and articles written about the procedure, and everything it encompasses, there are still questions worthy of discussing.

Fifth, the preliminary references themselves, and e.g. how the national courts frame them, will not be up for scrutiny. However, a vast study on that area – how national courts talk to the CJEU, and how that may affect the outcome of the Court’s rulings – is being conducted presently,<sup>14</sup> and could, for future reference, be applied on this thesis when done to complete the picture of member state influence through tools made available under the preliminary ruling procedure.

#### *1.4. Method and material, or how it was done and what have been used*

One great flaw to a thesis would be to boldly claim to have used a certain method, and then applying a different one. In order to avoid that, one can instead just explain what has been done and let the reader draw the conclusion. There is, however, a value in labelling the method for the thesis, namely to be transparent to the reader, and to set the scientific frameworks from the outset. It is also a way for the writer to show that she comprehends the task entrusted to her.

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<sup>12</sup> For example, concerning political tools, member states can appoint judges to the CJEU who has the “right” policy preferences, and/or make it clear to that person that he or she will not be reappointed if national interests are disregarded in important or systematic ways; see Stone Sweet, A., *The Judicial Construction of Europe* (1<sup>st</sup> ed., Oxford, Oxford University Press, 2004), p. 26. Concerning judicial tools, there are for example, the possibility to amend the Treaties.

<sup>13</sup> See *infra*, section 1.4.4.; Craig and de Búrca states that the relationship between the CJEU and the member states is reference-based; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials* (6<sup>th</sup> ed., Oxford: Oxford Univ. Press, 2015), p. 464.

<sup>14</sup> The study is conducted by Anna Wallerman, the first article will be published in January 2018; Wallerman, A., ‘Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example’ in Derlén, M., Lindholm, J., (eds.) *The Court of Justice of the European Union: Multidisciplinary Perspectives* (forthcoming, 2018).

This is, thus, a tentative description of this thesis' method and material, or an answer to how it was done and what have been used.

#### 1.4.1. EU legal method

It must be remembered that due to the theme, EU law, the EU legal method will permeate the entire thesis.<sup>15</sup> The legal sources within the EU legal order are primarily primary and secondary legislation.<sup>16</sup> The primary legislation consists of the EU treaties,<sup>17</sup> general principles, and international agreements.<sup>18</sup> The secondary legislation includes regulations, directives, decisions recommendations and opinions.<sup>19</sup> In addition to the primary and secondary legislation, the legal sources also consist of CJEU case law and soft law.<sup>20</sup> The sources are listed in the proper hierarchical order, and lower sources are only valid if they are consistent with the acts or agreements that have precedence over them.<sup>21</sup>

This thesis will mainly use CJEU case law as its main source, in addition to the legal doctrine. The CJEU mainly uses a teleological interpretational method when assessing the EU legal sources.<sup>22</sup> When using that method, the Court strives at fostering the purpose of the provisions, counteracting possible unreasonable consequences that may arise from a literal interpretation, and to fill in possible gaps in the Union law.<sup>23</sup> This approach will be taken into account when analysing the CJEU case law and the actions from the Court from a legal interpretivist and legal positivist viewpoint.

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<sup>15</sup> For more on the EU legal method, see Hettne, J., Otken Eriksson, I., *EU-rättslig Metod: Teori Och Genomslag I Svensk Rättstillämpning* (2nd rev. ed., Stockholm, Norstedts Juridik, 2011).

<sup>16</sup> European Parliament, 'Sources and scope of European Union law', last updated October 2017, retrieved 8-11 December 2017, available at [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_1.2.1.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.2.1.html)

<sup>17</sup> Including not only the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), but also the Charter of Fundamental Rights of the European Union (CFR) and the Treaty Establishing the European Atomic Energy Community (Euratom); European Parliament, 'Sources and scope of European Union law', supra note 16.

<sup>18</sup> International agreements are however subordinate to both the Treaties and the general principles; European Parliament, 'Sources and scope of European Union law', supra note 16.

<sup>19</sup> Ibid.

<sup>20</sup> Soft law is non-legally enforceable instruments that are used for the interpretation and/or application of EU law; European Parliament, 'Sources and scope of European Union law', supra note 16.

<sup>21</sup> Ibid.

<sup>22</sup> Livsmedelsverket, 'EU-rättsliga rättskällor och tolkningsmetoder', last updated 27 January 2017, retrieved 18 December 2017, available at <https://kontrollwiki.livsmedelsverket.se/artikel/88/eu-rattsliga-rattskallor-och-tolkningsmetoder>

<sup>23</sup> Ibid.

### 1.4.2. Applied theories

The theory of legal interpretivism is a theory based on principles.<sup>24</sup> When analysing the use of principles thoroughly, the theory of legal interpretivism ought to be part of the analysis. In order to create a proper discussion, since legal interpretivism is not the only theory that can be applied on the analysis of principles, at least one more theory would need to be applied. Even though the comparative method is by no means *de rigueur* to use in a thesis, there are clear advantages to use it in this context. When analysing the CJEU's development of principles, and member states' possible influence on the process, different conclusions can be drawn based on the theory one chooses. To only apply one theory could therefore give a distorted image of the reality – that *that* result and conclusion is the objectively right answer. In order to create a meaningful discussion with, reasonably, contrasting principles, the legal interpretivism, and Dworkin's version in particular, could gain from being compared with legal positivism.

Legal interpretivism and legal positivism are, in some areas, stark contrasts to one another. They are, however, not so fundamentally different that a comparison would be that of apples and oranges. This partly because Dworkin has been seen, by some scholars, as a (critical) legal positivist<sup>25</sup> and Hart as a (positive) interpretivist.<sup>26</sup> Also, several opuses of Dworkin were written as a reaction to the ideas presented by Hart and the legal positivism,<sup>27</sup> and Hart's postscript in "The concept of law" was a direct reply to Dworkin.<sup>28</sup> An application of these two theories would therefore provide with a comprehensive image of the topic.

The theories will first be applied to the concept of principles, the CJEU's development of principles, and its possible conformity with democracy. Since both theories have different notions on this, both concepts need to be kept in mind when later aiming the attention at the member states' influential possibilities. The tools of non-referral and submitting observations, and the use of them in relation to legal certainty and democracy, is contingent on which theory one embraces. Both theories will thus be applied, since there is no objectively right conclusion to draw.

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<sup>24</sup> See *infra*.

<sup>25</sup> See e.g. Tuori, K., *Critical Legal Positivism* (Aldershot, Ashgate, 2002).

<sup>26</sup> See e.g. Bódog, M., 'The Issue of Normativity and the Methodological Implications of Interpretivism I: The Idea of Normative Guidance' (2013) 54:2 *Acta Juridica Hungarica*, 119, p. 121.

<sup>27</sup> E.g. Dworkin's "The model of rules"; Dworkin, R., 'The Model of Rules' (1967) 35 *The University of Chicago Law Review*.

<sup>28</sup> Hart, H. L. A., *The concept of law* (3<sup>rd</sup> ed., Oxford, Oxford University Press, 2012).



It is arguably impossible to answer the research questions of this thesis through simply applying a legal dogmatic method.<sup>29</sup> A theoretic perspective therefore needs to be applied. Should someone argue that there is an objectively right answer to, for example, what a principle is, he or she would not find support amongst the scholars. Whether one adheres to it or not, one or more theories would be necessary to apply to an examination on the concept of principles. The gain of being transparent concerning the application of theories is thus that the reader knows the frames from the beginning, since there will be theoretical frames even if the writer does not choose to state it.

Having argued the need for theories, and why legal interpretivism and legal positivism has been selected in this thesis, the two theories are going to be properly introduced.

### *Legal interpretivism*

Interpretivism about law offers a philosophical explanation of how institutional practice -the legally significant action and practices of political institutions- modifies legal rights and obligations.<sup>30</sup>

The legal interpretivism is a theory focused on the grounds of law; i.e. legal rights and obligations. Any legal right or obligation generates a need for institutional practice, which has resulted in its thesis that the law is affected by institutional practice through certain principles that, in turn, explain the role of the practice.<sup>31</sup> Legal interpretivism is classified as a natural law, in the sense that it claims that not just institutional practice, but also moral plays a significant role in the development of law.<sup>32</sup> In particular, legal interpretivism states that there should not, and cannot, be a distinction between law and moral. Due to this position, the legal interpretivism theory concerns law to be an interpretive concept.<sup>33</sup> The protagonist of the legal interpretivism is Dworkin. To him, law does not only consist of rules, but also of principles and even politics.<sup>34</sup> The difference between rules and principles, according to Dworkin, will be examined further.<sup>35</sup>

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<sup>29</sup> On the legal dogmatic method, see e.g. Kleineman, J., 'Rättsdogmatisk metod' in Korling, F., Zamboni, M., (reds.) *Juridisk Metodlära* (1st ed., Lund, Studentlitteratur, Exaktaprinting, 2013).

<sup>30</sup> Stavropoulos, N., 'Legal interpretivism' (2016) 10 *Problema*, 23, p. 25.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 26.

<sup>33</sup> Plunkett, D., Sundell, T., 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 19:3 *Legal Theory*, 242, p. 243.

<sup>34</sup> Lübecke, G., et al., *Filosoflexikonet - en Uppslagsbok: Filosofer och filosofiska begrepp från A till Ö* (Stockholm, Forum, 1988), p. 482.

<sup>35</sup> See *infra*, section 2.1.1.

### *Legal positivism*

Concerning philosophical theories, legal positivism is one of the leading theories of the nature of law.<sup>36</sup> The main theses for legal positivists are that the law's content and existence is fully dependent on social facts,<sup>37</sup> and that law is not dependent on its merits or demerits, i.e. that there is no connection, or at least no necessary connection, between morality and law.<sup>38</sup> The evident distinction between legal positivism and legal interpretivism is thus their notion of the connection between law and moral, where legal positivists clearly oppose moral affecting or being part of the development of law.

Legal positivism was first developed by utilitarian Jeremy Bentham, and is today most associated with H. L. A. Hart or Kelsen.<sup>39</sup> Hart argues that law consists of primary and secondary rules.<sup>40</sup> Primary rules are applicable to actions, they impose duties to do or to not do something. Secondary rules, on the other hand, are meta-rules that create or modify primary rules, and they govern the conference of powers to officials.<sup>41</sup> Hart's most famous secondary rule is his rule of recognition, which establishes the fundamental criteria of legal validity.<sup>42</sup>

#### **1.4.3. Selected principles**

As has been stated above,<sup>43</sup> the principles focused on in this thesis are the principle of direct effect and the principle of supremacy. The principle of direct effect was founded by the Court in the *van Gend* case,<sup>44</sup> which to this day is arguably the most famous case of the CJEU.<sup>45</sup> In the case, the Court stated that EU law provisions can confer legal rights to individuals, which public authorities are required to respect and national courts obligated to protect.<sup>46</sup> The term

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<sup>36</sup> Sevel, M., Leiter, B., 'Legal Positivism' (2010) Philosophy, Oxford University Press, last modified 10 May 2010.

<sup>37</sup> In this context, social facts consist of fact about human behaviour and intentions; Sevel, M., Leiter, B., 'Legal Positivism', supra note 36.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Choi, N., 'Interpretivism in Jurisprudence: What Difference Does the Philosophy of History Make to the Philosophy of Law?' (2007) 1:3 Journal of the Philosophy of History, 365, p. 377-78.

<sup>41</sup> Choi, N., 'Interpretivism in Jurisprudence: What Difference Does the Philosophy of History Make to the Philosophy of Law?', supra note 40, p. 377-78.

<sup>42</sup> See infra, section 2.3.2.; Sevel, M., Leiter, B., 'Legal Positivism', supra note 36.

<sup>43</sup> See supra, section 1.3.

<sup>44</sup> Case C-26/62 *van Gend en Loos v Administratie der Belastingen* (1963) ECLI:EU:C:1963:1.

<sup>45</sup> Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 187.

<sup>46</sup> Case C-26/62 *van Gend en Loos*, supra note 44.

direct effect thus equated “the immediate enforceability by individual applicants of those provisions in national courts”.<sup>47</sup> In order to reach that conclusion, the Court reasoned partly from the Treaty text, especially the preamble, and from the vision of the Community that the Treaties seemed designed to establish.<sup>48</sup> In order for a provision to have direct effect, certain criteria must be met. The provision needs to be clear and unconditional, and without any reservation on the part of the member state in question.<sup>49</sup> Through the *van Gend* case, The Court also, famously, established the “new legal order” of the Community,<sup>50</sup> further confirming the case’s status as the most famous case of the CJEU.

The principle of supremacy was founded by the CJEU in the *Costa* case.<sup>51</sup> It dictates the relationship between EU law and national law; in the case of a conflict between an EU legal rule and a national legal rule, the former must be given primacy. This conclusion was reached through a teleological interpretation of the Treaties, where the Court analysed the aims and spirit of the Treaties.<sup>52</sup> The Court further cemented the principle of supremacy in the *Internationale Handelsgesellschaft* and the *Simmenthal* cases.<sup>53</sup>

Barring both principles being considered the most important principles concerning the creation of the Union legal order and the constitutional structure of the Union,<sup>54</sup> they patently have an immense direct impact on the member states. For the member states, then, it would seemingly be of great importance to have a possibility to influence the development of those principles. For that reason, this thesis will focus on the principles of direct effect and supremacy, rather than any other CJEU-developed principle, when exemplifying the topic of principles.

#### 1.4.4. Used tools

The third section consists of an examination of the two member state tools of non-referral and submitting observations. For this part, an empirical method has been applied. The chosen

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<sup>47</sup> Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 189.

<sup>48</sup> *Ibid.*, p. 189.

<sup>49</sup> Case C-26/62 *van Gend en Loos*, supra note 44; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 190.

<sup>50</sup> Case C-26/62 *van Gend en Loos*, supra note 44.

<sup>51</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.* (1964) ECLI:EU:C:1964:66.

<sup>52</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 268.

<sup>53</sup> Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECLI:EU:C:1970:114; Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* (1978) ECLI:EU:C:1978:49.

<sup>54</sup> See supra, note 7.

member state tools are both connected to the preliminary ruling procedure, they were selected for that reason. The preliminary ruling procedure is the most important procedure concerning the interaction between the CJEU and the member states.<sup>55</sup> It is also almost exclusively through this procedure that the Court has been able to develop principles.<sup>56</sup> When analysing the CJEU's development of principles, and the member states' influential possibilities, not focusing on the preliminary ruling procedure and the tools that it enables would be problematic.

Non-referral could easily be dismissed since the influential possibilities might seem obvious. If a national court does not refer a question for preliminary ruling to the CJEU, the CJEU cannot interpret EU law and, in that case, develop principles. However, there are important aspects of this tool that will be examined in this thesis, that go beyond the first obvious appearance. First, it is important to point at this as being a vastly spread-out tool, used by national courts throughout the Union.<sup>57</sup> There are also issues connected with the use of this tool, both from the perspective of national courts and the CJEU, and the development of the EU legal order, that is highlighted here.<sup>58</sup> Instead of just stating the primarily obvious, that non-referral limits the CJEU's possibilities at developing principles, this thesis will provide an in-depths analysis concerning all intricate elements concerning the non-referral tool. This will also be reflected upon from the legal interpretivist and legal positivist's point of view regarding the two perspectives of legal certainty and democracy, with the hope of providing with an *approche innovant*.

When analysing member state observations, compared to the non-referral tool, there is no as fast-reaching conclusion. This tool has been quantitatively studied by many scholars over the course of the development of the Union.<sup>59</sup> The possible outcome, and influential possibilities both from an empirical perspective and from a theoretical perspective will be provided. Also, as with the non-referral, the submitting observation-tool will be reflected upon from the legal interpretivist and legal positivist's point of view regarding the two perspectives of legal certainty and democracy.

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<sup>55</sup>; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 464.

<sup>56</sup> Ibid.; There should, however, be remembered that there are other procedures from which the CJEU can develop principles though less used, for instance during direct proceedings against EU institutions (see e.g. Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) ECLI:EU:C:2008:461), and in opinions of international treaties (see e.g. The Court's opinion 1/91, ECLI:EU:C:1991:490)

<sup>57</sup> See infra, section 3.1.

<sup>58</sup> See infra, section 3.1.4.

<sup>59</sup> See infra, sections 3.2.2. and 3.2.3.

### 1.4.5. Chosen perspectives

Two perspectives will be applied on the chosen member state tools in order to provide with a deeper understanding of the issue and to put it in a social context, like a concrete icing on an abstract legal cake. The perspectives chosen are legal certainty and democracy.

Democracy is one of the Union's key values.<sup>60</sup> It is also a highly debated topic in relation to the decision-making within the Union.<sup>61</sup> Principles are, as has been mentioned in the 1.4.1-subsection and will be confirmed in the second section, part of the primary law and thus the EU legal order, and the development of them are in some sense to be considered development of law. Because of that, the development of principles, and consequently the member states' influential possibilities on that process, could be up for questioning on whether or not it has a democratic bearing. Therefore, the perspective of democracy was chosen as one of two perspectives in this thesis.

Concerning legal certainty, the standpoint of this thesis is legal certainty from a perspective of legitimate expectations. This is in line with the literature and CJEU case law.<sup>62</sup> Legitimate expectations shall be seen from the two theories' perspective, hence what legal interpretivists and legal positivists consider that EU members can expect from a court or a member state. Legal certainty is an immensely important concept in a legal system.<sup>63</sup> It has not been defined in the EU Treaties, but has, however, been referred to by the CJEU in its case law.<sup>64</sup> Due to the importance of the legal certainty, it was chosen as the second perspective in this thesis.

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<sup>60</sup> TEU Preamble.

<sup>61</sup> Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 151.

<sup>62</sup> On literature, see e.g. Schermers, H., Waelbroeck, D., Rijksuniversiteit Te Leiden, Europa Instituut. *Judicial Protection in the European Communities* (5<sup>th</sup> ed., Deventer, Kluwer, 1992), p. 65-69 Raitio, J., 'The Principle of Legal Certainty as a General Principle of EU Law' in Bernitz, U., Nergelius, J., Cardner, L., (eds.) *General Principles of EC Law in a Process of Development: Reports from a conference Stockholm, 23-24 march 2007 organised by the Swedish Network for European Legal Studies* (Alphen aan den Rijn, Kluwer Law International, 2008), p. 10; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 558; on CJEU case law, see e.g. Case C-2/75 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Mackprang* (1975) ECLI:EU:C:1975:66, para. 4; Case C-316/86 *Hauptzollamt Hamburg-Jonas v Krücken* (1988) ECLI:EU:C:1988:201, para. 23.

<sup>63</sup> See e.g. Radbruch, G., 'Statutory Lawlessness and Supra-Statutory Law' (1946, this version printed 2006) 26:1 Oxford Journal of Legal Studies, 1, p.6. Radbruch referred to legal certainty as one of the three fundamental pillars of law.

<sup>64</sup> See e.g. Case C-42/59 *S.N.U.P.A.T. v High Authority* (1961) ECLI:EU:C:1961:5, p. 87; Case C-58/85 *Ethicon v Hauptzollamt Itzehoe* (1986) ECLI:EU:C:1986:128, para. 10, 12; Case C-40/88 *Weber v Milchwerke Paderborn-Rimbeck* (1989) ECLI:EU:C:1989:214, para 13; Case C-323/88 *Sermes v Directeur des services des douanes de Strasbourg* (1990) ECLI:EU:C:1990:299, para 14-18; Case C-201/02 *Wells* (2004) ECLI:EU:C:2004:12, para. 40, 54-60.

#### 1.4.6. In substance

##### *Principles*

Some would say that the classification of legal principles was first made by Esser and, later, Larenz.<sup>65</sup> The section on principles,<sup>66</sup> however, follow the delimitation made by Alexy in his article “On the structure of Legal Principles”,<sup>67</sup> and depart from Dworkin’s theory. This is also in line with the application of the chosen theories.

For section 2.2, the setup will mainly follow the setup in Raz’s article “Legal principles and the limits of law”.<sup>68</sup> This is mostly due to pedagogical reasons, as Raz uses a setup that is easy for the reader to follow and appreciate. For subsection 2.2.1, concerning the CJEU and its development of principles, the main scholars chosen in this thesis are Bernitz, Brunell, Garrett, Groussot, Gutiérrez-Fons, Lennaerts, Nergelius, Pollack, Stone Sweet, Tridimas, and Widdershoven. This is due to their prominence within the EU legal field, especially in relation to principles.

##### *Non-referral*

The examples in this section were chosen for several reasons. First, the examples from the *Conseil d’Etat* and the *Bundesfinanzhof* were chosen in order to reflect the view that is held by some scholars, that France and Germany are amongst the member states that tend not to refer questions to a slightly larger extent than other countries.<sup>69</sup> The example from the *Regeringsrätten* was chosen to provide diversity to the otherwise (easily) central/southern European focus. It also signifies that no major differences can be found between older and newer members of the Union concerning the non-referral. Even though all cases involve different areas of EU law, they all concern the principles of direct effect and supremacy. Since the examples are presented as a way to illustrate the concept of non-referral, not too much emphasis is put on them. Therefore, the selection process, which involved considerations of geographical and historical measures, is to be seen as sufficient for this purpose. Consequently,

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<sup>65</sup> See e.g. Avila, H., *Theory of Legal Principles* (Dordrecht: Springer, 2007), ch 2.

<sup>66</sup> Section 2.1.

<sup>67</sup> “The distinction between rules and principles had already been thoroughly considered in Germany by Joseph Esser during the 1950s, albeit with a slightly different terminology. [...] Still, it was Ronald Dworkin’s major challenge to H. L. A. Hart’s version of legal positivism initially in “The Model of Rules,” that marked the beginnings of a broad discussion.” Alexy, R., ‘On the Structure of Legal Principles’ (2000) 13: 3 Ratio Juris, 294, p. 294.

<sup>68</sup> Raz, J., ‘Legal Principles and the Limits of Law’ (1972) 81:5 Yale Law Journal, 823.

<sup>69</sup> Bengoetxea, J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (New York, Oxford University Press, 1993), p. 201-02.

had other cases been chosen, the image illustrated might have been slightly different, but the over-all result would have remained the same since it is not hinged on the examples.

### *Submitting observations*

It is important to acknowledge that in the study from Swedish Institute for European Policy Studies (Sieps),<sup>70</sup> no distinction was made between questions referred which concerned principles and those which did not. This means that the result must not mirror the actual situation and influential rate that member states have concerning the development of principles. Also, the study includes cases between 1997-2008, which do not include the “prime” years of the development of the principles of direct effect and supremacy.<sup>71</sup> It could therefore present slightly misleading results when applied in this context. However, the study does give an indication of the effects of member state observations on the procedures before the Court, and is to be used as such.

Concerning the examples mentioned on member state observations, it is highly important to acknowledge that the information is gathered from the CJEU judgments. For the purpose of this thesis, a request was made to the European Commission asking for the actual national submissions. Unfortunately, due to the extreme increase in requests, as a result of the *Commission v Breyer’s* case<sup>72</sup> from this summer, they have not been able to provide the requested documents within the timeframes of this thesis. The opinions and suggestive interpretations provided by the member states are therefore “filtered” through the CJEU. As was brought into attention by the Sieps study, the CJEU does not refer to all observations made

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<sup>70</sup> Cramér, P., et al, ‘See you in Luxembourg? EU Governments’ observations under the Preliminary Reference Procedure’ (2016) 5 Sieps.

<sup>71</sup> The main cases concerning development of the principles of direct effect and supremacy happened between the 60’s and the beginning of the 90’s, with a boom during the 70s and 80s with cases like Case C-9/70 *Grad v Finanzamt Traunstein* (1970) ECLI:EU:C:1970:78; Case C-11/70 *Internationale Handelsgesellschaft*, supra note 53; Case C-4/73 *Nold KG v Commission* (1974) ECLI:EU:C:1974:51; Case C-41/74 *Van Duyn v Home Office* (1974) ECLI:EU:C:1974:133; Case C-43/75 *Defrenne v Sabena* (1976) ECLI:EU:C:1976:56; Case C-106/77 *Simmenthal*, supra note 53; Case C-147/78 *Ratti* (1979) ECLI:EU:C:1979:110; Case C-14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* (1984) ECLI:EU:C:1984:153; Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* (1986) ECLI:EU:C:1986:84; Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* (1990) ECLI:EU:C:1990:395; Case C-188/89 *Foster and Others v British Gas* (1990) ECLI:EU:C:1990:313; Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* (1990) ECLI:EU:C:1990:257.

<sup>72</sup> The result of the case was that it is now easier to request copies of member state observations, which up until then had been deemed classified as a starting point; Case C-213/15 P *Commission v Breyer* (2017) ECLI:EU:C:2017:563.

by the member states, but “picks and chooses as it deems suitable”.<sup>73</sup> Even though one could hope that the Court presents all arguments without leaving negative opinions out, or distorting the actual meaning of the observations, the risk of the presented observations in the rulings being a biased sample is present.

For subsection 3.2.4, the cases that are examined were chosen due to their importance, pedagogical value and relevancy to the topic of the thesis. The pedagogical value is made apparent when the cases are read as examples of when the member states’ view on the principles of direct effect and supremacy, and the opposition or agreement of the further development of them, is clear, and where the CJEU acknowledges and responds to the views. In other words, in these cases the opinion of both member states and the CJEU are clearly visible in the material. All examples chosen have had a maximum of three member state observations. The choice of not including cases with more observations was made because the cases would then take up too much space in relation to their importance to this thesis. Just like with the non-referral examples, the examples of member state observation are included to illustrate the concept as such, and not to be used for drawing quantitative conclusions. Choosing other cases as examples could have resulted in a different illustration. The cases chosen does however include two examples of when the CJEU does not rule in line with the favoured view of the member states, and one case where it partly rules in line with the member states’ observation’, which conforms to the statistics in the cited studies.

The *Defrenne II* case was chosen for the above stated reasons, but also because there is a value in showing an important case where the Court, seemingly, to a slight extent ruled in favour of the member state observations. This, as have been stressed above, because the examples are used as illustrative examples, and not as quantitatively representable.

Concerning the principle of supremacy, the *Ciola* case was chosen due to it having observations from a member state that clearly contested the supremacy doctrine, and it was easy to follow the argumentation from both the member state and the CJEU. Even though it is not one of the major supremacy cases, like *Costa*,<sup>74</sup> *Internationale Handelsgesellschaft*,<sup>75</sup> or *Simmenthal*,<sup>76</sup> it is still a hugely important case where the Court called for the principle of supremacy to be

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<sup>73</sup> Naurin, D., et al, ‘Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008’ (2013) 1 CERGU’s working paper series.

<sup>74</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51.

<sup>75</sup> Case C-11/70 *Internationale Handelsgesellschaft*, supra note 53.

<sup>76</sup> Case C-106/77 *Simmenthal*, supra note 53.



required in all cases where a directly effective EU law is concerned.<sup>77</sup> The Court has, however, qualified its reasoning in *Ciola* to a slight extent in later case law,<sup>78</sup> demonstrating that the CJEU case law is a living instrument.

### 1.5. *Terminology, or the meaning of words*

In the thesis, when talking about principles, that equates to legal principles. Legal principles are defined, by the free dictionary, as “principle[s] underlying the formulation of jurisprudence”.<sup>79</sup>

The term European Community, instead of European Union, will be used in quotes when that phrase is present, and when referring to the years when the EU was labelled a Community.

In this thesis the method of legal interpretivism is used. The most renowned scholar in this theory is Dworkin. There are opinions, though, that Dworkin’s theories should rather be classified as critical legal positivism.<sup>80</sup> It is not the task of this thesis to make an assessment of that claim. The term legal interpretivism will be used, without taking a stand in this debate.

In this thesis, no distinction is made between the principles of supremacy and primacy.<sup>81</sup>

### 1.6. *Disposition, or how to arrange a thesis*

The second section will provide a theoretical context, focusing on the legal interpretivist and legal positivist theories. They will be analysed in relation to their notion of principles; the definition of principles, the possible creation of principles, and the development of principles in relation to democracy. Also, the second section will provide with a description on the use of principles, with a directed focus at the CJEU. The third section consists of a scrutiny of member states’ possible influence concerning the two tools available through the preliminary ruling procedure – nonreferral and the submission of observations. To exemplify, both tools will be examined from the perspective of the principles of direct effect and supremacy. The fourth section will provide with a sort of “connect the dots” perspective, where the legal certainty and

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<sup>77</sup> Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 269.

<sup>78</sup> Case C-453/00 *Kühne & Heitz* (2004) ECLI:EU:C:2004:17; Case C-2/06 *Kempter* (2008) ECLI:EU:C:2008:78.

<sup>79</sup> The Free Dictionary by Farlex, ‘legal principle’, last updated 2012, retrieved 2 November 2017, available at <https://www.thefreedictionary.com/legal+principle>.

<sup>80</sup> See e.g. Tuori, K., *Critical Legal Positivism*, supra note 25.

<sup>81</sup> On the difference between supremacy and primacy see e.g. Avbelj, M., ‘Supremacy or Primacy of EU Law—(Why) Does It Matter?’ (2011) 17:6 *European Law Journal*, 744.

democracy perspectives, from the two theories' in section two's point of view, will be applied to the member state tools from the third section. The fifth section will consist of some concluding remarks and, lastly, the sixth section will provide a tentative suggestion of how to further develop this research.

## 2. Legal positivism and interpretivism – introducing theories

Even though the heading of this section vaguely states that the two theories of legal interpretivism and legal positivism shall be introduced, this has been done under section 1.4.2. Here, the theories are going to be introduced and examined in relation to principles, their take on what principles are and how they are formed. The results will then be applied to the development of principles in the CJEU. There will also be an assessment of the use of principles in relation to how the CJEU uses them. Lastly, an examination on how legal interpretivists and legal positivists define democracy in relation to the development of principles, and whether or not the development of principles by the CJEU adheres to those definitions, will be provided.

### 2.1. Principles versus rules

As previously stated, principles are used as a ground of interpretation for judges in both national and international courts. In practice, principles thus play a significant role in the judicial domain.

There are numerous principles at work in the legal sphere. According to Dworkin, a principle is “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”<sup>82</sup> Principles are hence used as a source of law, and they have shown to, at times, have the power to trump legislation in judgments.<sup>83</sup> To better understand why that is, one needs to examine the concept of principles. In order for a description to be valuable, it needs to be presented in a context. For principles that would be the comparison to rules. This because the legal norms are made up by the two. An examination of the two principles, direct effect and supremacy, and whether or not they actually are principles will also be provided.

#### 2.1.1. Legal interpretivism

It is quite impossible, and almost erroneous, to talk about principles and their distinction without mentioning Dworkin. Dworkin, as a legal interpretivist, has a very clear idea of the concept of

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<sup>82</sup> Dworkin, R., *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977), p. 22.

<sup>83</sup> See e.g. *Riggs v Palmer*, supra note 4, and *Henningsen v Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

principles and the distinction between them and rules. Dworkin used the concept of principles primarily to criticise H. L. A. Hart and the legal positivism in relation to Hart's "rule of recognition". Dworkin's critique, however, provided with his understanding of principles and their notion.

To begin with, it is clear to Dworkin that principles are part of the law and are to be considered a source of law.<sup>84</sup> Considering the distinction between principles and rules, Dworkin claims, it is to be seen as logic.<sup>85</sup> Rules and principles differ in both "character of the direction they give"<sup>86</sup> and in the way they are formulated.<sup>87</sup> There are, according to Dworkin, two main differences between principles and rules. First, rules are applicable in a hard-line inflexible way; they either apply and are valid or they do not and are to be considered invalid.<sup>88</sup> Also, if one does not follow a rule, there are often consequences.<sup>89</sup> Principles, on the other hand, do not have this inflexible attribute.<sup>90</sup> Alexy, who has emanated on Dworkin's opinions in this matter, shares his main points that there is a clear difference between principles and rules. Considering Dworkin's first difference Alexy, however, explains it with an optimization thesis. To Alexy, rules, which do apply in an all-or-nothing fashion,<sup>91</sup> are "definitive commands".<sup>92</sup> Principles, which rather are always applicable, if they affect the situation at hand, are instead fulfilled in different degrees, and therefore considered "optimization commands".<sup>93</sup>

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<sup>84</sup> Dworkin, R., 'The Model of Rules', supra note 27.

<sup>85</sup> Ibid., p. 25.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid., p. 26.

<sup>88</sup> Dworkin explains them as "applicable in an all-or-nothing fashion"; Ibid., p. 25. This opinion is shared by Alexander; Alexander, L., 'Legal Objectivity and the Illusion of Legal Principles' in Klatt (ed.) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (The United States, Oxford University Press, 2012), p. 117.

<sup>89</sup> An example that Dworkin mentions is if a will is not witnessed by three people, and that is the rule, the will is invalid; Dworkin, R., 'The Model of Rules', supra note 27, p. 25.

<sup>90</sup> An example that Dworkin mentions is that even though the principle "no man may profit from his own wrong" exists, there are situations where that happens and are "legal". Dworkin describes, for instance, that if a person trespasses on someone else's land for a "sufficient period of time", the person will then gain the right to cross the land whenever he or she pleases; Ibid., p. 25.

<sup>91</sup> Alexy refers to them as applicable in an "alles-oder-nichts" sense; Avila, H., *Theory of Legal Principles*, supra note 65, p. 10, referring to Alexy, R., *Theorie der Grundrechte* (2<sup>nd</sup> ed., Frankfurt am Main, Suhrkamp Verlag, 1994), p. 80, 83, Alexy, R., 'Zum begriff des Rechtsprinzips' in von Werner, K., Opalek, K., Peczenik, A., *Argumentation und Hermeneutik in der Jurisprudenz* (Berlin, Duncker und Humblot, 1979), p. 70.

<sup>92</sup> Alexy, R., 'On the Structure of Legal Principles', supra note 67, p. 295.

<sup>93</sup> Ibid, p. 295; Avila, H., *Theory of Legal Principles*, supra note 65, p. 9-10, referring to Alexy, R., 'Zum begriff des Rechtsprinzips', supra note 91, p.59ff, Alexy, R., 'Rechtsregeln und Rechtsprinzipien' (1985) Archives Rechts und Sozialphilosophie, Beiheft, 25, p. 19ff, Alexy, R., 'Rechtssystem und praktische Vernunft' in Alexy, R., *Recht, Vernunft, Discus* (Frankfurt am Main, Suhrkamp Verlag, 1995), p. 216-217, Alexy, R., *Theorie der Grundrechte*, supra note 91, p. 77ff.

Second, Dworkin argues, principles have a dimension of weight that rules lack.<sup>94</sup> Should two principles intersect, the conflict is resolved by weighing the principles against each other.<sup>95</sup> In a conflict between e.g. consumer protection and the freedom of contracts, the court will find one of the principles to be of more weight and thus that it prevails. Alexy, however, has a slightly different take on the dimension of weight. When principles collide, Alexy argues, one principle is not found to take precedence over the other as such, and therefore found to always have more weight than the other, but rather that one principle takes precedence in the specific case at hand due to the distinguishing circumstances.<sup>96</sup> This means that principles are only realized, and valued in relation to their weight, when they are applied in an actual case before a court.<sup>97</sup>

Dworkin, thus, explains the difference between principles and rules foremost in relation to the “all-or-nothing” aspect and the dimension (or lack of) weight. Even though Alexy agrees with these specific differences, the distinction between principles and rules, he argues, should rather be derived from their differences concerning collision-situations<sup>98</sup> and the different obligations they entail.<sup>99</sup> This means that principles and rules have different properties and qualities. Rules establish a definite standard and are applied by connection, while principles are applied by weighing, and a conflict between rules is “abstract [...], necessary [...], and located on the plane of validity”<sup>100</sup> whereas conflicts between principles are “concrete [...], contingent [...] and located on a plane of efficacy”.<sup>101</sup>

Peczenik and Aarnio, legal theorists who are also considered to be legal interpretivists, have also expressed their opinions concerning the distinction of principles. In addition to the aforementioned differences, Peczenik and Aarnio add another difference. In their opinion,

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<sup>94</sup> Dworkin, R., ‘The Model of Rules’, supra note 27, p. 27.

<sup>95</sup> Ibid., p. 26.

<sup>96</sup> Avila, H., *Theory of Legal Principles*, supra note 65, p. 10, referring to Alexy, R., ‘Rechtsregeln und Reichsprinzipien’, supra note 93, p. 17.

<sup>97</sup> Ibid., referring to Alexy, R., ‘Rechtsregeln und Reichsprinzipien’, supra note 93, p. 18.

<sup>98</sup> In a collision between rules, one is declared invalid or an exception is created. In a collision between principles, one principle is found of more weight in the specific case at hand. Both principles, though, stay “valid”; Avila, H., *Theory of Legal Principles*, supra note 65, p. 10, referring to Alexy, R., ‘Rechtsregeln und Reichsprinzipien’, supra note 93, p. 20.

<sup>99</sup> Rules are considered to entail absolute obligations, while principles entail prima facie obligations making them in risk of being overcome or pre-empted by other colliding principles; Avila, H., *Theory of Legal Principles*, supra note 65, p. 10, referring to Alexy “Rechtsregeln und Reichsprinzipien”, *Archives Rechts und Sozialphilosophie*, Beiheft 25, 1985 Alexy, R., ‘Rechtsregeln und Reichsprinzipien’, supra note 93, p. 20.

<sup>100</sup> Avila, H., *Theory of Legal Principles*, supra note 65, p. 47.

<sup>101</sup> Ibid.

principles express a specific value while rules contain an arrangement of many different values.<sup>102</sup>

To conclude, Dworkin and the other legal interpretivists consider the distinction between principles and rules clear and evident. That is, however, not the case for Hart and legal positivists.

### 2.1.2. Legal positivism

Although Hart himself did not address principles in his “The concept of law”, he briefly addressed it, due to the direct critique from Dworkin, in the postscript to the second edition. His view is therefore a direct answer to Dworkin, which is why he does not discuss every aspect concerning principles.

Hart contests that there would be a logical distinction between principles and rules. Raz, a pupil of Hart, expressed that suggesting there is a logical distinction between the two should be “greeted with some suspicion”.<sup>103</sup>

To Hart, there are two characteristics that separate principles from rules. He, however, emphasizes that these differences are a matter of degree, it is not a clear cut either-or as Dworkin claims. The first difference is that principles, in general, are broad, unspecific and imprecise.<sup>104</sup> In contrast to what Peczenik and Aarnio holds, Hart claims that “often what would be regarded as a number of distinct rules can be exhibited as the exemplifications or instantiations of a single principle”.<sup>105</sup> The second characteristic that distinguishes principles from rules, according to Hart, is that principles, more than rules, pursue a specific goal or value, and, because of this, are considered desirable to uphold.<sup>106</sup> This makes principles not only a provider of an explanation to the rules, but also something that contributes to their justification. Rules are instead often, but not always, described in sentences containing normative expressions like “should”, “must” or “ought to” – or indeed their antonyms.<sup>107</sup>

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<sup>102</sup> Peczenik, A., *On Law and Reason* (2<sup>nd</sup> ed., Dordrecht, Springer Science Business Media B.V, 2008), p. 66.

<sup>103</sup> Raz, J., ‘Legal Principles and the Limits of Law’, supra note 68, p. 838.

<sup>104</sup> Hart, H. L. A., *The concept of law*, 3<sup>rd</sup> ed., supra note 28, p. 260.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid., p. 10.

The main differences between principles and rules, according to Hart, are hence their breadth and desirability. He also addresses Dworkin's opinion of rules being applicable in an all-or-nothing fashion, and principles, lacking that attribute, having a "non-conclusive" character.<sup>108</sup> Hart instead holds that the distinction between "all-or-nothing" rules and "non-conclusive" principles does not always exist, and that, as has already been mentioned, principles and rules should be seen as part of the same norm-scale where the differences are a matter of degree.<sup>109</sup>

Raz expands on Hart's theories. He explains that principles can be used to justify rules, but not vice versa.<sup>110</sup> He agrees with the seemingly common view in legal positivism, that there can be no clear distinction between principles and rules as such; as Raz writes, "not everything which looks like a legal principle is a legal principle".<sup>111</sup> On this division, Raz also uses Dworkin's own arguments to show that Dworkin lacks consistency and logic, and that the distinction between principles and rules therefore is to be seen as illusory.<sup>112</sup>

Wiklund and Bengoetxea also shares Hart's and Raz's opinion concerning the differentiation. In their "General Constitutional Principles of Community Law" they do however differentiate between principles and rules "[for] the purpose of this work".<sup>113</sup> Principles are, according to them, generally found to underlie rules and explain the reason for the rule's existence.<sup>114</sup> Even though they do stress that there are rules that can look like principles, they have identified seven senses of expression for identifying a (legal) principle. Principles are norms or provisions with a high degree of generality, that are vague or with a high degree of vagueness, of a programmatic nature that addresses the legislator, that rank high in the hierarchy of sources, that are of a fundamental importance in the legal system, that are considered meta-norms, and that are found through a comparison of different legal systems.<sup>115</sup> That said, a principle does

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<sup>108</sup> Hart, H. L. A., *The concept of law*, 3<sup>rd</sup> ed., supra note 28, p. 261.

<sup>109</sup> Ibid.

<sup>110</sup> Raz, J., 'Legal Principles and the Limits of Law', supra note 68, p. 839.

<sup>111</sup> Ibid., p. 828.

<sup>112</sup> "Since principles apply to cases which are regulated by contrary rules, one cannot observe that words like 'reasonable' and 'unjust' make 'the application of the rule which contains [them] depend to some extent upon principles ... and in this way makes that rule itself more like a principle' and then argue that it is nevertheless only a rule because each of 'these terms restricts the *kind* of other principles on which the rule depends.'"; Raz, J., 'Legal Principles and the Limits of Law', supra note 68, p. 837 making references to Dworkin "The model of rules" Dworkin, R., 'The Model of Rules', supra note 27, p. 28-29.

<sup>113</sup> Wiklund, O., Bengoetxea, J., 'General Constitutional Principles of Community Law' in Bernitz, U., Nergelius, J., (eds.), and Swedish Network for European Legal Studies the Faculty of Law, University of Lund, *General Principles of European Community Law: Reports from a Conference in Malmö, 27-28 August 1999* (The Hague, Kluwer, 2000), p 121.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid., p 124.

not have to fulfil all these seven criteria in order to be classified as a principle. Inversely, there are certainly rules that fulfil one or more of these criteria and still are classified as rules.

All in all, the common standpoint for legal positivists, Hart being the frontrunner, is to not make a clear distinction between principles and rules, but rather see them as part of the same norm-concept.

### 2.1.3. Direct effect and supremacy

Direct effect and supremacy are referred to as principles by both scholars<sup>116</sup> and EU institutions.<sup>117</sup> The CJEU has consistently used direct effect and supremacy as principles, seemingly without much concern of the theoretical value. Should they, however, be classified as principles?

The question of “branding” might seem unimportant. It is of interest though since principles have a greater influence than rules, due to them affecting many legal areas and not just one subject. Also, in order to deal with them correctly it is important to know what applies. It is, furthermore, important to acknowledge that several actors, like the CJEU, might have their own agenda when applying a norm as a principle.<sup>118</sup> Since the word principle automatically attributes certain characteristics<sup>119</sup> to the norm,<sup>120</sup> there could, therefore, be in the CJEU’s interest to use that label even if the norm does not fulfil the criteria of principles.

Direct effect and supremacy are not applied in an all-or-nothing fashion, they are always applicable, like principles. However, they more resemble norms that fulfil the “definitive commands” and are to be fulfilled to a full extent rather than to a certain degree. They are specific in the sense that they clearly state how a situation where they apply should be interpreted, like rules. Also, like rules, they seem to lack weight. Direct effect and supremacy are, however, desirable for the Union to uphold, like principles. Even though that is, they do

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<sup>116</sup> See e.g. Wiklund, O., Bengoetxea, J., ‘General Constitutional Principles of Community Law’, supra note 108, Groussot, X., *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?*, supra note 7, Tridimas, T., *The General Principles of EU Law*, supra note 7.

<sup>117</sup> See e.g. Eurlex, ‘Direct effect of European law’, 14 January 2015, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114547>.

<sup>118</sup> “Sometimes, however, the ECJ oversimplifies things: by merely characterising a provision as a principle it occasionally attempts to justify its wide interpretation and the narrow interpretation of a contradictory norm.”; von Bogdandy, A., Bast, J., *Principles of European Constitutional Law*, supra note 1, p. 17.

<sup>119</sup> E.g. principles being more applicable and thusly easier to conform; see Avila, H., *Theory of Legal Principles*, supra note 65, p. 47.

<sup>120</sup> von Bogdandy, A., ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’ (2010) 16:2 European Law Journal, 95, p. 104.



seem to consist of more than one value; a principle might be to uphold the effectivity of EU law, the rule then being direct effect. Concerning the seven tell-tales, direct effect and supremacy fulfil three; they are ranked high in the EU legal order – they are part of EU primary law, they are fundamentally important – that has been firmly established by several scholars and by the CJEU itself, and they are meta-norms – they are applied “on top of” any case or situation, unlike more subject-bound rules.

These observations points in both directions. Direct effect and supremacy have some characteristics that principles have, and some that are consistent with rules. They do, however, span over the entire *aquis* and, as has been mentioned, affect more than just one area of law. Also, as Hart writes, the distinction between rules and principles might not be as sharp as Dworkin and Alexy propose – not all norms will fulfil all criteria of either principles or rules. It furthermore cannot be completely overlooked that the two norms always have been referred to as principles by the EU institutions and by scholars.

The logic conclusion would therefore be that direct effect and supremacy, even though they do not have all characteristics, should be, and rightfully are, classified as principles.

## 2.2. *The roles of principles*

As has been demonstrated, the definition of principles is a debateable question on which scholars disagree. What is not as unclear is how principles are used and what role they have. A review on this, aiming the attention at the CJEU’s use of principles, will thus be provided. This review is rather relevant to have here so that one can keep it in mind when later reading the discussion on how the principles are (or are not) created.

The role of principles has been established by many scholars. The general view seems to be quite consonant, why no division between e.g. the two theories will be applied here. Alexander and Kress, for example, describe principles as “the theoretical entities that justify the legal rules, determine how they should be extended and modified, and resolve conflicts among them.”<sup>121</sup> “[P]rinciples”, they continue, “ultimately determine all legal decisions, even those clearly covered by non-conflicting rules, since the decision to apply the rules rather than overrule or modify them is itself a product of the legal principles.”<sup>122</sup> This application and citation of

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<sup>121</sup> Alexander, L., Kress, K., ‘Against Legal Principles’ (1997) 82 Iowa Law Review, 739, p. 748.

<sup>122</sup> Ibid.

principles as a justification to adopt, or apply, rules, is shared by, amongst others, Dworkin.<sup>123</sup> Dworkin further explains that, in courts, principles play an essential part for arguments that support rulings concerning a specific right or obligation, using *Riggs v Palmer*<sup>124</sup> and *Henningsen*<sup>125</sup> as examples.<sup>126</sup>

Raz has also commented on the role of principles. According to him, they can be used in five different ways.<sup>127</sup> They can be grounds for interpreting laws, changing laws, be grounds for particular exceptions to laws, grounds for making new rules, and as the sole ground for action in particular cases.<sup>128</sup>

When principles are used to interpret law, the most common and least constrained form of use,<sup>129</sup> they are not limited to a specific type of legislation. As Raz describes, some interpretations are obviously found to be more conform and in line with a principle, the preferred interpretation is however up to the court. This use of principles is therefore extremely important since it, when used “correctly”, fosters a coherence within the legal system.<sup>130</sup>

Principles can also be used for changing subordinate legislation.<sup>131</sup> This use is closely intertwined with the first one, since it sometimes can be hard to distinguish between an interpretation and a change.

The third use is to use principles as grounds for particular exceptions to law. This means that in certain cases where applying a specific law, which would in fact be applicable, would lead to a sacrifice of important principles worth protecting, that law can be exempt.<sup>132</sup> This, notably, does not mean that the law is modified or amended, but that it in the specific case was to be exempt.

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<sup>123</sup> Dworkin, R., *Taking Rights Seriously*, supra note 82, p. 28.

<sup>124</sup> *Riggs v Palmer*, supra note 4.

<sup>125</sup> *Henningsen v Bloomfield Motors, Inc.*, supra note 83.

<sup>126</sup> Dworkin, R., *Taking Rights Seriously*, supra note 82, p. 28.

<sup>127</sup> As can be compared to the eight functions expressed by Kolb; Kolb expresses eight functions for principles. First, they ensure a unification of the legal system. Second, they provide with a flexibilization to the legal system. Third, they act as value-catalysers of the legal system. Fourth, they serve a prominent role concerning the dynamic and evolution of the law. Fifth, they function as a guide to interpretation and have a corrective function. Sixth, they may serve as an autonomous source of law. Seventh, they are a necessary complement to a series of legal rules. Eighth, and last, they facilitate legislative compromises.; Kolb, R., ‘Principles as Sources of International Law (with Special Reference to Good Faith)’, supra note 6, p. 27-35.

<sup>128</sup> Raz, J., ‘Legal Principles and the Limits of Law’, supra note 68, p. 839-841.

<sup>129</sup> *Ibid.*, p. 839.

<sup>130</sup> *Ibid.*, p. 840.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

Principles can also be ground for establishing new rules. This use is very important with regards to how the common law is developed.<sup>133</sup> When there are principles applicable to a certain range of issues, but no law, courts themselves regulate that specific area by establishing new rules.<sup>134</sup>

The last use for principles, according to Raz, is to use them as the sole ground for making new rules. This resembles the previous situation, but there are significant differences. When principles are the sole ground for making new rules, they “do not operate through the mediation of rules”.<sup>135</sup> In certain situations, for example the area of sentencing, or the activities of official agencies, the entire area is (almost) exclusively governed by principles.<sup>136</sup>

### **2.2.1. How are principles being used by the CJEU**

It is clear to see that principles can be used in several different ways, with a various degree of judicial impact. It is, though, not by default so that all courts use principles in all possible ways. There are, for instance, differences between courts in common law and civil law systems, concerning the use of principles.<sup>137</sup> The focus will however be directed towards the CJEU and its specific use of principles.

#### *History and development*

The CJEU has used principles in their judgments since the earliest Community years, the first example being non-discrimination and proportionality, which can be found in case law from the 1950s.<sup>138</sup> The Court started developing principles themselves through the *Algera* case<sup>139</sup> in 1957, where the principle of legitimate expectations was founded.<sup>140</sup> When establishing principles the Court uses comparative research, administered by the Advocate Generals, to find legal principles within the national legal systems.<sup>141</sup> National legal traditions thus play an essential role in the development of principles, however, it is not the only source for

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<sup>133</sup> Raz, J., ‘Legal Principles and the Limits of Law’, supra note 68, p. 841.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 7.

<sup>139</sup> Joined cases 7/56 and 3-7/57 *Algera & Others v. Assembly* (1957) ECLI:EU:C:1957:7.

<sup>140</sup> Widdershoven, R., ‘The principles of loyal cooperation: lawmaking by the European Court of Justice and the Dutch Courts’ in Stroink, F., van der Linden, E., (eds.) *Judicial lawmaking and Administrative law* (Antwerpen, Intersentia, 2005), p. 4.

<sup>141</sup> Ibid.; Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 23.

interpretation that the CJEU uses and not all national legal traditions are consistent with each other.<sup>142</sup> Also, some member states' legal traditions are more often sources for inspiration, and therefore more influential, than other member states'.<sup>143</sup>

General principles in the EU has been described by Tridimas as *enfants terribles*, in the sense that they are “children of national law but, as brought up by the Court they become [...] extended, narrowed, restated, transformed by a creative and eclectic judicial process.”<sup>144</sup> With that in mind, these terrible children of law do play an important role in the CJEU, and affect cases before the Court in significant ways. They mainly serve three purposes for the Court; as grounds for interpretation, for filling up legal lacunae and for reviewing legislation.<sup>145</sup>

### *Used as grounds for interpretation*

Just as Raz describes the use of principles as grounds for interpretation, so does Lenaerts and Gutiérrez-Fonts in the specific arena of the CJEU and the Union. There are, however, limitations to when principles can serve as the ground for interpretation. They can only be used as such in cases which fall within their scope of application.<sup>146</sup> Also, worth mentioning even though it does not concern the CJEU but rather the Union, in proceedings before national courts where the courts refer to EU principles, using the principles as an interpretation of national law *contra legem* is precluded.<sup>147</sup>

The CJEU has stated in several judgements that when an EU provision is open to more than one interpretation, preference should be given to the interpretation which renders the provision

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<sup>142</sup> A clear example of when national legal traditions differed was when the Court established the principle of non-discrimination in relation to age in the *Mangold* case, which could not be derived from all member states legal traditions; Case C-144/04 *Mangold* (2005) ECLI:EU:C:2005:709; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 932-34.

<sup>143</sup> It is established that the French and German legal traditions have been great sources for inspiration and that English law, for example, have had less influence. It should though be noted that the two first Advocate Generals were from France and Germany respectively; Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 24-25.

<sup>144</sup> *Ibid.*, p. 6.

<sup>145</sup> Lenaerts, K., Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47:6 *Common Market Law Review*, 1629, p. 1629.

<sup>146</sup> See e.g. case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* (1987) ECLI:EU:C:1987:400, para 28, and case C-260/89 *ERT v DEP* (1991) ECLI:EU:C:1991:254, para 42.

<sup>147</sup> See e.g. Case C-105/03 *Pupino* (2005) ECLI:EU:C:2005:386, para 47; Case C-212/04 *Adeneler and Others* (2006) ECLI:EU:C:2006:443, para 110; Case C-268/06, *Impact*, ECLI:EU:C:2008:223, para 100; Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 30; Lenaerts, K., Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers and General Principles of EU Law’, supra note 145, p. 1638.

consistent with the general principles.<sup>148</sup> The Court has thusly also voiced the principles' function as grounds for interpretation.

As is more evident under the next heading, the CJEU uses principles to foster harmonization and thus make sure that all legislation is interpreted in the same way, through i.e. using them as grounds for interpretation of Union provisions.<sup>149</sup>

### *Used for filling up legal lacunae*

When EU legislation is left with gaps, principles can be used for filling those lacunae. This function is seemingly the most acknowledged for principles within the EU.<sup>150</sup> The EU Treaties have been described as incomplete contracts,<sup>151</sup> with scholars referring to them as something that at times resembles a swiss cheese, or maybe rather like Rauschenberg's white paintings<sup>152</sup> – frames with no substantial content. The need for filling up the legal lacuna has therefore surely been vital.

The gap-filling serves several functions. First, it ensures the avoidance of *a déni de justice*.<sup>153</sup> This function was recognised by the Court in the *Algera* case.<sup>154</sup> To use principles to avoid risking a denial of justice is also in line with member state legal traditions.<sup>155</sup> Second, as has

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<sup>148</sup> See e.g. case C-314/89 *Rauh v Hauptzollamt Nürnberg-Fürth* (1991) ECLI:EU:C:1991:143, para 17.

<sup>149</sup> Tridimas, T., *The General Principles of EU Law*, supra note 7; Also, see e.g. Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* (1996) ECLI:EU:C:1996:131, para 28.

<sup>150</sup> For example, “[i]t may be said that each time the Court of Justice elaborates a general principle, its basic function is to patch gaps left into the Community legal order.”; Groussot, X., *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?*, supra note 7, p. 25; also Rzotkiewicz, M., ‘The General Principles of EU Law and Their Role in the Review of State Aid Put into Effect by Member States’ (2013) 12:3 *European State Aid Law Quarterly*, 464, p. 465; Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 17ff.

<sup>151</sup> See e.g. Stone Sweet, A., *The Judicial Construction of Europe* (1<sup>st</sup> ed., Oxford, Oxford University Press, 2004), p. 24; Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford, Oxford University Press, 2003), p. 157; Pollack, M., ‘Delegation, Agency, and Agenda Setting in the European Community’ (1997) 51:1 *International Organization*, 99; Alter, K., ‘Who Are the "Masters of the Treaty?": European Governments and the European Court of Justice’ (1998) 52:1 *International Organization*, 121, p. 124.

<sup>152</sup> Rauschenberg caused quite a stir in the art world in the 1950's with his monochromatic “White paintings” – white canvases that he had painted white.

<sup>153</sup> Herdegen, M., ‘The Origins and Development of the General Principles of Community Law’ in Bernitz, U., Nergelius, J., (eds.), and Swedish Network for European Legal Studies the Faculty of Law, University of Lund, *General Principles of European Community Law : Reports from a Conference in Malmö, 27-28 August 1999* (The Hague, Kluwer, 2000), p. 5.

<sup>154</sup> The Court emphasised that “unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member States”; Joined cases 7/56 and 3-7/57 *Algera*, supra note 139, p 55.

<sup>155</sup> In *Algera*, the Court compared the legal traditions of the, then, six member states and found support both in the German and the French legal traditions for applying principles in order to ensure justice; Hettne, J., *Rättsprinciper Som Styrmedel: Allmänna Rättsprinciper I EU:s Domstol* (Stockholm, Norstedts Juridik, 2008), p. 240.

already been mentioned under the previous heading, using principles as gap-fillers helps ensuring a harmonious interpretation of EU provisions and a coherence of the EU legal order.<sup>156</sup> This function of principles is by no means unique for the EU or CJEU, but commonly found in other courts.<sup>157</sup>

However, as claimed by Koopmans, “[t]he general principles are not, or not any more, used to patch gaps left between legal provisions duly enacted by the framers of laws, constitutions or Treaties. On the contrary, they are an integral part of the conceptual tools judges employ nowadays for settling disputes.”<sup>158</sup> This view is, and has been, contested by many scholars, for example Groussot.<sup>159</sup> Even though principles were used as gap-fillers more frequently in the early Union years, they still fill this function.<sup>160</sup>

### *Used as a ground for review*

The third main use for principles in the CJEU is to use them as a ground for reviewing secondary legislation, and the compatibility of national law, falling within the scope of EU law, with Union provisions.<sup>161</sup> This review-function of the Court is expressed in the Treaties.<sup>162</sup>

Any Union measure that is found by the CJEU to infringe a general principle is annulled by the Court.<sup>163</sup> The Court has expressed this role of principles in several cases, for instance in *Cinéthèque*,<sup>164</sup> *Demirel*,<sup>165</sup> and *ERT*.<sup>166</sup>

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<sup>156</sup> Lenaerts, K., Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers and General Principles of EU Law’, supra note 145, p. 1635-36.

<sup>157</sup> E.g. in member state courts like the French Conseil d’Etat; Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 17-18.

<sup>158</sup> Koopmans, T., ‘General principles of law in European and National Systems of law: A comparative view’ in Bernitz, U., Nergelius, J., (eds.), and Swedish Network for European Legal Studies the Faculty of Law, University of Lund, *General Principles of European Community Law : Reports from a Conference in Malmö, 27-28 August 1999* (The Hague, Kluwer, 2000), p. 34.

<sup>159</sup> Groussot, X., *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?*, supra note 7, p. 25.

<sup>160</sup> Ibid.

<sup>161</sup> Lenaerts, K., Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers and General Principles of EU Law’, supra note 145, p. 1649-50.

<sup>162</sup> See e.g. art 19 TEU, and arts. 258-60, 263 and 267 TFEU.

<sup>163</sup> Tridimas, T., *The General Principles of EU Law*, supra note 7, p. 31.

<sup>164</sup> Joined cases 60 and 61/84 *Cinéthèque v Fédération nationale des cinémas français* (1984) ECLI:EU:C:1985:329, para 26.

<sup>165</sup> Case C-12/86 *Demirel*, supra note 146, para 28.

<sup>166</sup> Case C-260/89 *ERT*, supra note 146, para 42.

### **2.2.2. Usage of direct effect and supremacy**

The principles of direct effect and supremacy were primarily established as a way to fill up legal lacunae.<sup>167</sup> Direct effect was created by the CJEU to establish a right, for individuals within the Union, that did not exist before, i.e. a gap in the Court's mind.<sup>168</sup> The principle of supremacy was created to ensure said right. Since established, however, the principles have rather been used as a ground for interpretation and review of EU legislation.<sup>169</sup> When national courts, for instance, refer questions to the CJEU for preliminary rulings, they often refer to the principles considering how a EU provision should be interpreted.<sup>170</sup> This change in use has also been emphasized by Koopmans.<sup>171</sup> Nevertheless, the principle of direct effect has been developed over decades, and every large development, e.g. creating direct horizontal effect or indirect effect, can be seen as filling new gaps found by the Court.

Reconnecting to subsection 2.1.3, the function that direct effect and supremacy have, i.e. created as gap-fillers and grounds for interpretation and review, also supports the conclusion that they are (theoretically) principles.

## **2.3. *The existence or creation of principles***

Following the discussion on what principles are and how they are used, the logical continuance would be to examine their existence or creation. Legal interpretivists and legal positivists have different opinions on the source of principles, and the possible discretion that courts have concerning them.

### **2.3.1. Legal interpretivism**

Staying with Dworkin as the representative for legal interpretivism, it first has to be stated that, to him, the law does not contain gaps of which judges need to fill by creating norms. To claim that there are gaps is both misleading and an expression of a superficial phenomenon, he

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<sup>167</sup> Lenaerts, K., Gutiérrez-Fons, J., 'The Constitutional Allocation of Powers and General Principles of EU Law', supra note 145, p. 1632.

<sup>168</sup> de Witte, B., 'Direct Effect, Primacy, and the Nature of the Legal Order', supra note 10, p. 330.

<sup>169</sup> Ibid., p. 332.

<sup>170</sup> Ibid.

<sup>171</sup> Koopmans, T., 'General principles of law in European and National Systems of law: A comparative view', supra note 158, p. 34.

states.<sup>172</sup> Instead judges use principles, that they find – not create, through cognising what is available within the system.<sup>173</sup> Even in cases which are unclear,<sup>174</sup> judges need to seek and find principles instead of creating them.<sup>175</sup> The task of a court is, thus, to not invent new rights retrospectively when the case is presented to them, but discover what rights the parties do have under current judicial conditions.<sup>176</sup> The way that judges then have discretion in unclear cases, to Dworkin, is to find the underlying legal principles that will yield a “right answer”<sup>177</sup> and thus a correct ruling.

What signifies Dworkin’s theory is hence that people have rights *ex ante*, i.e. before they have been acknowledged or upheld by a court.<sup>178</sup> The court then simply adheres to them when they use them in their rulings.

When applying this legal interpretivist view on development of principles, it is clear that the way that CJEU develops principles is in line with their way of “finding” principles. The CJEU, as has been described above, draws inspiration from member state legal traditions, the Treaties and other sources of legal grounds. The Court did this also when developing the principles of direct effect and supremacy. In *van Gend*,<sup>179</sup> the Court referred to the objectives expressed in the preamble of the Treaties as stating that direct effect could be drawn from them, and thus something that already “existed”.<sup>180</sup> In other words, the Court considers the EU legal order as a system that is complete, and that every legal question can be answered through the reliance on legal principles, that may not be written.<sup>181</sup> It is therefore not illogical that Bengoetxea has claimed similarities between Dworkin’s approach to law and CJEU’s legal justification.<sup>182</sup> The

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<sup>172</sup> Hernández, G., ‘Interpretation’ in Kammerhofer, J., d’Aspremont, J., (eds.) *International Legal Positivism in a Post-modern World* (Cambridge, Cambridge University Press, 2014), p. 320.

<sup>173</sup> *Ibid.*, p. 320.

<sup>174</sup> Dworkin uses the term “hard-cases”.

<sup>175</sup> Wiklund, O., *EG-domstolens Tolkningsutrymme: Om Förhållandet Mellan Normstruktur, Kompetensfördelning Och Tolkningsutrymme I EG-rätten* (1<sup>st</sup> ed., Stockholm, Norstedts Juridik, 1997), p. 68.

<sup>176</sup> Dworkin, R., *Taking Rights Seriously*, supra note 82, p. 81.

<sup>177</sup> Dworkin’s “One right answer”-theory has been criticised by several legal positivist scholars, see e.g. Peczenik, A., *On Law and Reason*, supra note 102, p. 307-09.

<sup>178</sup> Raitio, J., ‘The Principle of Legal Certainty as a General Principle of EU Law’, supra note 62, p. 281.

<sup>179</sup> Case C-26/62 *van Gend en Loos*, supra note 44.

<sup>180</sup> *Ibid.*, p. 12.

<sup>181</sup> Wiklund, O., *EG-domstolens Tolkningsutrymme: Om Förhållandet Mellan Normstruktur, Kompetensfördelning Och Tolkningsutrymme I EG-rätten*, supra note 175, p. 73-74.

<sup>182</sup> Bengoetxea, J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, supra note 69, p. 145-47.



Court has also been called Dworkian by several scholars, which might in this sense be rather suitable.<sup>183</sup>

Legal interpretivists would, however, not agree with the Court's expressed way of filling legal gaps. These two viewpoints do not have to be opposites. Because the CJEU considers the EU legal order to be a complete system, where principles can be found, that would mean that there are no real gaps. What appears to be a gap, due to e.g. the Treaties being *traités cardres*, is not an actual gap since principles, which do exist, cover those lacunae. In that sense, the CJEU's method and pronounced use of principles is in line with the interpretivist understanding, and the Court could still keep its epithet of being Dworkian.

### 2.3.2. Legal positivism

For legal positivists like Hart, principles are created by judges due to their discretion in unclear cases. There are gaps in the law which courts have the right to fill. As Hart states, "there will always be certain unforeseen cases, unregulated by the law".<sup>184</sup> Judges should, in those situations, exercise their discretionary powers and create proper norms.<sup>185</sup> To do so, judges need to apply the rule of recognition. The rule of recognition is to be seen as a social practice amongst officials, and entail judges to consider specified characteristics when they create norms. These characteristics can be to look at customs, precedents or even sources outside of the law, to draw inspiration when constructing norms.<sup>186</sup> As long as judges follow this rule, they are "entitled to follow standards or reasons for decisions which are not dictated by the law and may differ from those followed by other judges faced with a similar [unclear] case."<sup>187</sup> To continue, for legal positivists, there is no such thing as rights *ex ante*. Norms exist when courts have established them, and not before.<sup>188</sup>

The development of principles by the CJEU might be seen as legitimate creation by legal positivists, since, as the CJEU itself claims, the principles are developed to fill legal lacunae.

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<sup>183</sup> See e.g. Wiklund, O., *EG-domstolens Tolkningsutrymme: Om Förhållandet Mellan Normstruktur, Kompetensfördelning Och Tolkningsutrymme I EG-rätten*, supra note 175, p. 73; Bengoetxea, J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, supra note 69.

<sup>184</sup> Hart, H. L. A., 'The New Challenge to Legal Positivism' (1979, this version printed 2016) 36:3 Oxford Journal of Legal Studies, 459.

<sup>185</sup> Hart, H. L. A., *The Concept of Law* (1<sup>st</sup> ed., Oxford, Clarendon, 1961), p. 128; Hart, H. L. A., 'The New Challenge to Legal Positivism', supra note 184.

<sup>186</sup> Hart, H. L. A., *The Concept of Law*, 1<sup>st</sup> ed., supra note 185, p. 97.

<sup>187</sup> Hart, H. L. A., 'The New Challenge to Legal Positivism', supra note 184.

<sup>188</sup> Hart, H. L. A., *The Concept of Law*, 1<sup>st</sup> ed., supra note 185, p. 97.

However, the CJEU rather states that they find principles and then use them to fill up lacunae, which rather insinuates that they consider the principles to already exist. The view that legal positivists have on the creation of principles is therefore more in line with how national courts work.

## 2.4. *Principles and democracy*

“Principles enable an autonomous legal discourse, strengthen the autonomy of courts vis-à-vis politics and allow for an internal development of the law which circumvents Article 48 EU. Is this acceptable in light of the principle of democracy?”<sup>189</sup>

As Bast and von Bogdandy so candidly put it, there are some concerns regarding the CJEU’s creation of principles and the principle of democracy. As has been stated, direct effect and supremacy are principles, and also a part of the law. To create law is a task for the legislator. In the Union, the legislator, i.e. the Commission, the Parliament and the Council, are political bodies which EU nationals have the direct and indirect possibility to choose through democratic elections. This procedure has been transcribed in the Treaties by the member states, meaning that the design of it was intended. Member states and (indirectly) EU members were thus supposed to have the legislative power. When the CJEU then develops principles, it takes on a legislative role that it might not be supposed to have. As has been mentioned above, the CJEU has the power to fill gaps in the EU legislation. Would developing principles count as gap-filling or simply a form of judicial activism creating judicial legislation? Or maybe rather, since this thesis is not going to cover the judicial activism-debate, is the development of principles, regardless whether it is gap-filling or judicial legislation, in line with the principle of democracy?

The principle of democracy is transcribed in the preamble of the Treaties and is a value that the Union strongly advocates and adheres to.<sup>190</sup> Legal interpretivists and legal positivists, however, have two different point of views on the concept of democracy.

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<sup>189</sup> von Bogdandy, A., Bast, J., *Principles of European Constitutional Law*, supra note 1, p. 18.

<sup>190</sup> TEU Preamble.

### 2.4.1. Legal interpretivism

Democracy from a legal interpretivist perspective<sup>191</sup> can mostly be described as a strive for freedom. Dworkin describes two types of democracy, a majoritarian and a partnership view.<sup>192</sup> The majoritarian view is democracy governed by majority will. This does not ensure a fair result, since it might lead to unfair treatment of minority groups, where their rights and will might be overlooked.<sup>193</sup> Dworkin, instead favour the other form of democracy, the partnership view. In that view the people governs themselves as a “full partner in a collective political enterprise”.<sup>194</sup> The focal point, thus, is democracy for people as parts of a collective rather than people as a unity.

This focus on individuals and rights is in line with how the CJEU has justified the creation of principles. When the Court developed the principle of direct effect, for instance, they did so with a reference to the rights of the EU members.<sup>195</sup> This has also been the case when the Court has developed other principles.<sup>196</sup> The development of principles by the CJEU can thusly be said to be in line with the legal interpretivist concept of democracy.

### 2.4.2. Legal positivism

If one looks at the older positivists’ view on democracy, the germane practice was habitual obedience by the majority of the population to the sovereign state.<sup>197</sup> The desirable value was thus unity – one people, one voice. Because legal positivism, as a theory, makes a distinction between law and moral,<sup>198</sup> and ensures a unity of the legal system by providing clear solution mechanisms for conflicts of law, it is by construction a close relative to the concept of sovereignty. Legal positivism has therefore been seen as related to the concept of the state, since it is through the sovereign state that the sovereignty of the people is realized, legal positivists

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<sup>191</sup> Still departing from Dworkin.

<sup>192</sup> Dworkin, R., *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton, New Jersey, Princeton University Press, 2006), p. 131.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> Case C-26/62 *van Gend en Loos*, supra note 44, p. 12.

<sup>196</sup> See e.g. the development of supremacy through e.g. case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51, human rights through e.g. Case C-29/69 *Stauder v Stadt Ulm* (1969) ECLI:EU:C:1969:57, and equal treatment through e.g. case C-43/75 *Defrenne v Sabena*, supra note 71.

<sup>197</sup> Hart, H. L. A., *The Concept of Law*, 1<sup>st</sup> ed, supra note 185, p. 97; Hart, H. L. A., ‘The New Challenge to Legal Positivism’, supra note 184.

<sup>198</sup> See supra, section 1.4.2.

argue.<sup>199</sup> Two examples that illustrate this state-focus are the concept of the *Reichsstaat* and the *Etat de droit législatif*.<sup>200</sup> In these concepts, the focus is not on sovereignty in relation to individuals but on sovereignty as an impersonal entity; a supreme juristic person or a nation.<sup>201</sup> This focus on unity can be compared with the majoritarian view on democracy that Dworkin describes. The focus on unity is thus a different take on democracy than the interpretivist view with its strive for freedom.

The practice of the CJEU when establishing principles is not in direct line with the positivist unity-value. As has been established, the principles developed strengthen the individual rights for EU members, and thus do not ensure unity and stability for the state or entity. The development of the principles of direct effect and supremacy, and thus the creation of an autonomous legal system, would therefore be particularly troublesome for legal positivists concerning the compatibility with democracy, since it directly threatens the sovereign state.<sup>202</sup>

## 2.5. Summary

In this first section the possible differences between principles and rules have been established. To Dworkin and other legal interpretivists there is a clear distinction between the two. The main differences are that rules either apply or do not, while principles are not that inflexible. Principles have weight that rules on the other hand lack. Principles also tend to express one value, while rules consist of several. For Hart and legal positivists, this distinct differentiation between rules and principles is not appropriate since both principles and rules are part of the same norm-scale. Principles, however, tend to be used in a broader and more unprecise way. Also, what can be transcribed in several rules, can be put in one principle. Principles, furthermore, tend to pursue a specific goal and therefore are desirable to uphold.

Concerning direct effect and supremacy, they have characteristics of both rules and principles. The fact that they span over the entire *aquis*, are meta-norms, are desirable to uphold and affect more than one area of the law, however, lead to a conclusion that they should be classified as

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<sup>199</sup> Pino, G., 'The Place of Legal Positivism in Contemporary Constitutional States' (1999) 18:5 Law and Philosophy, 513, p. 519

<sup>200</sup> Ibid.

<sup>201</sup> Ibid., p. 519-20.

<sup>202</sup> See also e.g. Chiassoni, P., 'Constitutionalism Out of a Positivist Mind Cast: The Garantismo Way' (2011) 17:4 Res Publica, 327.

principles. The reference to them as principles by scholars and EU institutions are therefore theoretically correct.

Principles have several roles in the judicial sphere. Alexander and Kress describe principles as justification for rules, a means to determine modifications to rules, and a means to resolve conflicts among rules. To Dworkin, principles are used to support the use of a specific right or obligation. Raz describes five main roles for principles. They can be grounds for interpreting laws, changing laws, be grounds for particular exceptions to laws, grounds for making new rules, and as the sole ground for action in particular cases.

The CJEU has been described to have three main uses for principles. It uses them as grounds for interpretation of EU provisions. This function helps ensuring a uniform interpretation of norms and a harmonization within the EU legal order. The CJEU further uses principles as a means to fill up legal lacunae. With the EU Treaties being described as incomplete contracts, this use is plausibly the most acknowledged. Lastly, principles are used as a ground for review of secondary legislation, and the compatibility of national law, falling within the scope of EU law, with Union provisions.

The principles of direct effect and supremacy, specifically, were established as a way to fill legal lacunae. Their development has, however, led to them more often being used as grounds for interpretation and for review.

The legal interpretivists and legal positivist have different approaches to the existence or creation of principles. According to Dworkin and the legal interpretivists, principles always exist. When courts use them in their rulings, they find them within the existing system. There are no gaps in the law, the system is to be seen as complete. For legal positivists, like Hart, judges do create principles when there are no clear rules governing a specific situation, and they do have discretionary powers as long as they apply the rule of recognition.

The CJEU's development of principles is more in line with the legal interpretivist view. The Court is said to draw inspiration from e.g. national legal orders and therefore finding principles within the system. The fact that the Court uses principles to fill gaps can, however, be seen as in line with the legal positivist view.

If one draws the attention to the principle of democracy, there are scholars that have some concerns regarding the CJEU's creation of principles and the principle of democracy. Legal interpretivists and legal positivists have different views on how the concept of democracy is to

be understood. For legal interpretivists, democracy means a strive towards freedom, and the focus lies with people as parts of a collective rather than people as a unity. For legal positivists, democracy is instead to be understood as a strive towards habitual obedience by the majority of the population to the sovereign state, and thus a unity. The focus is not on sovereignty in relation to individuals but on sovereignty as an impersonal entity.

The development of principles in the CJEU is in line with the strive for freedom, and therefore democratic in the legal interpretivist way. The sovereignty and unity focus that legal positivists have is more in line with a classic state rather than the EU system.

### 3. Non-referral and submitting observations – examining tools

National courts' main contact with the CJEU is through the preliminary ruling procedure. The procedure is regulated through article 267 TFEU. Courts may or shall ask questions about interpretation of EU provisions if they appear unclear.<sup>203</sup> Should they appear clear, or have the provisions in question already been interpreted by the CJEU, national courts may refrain from posing a question to the CJEU. To refrain from referring a question for preliminary ruling is a tool used by national courts.

In addition to the possibility to ask the CJEU for interpretation of EU provisions, the preliminary ruling procedure also gives member states the possibility to submit observations to the CJEU. When a national court has referred a question for preliminary ruling, any member state (including the member state of the referring court) may send their view to the CJEU on how the question should be answered. This is a tool used by member state governments.

These two tools – to not send a question and to send observations – can both possibly be used to change the development of principles within the EU. The preliminary ruling procedure as such has been described by scholars as the main opportunity for CJEU to develop principles.<sup>204</sup> It was, for instance, through preliminary rulings that the principles of direct effect and supremacy were created and developed.

An analysis of the two tools, in relation to the development of direct effect and supremacy, is therefore in order.

#### 3.1. *Non-referral – hiding behind the acte clair doctrine*

##### 3.1.1. Legal ground

To refer a question to the CJEU is, as has already been stated, regulated through art 267 TFEU. National courts may refer questions if they are uncertain on the interpretation of the Treaties<sup>205</sup> or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the

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<sup>203</sup> Art 267 (1) (a) and (b) TFEU.

<sup>204</sup> Lenaerts, K., Gutiérrez-Fons, J., 'The Constitutional Allocation of Powers and General Principles of EU Law', supra note 145, p. 1635; Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 189.

<sup>205</sup> Art 267 (1) (a) TFEU.

Union.<sup>206</sup> National courts of last instance, whose decisions cannot be appealed, have the obligation to refer a question to the CJEU if such uncertainties appear in a case.<sup>207</sup> This absolute obligation has exceptions, the most commonly used being the *acte clair* doctrine.

### 3.1.2. The *acte clair* doctrine

The concept of *acte clair* is described in the Oxford Dictionary of law as “[a] matter so obvious as not to need legal argument.”<sup>208</sup> In judicial terms, that entails that a clear provision (*acte clair*) would not require interpretation, and thus would not need to be referred to the CJEU. The conditions for when national courts could refuse to refer a question with reference to the *acte clair* were established by the Court in *CILFIT*.<sup>209</sup>

In *CILFIT*, the Court stated that national courts did not need to refer questions for preliminary rulings if they fulfilled certain criteria and restrictions:

“Before it comes to the conclusion that such is the case [ie. the application of EU law being obvious], the national court or tribunal must be convinced that the matter is *equally obvious to the courts of the other member states and to the court of justice*. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it. [...] [T]he existence of such a possibility must be assessed on the basis of the characteristic features of community law and the particular difficulties to which its interpretation gives rise. To begin with, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves *a comparison of the different language versions*. [...] Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various member states. Finally, every provision of community law must be *placed in its context and interpreted in the light of the provisions of community law as a whole*, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”<sup>210</sup>

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<sup>206</sup> Art 267 (1) (b) TFEU.

<sup>207</sup> Art 267 (3) TFEU.

<sup>208</sup> ” Oxford English Dictionary ‘Acte clair, n.,’ OED Online. June 2017. Oxford University Press, retrieved 4 November 2017, available at <http://www.oed.com.ezproxy.ub.gu.se/view/Entry/56692642?redirectedFrom=acte+clair>.

<sup>209</sup> Case C-283/81 *CILFIT v Ministero della Sanità* (1982) ECLI:EU:C:1982:335; The *acte clair* doctrine has been confirmed by the CJEU in several other cases, like case C-337/95 *Parfums Christian Dior v Evora* (1997) ECLI:EU:C:1997:517, case C-340/99 *TNT Traco* (2001) ECLI:EU:C:2001:281, and case C-99/00 *Lyckeskog* (2002) ECLI:EU:C:2002:329; Craig, P., de Búrca, G., *EU Law: Text, Cases, and Materials*, supra note 13, p. 478.

<sup>210</sup> Case C-283/81 *CILFIT*, supra note 209, para. 16-20, italics added.



It thus takes a lot to fulfil the criteria of *acte clair*. However, not referring questions to the CJEU with reference to that doctrine, both right- and wrongfully, is a common and criticised phenomenon.

### 3.1.3. Courts that did not ask

When a national court does not refer a question for a preliminary ruling, the argument for why not would often be due to the interpretation of the provision in question being clear enough. This would however almost never be the case, at least in the view of Bebr. To him, for national courts to correctly interpret an EU provision would be “a happy coincidence bordering on a legal miracle.”<sup>211</sup> He further criticises the *acte clair* doctrine, calling it an inherently flawed notion which “gravely threaten[s] an effective operation of the preliminary ruling procedure and so block the development of the Community legal order.”<sup>212</sup> It has been claimed by other scholars as well that national courts use the *acte clair* doctrine as an improperly justification for not referring a question to the CJEU.<sup>213</sup> For some scholars, clarity is even impossible in theory.

It is important to mention that several courts of last instance have been severely restrictive concerning asking the CJEU for a preliminary ruling. Under the 1970's, for instance, the *Bundesfinanzhof* and the *Conseil d'Etat* was especially mentioned as courts unwilling to refer questions.<sup>214</sup> It might not be the greatest mystery of all time as to why this is; courts of last instances will only risk losing their influence and authority when referring questions to the CJEU.<sup>215</sup> Having said that, courts of last instances do not *never* pose questions to the CJEU. The questions, however, often seem to consider technical issues rather than questions of a more intrusive nature.<sup>216</sup> To cite Alter, the courts seem to reserve the difficult questions for

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<sup>211</sup> Bebr, G., *Development of Judicial Control of the European Communities* (Springer, Dordrecht, 1981), p. 517.

<sup>212</sup> *Ibid.*, p. 516.

<sup>213</sup> Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 177f.

<sup>214</sup> Bengoetxea, J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, supra note 69, p. 201-02.

<sup>215</sup> Alter, K., ‘The European Court's Political Power’ (1996) 19:3 *West European Politics*, 458, p. 466.

<sup>216</sup> *Ibid.*, p. 465; Bebr, G., ‘The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice’ (1983) 20:3 *Common Market Law Review*, 439, p. 456; Also, Bebr states that “[i]t is typical for their attitude that precisely in matters of principle, particularly those concerning the supremacy of Community law, the delimitation of community and state competence or the nature and effect of directives, they have avoided, under the cover of this doctrine, a mandatory reference. [...] In this respect the practice of the Conseil d'Etat and of the Bundesfinanzhof seeking to reserve questions of fundamental importance to themselves in fact challenges the exclusive interpretation of the Court”; Bebr, G., ‘The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice’, p. 456-57.

themselves, applying a sort of “don’t ask and the ECJ can’t tell” policy.<sup>217</sup> This reticence of national courts effectively limits the CJEU’s possibility to return to the national courts an “unfavourable” ruling, and thus limits the CJEU’s opportunity to develop principles.<sup>218</sup> As Rasmussen puts it, “the more higher national courts take cover behind some questionable *acte clair* argument, the wider the scope of the concurrent jurisdictions become under article 177(3)[now art 167(3) TFEU].”<sup>219</sup>

### *Evaluating national courts*

It might be hard to evaluate the absence of matters referred to the CJEU by member states (how do you really prove a negative?!). One possibility would be to go through the case law from all the national courts to find cases where the questions concerned EU law and where the *acte clair* doctrine had been wrongfully relied upon. That would though be a task quite impossible to carry out, especially within the frames of this thesis. However, there are some examples already discovered that are worthy of mentioning here.

In the case *Syndicat des importateurs des vêtements*<sup>220</sup> from the French administrative court *Conseil d’Etat*, delivered in 1979, the matter concerned protective measures implemented by the French government. These measures introduced licenses for products already liberalized under article 113 EEC and covered by the multilateral arrangement regarding international trade in textiles, which in practice restricted their free movement. One of the issues raised by the plaintiff was whether or not the arrangement had direct effect, which indirect also concerned the question of supremacy.<sup>221</sup> The *Commissaire du gouvernement* highly recommended the *Conseil d’Etat* to send a question for preliminary ruling to the CJEU on the matter.<sup>222</sup> The *Conseil d’Etat*, however, declared the situation clear in relation to the *acte clair* doctrine and ruled against direct effect.<sup>223</sup> This denial of direct effect, in a matter that had not been tried and clarified by the CJEU, and therefore obviously was not clear, could be an incorrect interpretation of Union law, and thus a wrongful use of the *acte clair* doctrine. In order for the

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<sup>217</sup> Alter, K., ‘The European Court's Political Power’, supra note 215, p. 465-66.

<sup>218</sup> Golub, J., ‘The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice’ (1996) 19:2 West European Politics, 360, p 377; Garrett, G., ‘International Cooperation and Institutional Choice: The European Community's Internal Market’ (1992) 46:2 International Organization, 533, p. 556.

<sup>219</sup> Rasmussen, H., *The European Court of Justice* (1<sup>st</sup> ed., København, GadJura, 1998), p. 123.

<sup>220</sup> *Syndicat des importateurs des vêtements* RTDE 1979, 730-743.

<sup>221</sup> Bebr, G., ‘The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice’, supra note 216, p. 446.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid., p. 447.

Court to develop the principle of direct effect, member states need to refer questions to it. For the *Conseil d'Etat* to not do that in such an unclear matter as the case seemed to be (at least according to the *Commissaire du gouvernement*), it affected the development, or lack thereof, of the principle.<sup>224</sup>

Another example is a case before the German federal fiscal court, *Bundesfinanzhof*, delivered in 1981. The case concerned the effect of a provision in a directive that had been implemented after the time limit had expired,<sup>225</sup> i.e. a question of direct effect. The question was raised in a lower court, but after appeal ended up in the *Bundesfinanzhof*. Instead of posing the question to the CJEU, the German court denied the provision direct effect with the explanation that Union law only had direct effect in national legal orders where powers had been transferred to the EU, and in this case, it had not.<sup>226</sup> The *Bundesfinanzhof* also referred to rulings from the French *Conseil d'Etat*<sup>227</sup> in order to justify its opinion.<sup>228</sup> As a result, the *Bundesfinanzhof* denied any direct effect of a directive solely based on a matter of principles. Their ruling went against the case law of the CJEU,<sup>229</sup> thereon touching upon another tool available for member states – the non-compliance. However, since there were discrepancies concerning the nature of directives and their effect, a referral in order for the CJEU to clarify would have been in order. Also, there was a disagreement amongst the scholars on whether or not the Court, at that time, had granted directives direct effect.<sup>230</sup> Therefore, because the *Bundesfinanzhof* did not refer a question, the CJEU was deprived of their chance to develop the principle of direct effect and its effect in relation to directives.

The interpretation of a directive, and thus its direct effect and supremacy, has been made in several other cases. An example north of the European continent is the *Barsebäck* case<sup>231</sup> from the Swedish supreme administrative court, *Regeringsrätten*. The case concerned, amongst other

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<sup>224</sup> The *Conseil d'Etat* has numerous cases refrained from making a reference to the CJEU. See e.g., concerning the supremacy of EU law, *Shell c. Berre*, RTDE 1965, 121-125; *de Laubadere*, Actualité juridique-droit administratif 1964, 440-444; *Jammes*, RTDE 1970, 168-9; *Federation nationale des producteurs de vins de consommation courante*, Conseil d'Etat, Recueil des décisions 1971, 216-7.

<sup>225</sup> Bebr, G., 'The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice', supra note 216, p. 449.

<sup>226</sup> *Ibid.*, p. 450.

<sup>227</sup> *Ministre de l'intérieur c. Cohn-Bendit* CE, Ass., 1978, 524.

<sup>228</sup> I.e. to argue the fulfilment of other courts coming to the same conclusion, and regarding other language versions – the criteria established in CILFIT.

<sup>229</sup> E.g. joined Cases C-28 and 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* (1963) ECLI:EU:C:1963:6, case C-9/70 *Grad*, supra note 71, and case C-41/74 *Van Duyn*, supra note 71, case C-147/78 *Ratti*, supra note 71.

<sup>230</sup> See esp. CJEU judge Pescatore; Pescatore, P., 'The doctrine of direct effect: an infant disease of community law' (1983) 8 *European Law Review*, 155.

<sup>231</sup> RA 1999 ref 76 *Barsebäck*.

questions, the interpretation of a directive and the possible application of an exemption clause, i.e. if the directive should have direct effect and be supreme in the case before the court.<sup>232</sup> The *Regeringsrätten* stated that several possible interpretations were plausible, and the court presented, for example, a teleological and a textual interpretational model that could result in different outcomes. The court therefore discussed whether a question should be referred to the CJEU. As is clear from the *acte clair* doctrine, if an EU provision is unclear, the national court should<sup>233</sup> refer a question under art 267 TFEU. The *Regeringsrätten*, however, concluded that an interpretation of the directive would not be necessary or helpful in order to rule on the facts of the case. Worth noticing is that that conclusion was made after the court had in fact done an interpretation of the unclear direction, i.e. indirectly and, seemingly, wrongfully finding the directive clear enough. This case, and the non-referral, has been criticized by Swedish scholars.<sup>234</sup>

#### 3.1.4. Broken tool?

How potent is then the usage of the tool of non-referral? First, as stated above, the principles of direct effect and supremacy have only been developed through the preliminary ruling procedure. If national courts did not send questions to the CJEU, the Court would not have any possibility to expand the sphere of the principles. This strongly suggests a great power entrusted to the national courts concerning what the CJEU can rule upon.

There are examples of national courts not referring a question due to the matter being “clear”, when in fact the CJEU has established an opposite interpretation in earlier case law.<sup>235</sup> This behaviour is though rather an example of non-compliance, or contained compliance, and therefore a different tool in the judicial tool box. It is however important to acknowledge that a non-referral can lead to a non-compliance scenario if the proper interpretation is settled by the CJEU, but the national court uphold their original interpretation. There is another risk with the use of non-referral. When member state courts do not refer and instead do their own interpretations of EU provisions they ensure a non-consistency and an incohesive interpretation

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<sup>232</sup> RÅ 1999 ref 76 *Barsebäck*, section 5.3.3.

<sup>233</sup> The *Reringsrätten* is a court of last instance.

<sup>234</sup> See e.g. Bernitz, U., 'Barsebäckdomen i Regeringsrätten – borde förhandsavgörande av EG-domstolen ha begärts?' (199/2000) 4 *Juridisk Tidskrift*, 964; Nergelius, J., *De Europeiska Domstolarna Och Det Svenska äganderättsskyddet* (1st ed. Stockholm, Norstedts Juridik, 2012).

<sup>235</sup> See e.g. the *Cohn-Bendit* case from the French Conseil d'Etat; *Case Ministre de l'intérieur c. Cohn-Bendit* CE, supra note 227.

and application of EU provisions throughout the Union. This will, as with the non-compliance, result in a difference in jurisprudence for individuals depending on what member state one may live in. And to what gain? Non-referral, when used incorrectly, can thus be seen as a sort of (civil) disobedience. Through a constructive ambiguity, national courts create an advantage for themselves in relation to the CJEU at the expense of the EU members. A follow up question would therefore be, should non-referral through a (mis)use of *acte clair* be discarded?<sup>236</sup>

If interpretation of EU law was completely left to the CJEU, as it somewhat is supposed to be, that would definitely ensure a coherence and a uniform application of EU law in the entire Union. In practice, however, there might be hard to discard the *acte clair* doctrine because, if applied correctly, it rightfully limits the work load for the CJEU since it is supposed to cover matters that have already been clarified. Also, as has been stressed by de la Mare and Donnely, the possible lack of uniformity might be preferable to “diluting or degrading the manner in which the case is handled, or by increasing the damage caused by delay”.<sup>237</sup> It is by no means without possible damages to refer questions to the CJEU, especially concerning the delay of the case before the national court.<sup>238</sup> To risk lack of coherence might therefore, to some extent, be favourable than the removal of *acte clair* and the non-referral tool. To refer back to the second section and Dworkin and Alexy, in this conflict between the principles of coherence and member state autonomy, maybe the former has less weight in this situation.

There is, also, a rather grave flaw with the impact of the non-referral tool. If one examines the case from the German *Bundesfinanzhof* mentioned above, the effects of that ruling – i.e. not giving the CJEU the possibility to develop the principle of direct effect – were completely overturned when a German court of lower instance referred a question to the CJEU on the same matter.<sup>239</sup> It consequently only takes one question from any national court for the power of interpretation to end up at the CJEU. Higher courts, who might not want to give the CJEU the

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<sup>236</sup> On the development of the *acte clair* doctrine, see e.g. Limante, A., ‘Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a More Flexible Approach: Doctrine: Recent Developments’ (2016) 54:6 Journal of Common Market Studies, 1384.

<sup>237</sup> de la Mare, D., ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’ in Craig, P., de Búrca, G., (eds.) *The evolution of EU law* (2<sup>nd</sup> ed., Oxford, Oxford University Press, 1999), p. 389-390.

<sup>238</sup> See e.g. the *O’Byrne v Aventis Pasteur* case from the United Kingdom, where the court expressed that the need of referring a (second) question to the CJEU as “particularly unfortunate for the claimant in this case, who has been trying for over even years to litigate the question of whether he is entitled to any compensation”; [2008] UKHL 34 *O’Byrne v Aventis Pasteur*.

<sup>239</sup> The question was referred in the case from the Finanzgericht Münster; *Finanzgericht Münster*, Decision of 12 July 1982 (V 5931/79 U).

chance at expanding the principles, can misuse and hide behind the *acte clair* doctrine all they want then, it does not seem to matter in the end.

Lower courts do have several incentives for referring questions to the CJEU, thus “risking” undoing the non-referral from higher courts. First, being a court of a lower instance, they do not have the same “pride” that higher courts seemingly have.<sup>240</sup> They are used to having a higher instance rewrite and correct their jurisprudence. They also would not have to reflect and worry upon how their actions might affect the legal certainty, or the functioning of the national legal system.<sup>241</sup> Through referring a question to the CJEU, lower courts would also be allowed to circumvent restrictive jurisprudence created by higher courts, and have the opportunity to push issues on to the agenda that higher courts do not want to reopen.<sup>242</sup> To have a decision from the CJEU behind their judgements also significantly lowers the risk for the lower courts of getting their rulings overturned by a higher court, which, in turn strengthens the power and influence of the lower courts.<sup>243</sup> One humorous observation that Alter made from this is that lower courts have been using the CJEU as the “other parent” – the one to turn to if they suspect an undesirable answer from the first parent, the national higher court.<sup>244</sup>

What is apparent, however, is that lower courts have several strong incentives for referring a question to the CJEU when they deem it necessary. It is not remarkable then to find that they have been more open to send broad and, sometimes, provocative questions to the CJEU concerning the reach of EU law in the national legal order, i.e. questions concerning, for instance, direct effect and supremacy.<sup>245</sup>

A problem thus arises for national courts of last instance. It only takes one referral from any court for the higher courts to be bound by CJEU case law in comparable situations. Disturbingly, there are examples of when higher courts have been trying to prevent lower courts from referring questions to the CJEU. In the United Kingdom, the court of appeal along with the House of Lords developed strict and narrow guidelines for when lower courts had the justifiable right to refer a question to the CJEU.<sup>246</sup> There are other examples where higher courts have declared a narrow interpretation of EU legislation, in order to limit lower courts’ space for

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<sup>240</sup> Alter, K., ‘The European Court’s Political Power’, supra note 215, p. 466.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid., p. 466-67

<sup>245</sup> Ibid., p. 466.

<sup>246</sup> Ibid., p. 467.

referring questions.<sup>247</sup> In extreme cases, higher courts have even quashed decisions from lower courts to refer questions to the CJEU, or even gone as far as to directly challenge the jurisprudence of the CJEU.<sup>248</sup> These actions from higher courts, however, do not seem to have the greatest impact, since lower courts have been found to ignore the commands given to them.<sup>249</sup>

All in all, the non-referral tool seems to be both weak and not as potent as the national (higher) courts might want.

## 3.2. *Submit observations to the CJEU*

### 3.2.1. **Legal ground**

The right to send submissions or observations to the Court is transcribed in art 23 of the Courts statute, which is annexed to the Treaties.<sup>250</sup> This is a possibility for member states to thoroughly argue their favoured interpretation of the Union law. That, in turn, gives the Court a greater understanding on how different interpretations would play in the member states.<sup>251</sup> The order for reference, sent to the CJEU from the referring court, is disclosed to all member states, they can thus send their proposal of interpretations, i.e. their observations, to the CJEU before the Court rules on the matter.<sup>252</sup> This tool is therefore, seemingly, rather favourable for the member states.

### 3.2.2. **The outcome of the use of the tool**

The intended consequence when member states submit their observations is, as has been stated, to influence the EU law interpretation of the CJEU. Since the possible outcomes of the interpretation could be a loss of member state's sovereignty,<sup>253</sup> the outcome of one case before

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<sup>247</sup> See e.g. the turnover tax struggle, deriving from the *Lütticke* case; Case C-57/65 *Lütticke v Hauptzollamt Saarlouis* (1966) ECLI:EU:C:1966:34.

<sup>248</sup> See e.g. the *Cohn-Bendit* case mentioned earlier; *Case Ministre de l'intérieur c. Cohn-Bendit* CE, supra note 227.

<sup>249</sup> Alter, K., 'The European Court's Political Power', supra note 215, p. 467.

<sup>250</sup> Protocol (no. 3) on the statute of the Court of Justice of the European Union.

<sup>251</sup> Cramér, P., et al, 'See you in Luxembourg? EU Governments' observations under the Preliminary Reference Procedure', supra note 70, p. 15.

<sup>252</sup> Curia, 'Presentation – procedure', retrieved 18 December 2017, available at [https://curia.europa.eu/jcms/jcms/Jo2\\_7024/en/](https://curia.europa.eu/jcms/jcms/Jo2_7024/en/).

<sup>253</sup> Myers, W., Buti, E., 'Domestic Legal Infrastructures and Member State Observations' (2017) *European Political Science*, 1, p. 17.

the CJEU could therefore further deepen the integration in all EU member states. This gives the incentive for both the member state whose court referred the question, and non-party member states, to make use of the submitting observations-tool. Also, having the possibility to argue the member state's opinion to the Court could be a way to gain support for an issue that the state had not been able to raise on a political level.<sup>254</sup>

### 3.2.3. Utilization in practice

Even though this tool seems both useful and valuable, the possibility to submit observations has been scarcely used. There has been quantitative research done by several scholars in order to find out both how often member states use this tool, and how the CJEU has responded to the observations.

In a study by Mortelmans, in the 346 cases decided by the Court in the period 1962 – 1978, member states only submitted observations in 37,5% of all cases where their own national court referred the question to the CJEU, and in 5,59% of the cases when a court from another member state posed the question.<sup>255</sup> The aforementioned possibility to influence the possible loss of sovereignty thus seems like a stronger incentive when the member states' own national law or interests were directly affected,<sup>256</sup> at least in the earlier Community years.<sup>257</sup>

A later study, made by Nyikos, where cases from the 1961-1995 were covered, showed an increase in the use of submitting observations. Member states, in her research, submitted observations in 50,5% of the cases where their national court referred the question to the CJEU.<sup>258</sup> The study did not examine the rate concerning the percentage of observations when the referring court was from another member state. The study did, however, look at the influence on the rulings that member states observations had in comparison with e.g. the opinion of the Commission. Nyikos found that the CJEU rules in accordance with the Commission's

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<sup>254</sup> Broberg, M., Fenger, N., *Preliminary referenes to the European Court of Justice* (Oxford, Oxford University Press, 2014), p. 349.

<sup>255</sup> Stein, E., 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75:1 *The American Journal of International Law*, 1, p. 26, referring to Mortelmans, K. 'Observations in the Cases Governed by Article 177 of the EEC Treaty: Procedure and Practice' (1979) 16:4 *Common Market Law Review*, 557.

<sup>256</sup> A clear example of this is the fact that in the *Costa v E.N.E.L.* case, which was of immense importance, only the Italian government submitted observations; Case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51.

<sup>257</sup> Stein, E., 'Lawyers, Judges, and the Making of a Transnational Constitution', supra note 255, p. 26.

<sup>258</sup> Nyikos, S., *The European Court of Justice and National Courts: Strategic Interaction within the European Union Judicial Process* (ProQuest Dissertations and Theses, 2000), p. 30.



view in 72,4%, and only in the member state's view in 44,1% of the cases.<sup>259</sup> Neither Nyikos, nor Mortlemans did categorise their results so as it would be possible to find the rate for observations in cases concerning the principles of direct effect or supremacy. It is, however, important to acknowledge that most of the preliminary reference concern interpretation of EU law due to a possible non-conformity of national law, i.e. a question of direct effect together with supremacy.

In the Stein study, eleven out of the most important CJEU cases concerning constitutional issues were scrutinised.<sup>260</sup> The focus was on direct effect and supremacy. In all of these cases member states had submitted observations, and in eight of them the member states were against either the establishment or development of the issue.<sup>261</sup> In one, the observations were both against and for a deepening.<sup>262</sup> In the remaining two, the member states either found the questions unnecessary for the Court to decide,<sup>263</sup> or without position concerning the deepening of the issue.<sup>264</sup> The Commission and the Advocates Generals, however, were in favour of further development of the issues in ten and nine cases respectively.<sup>265</sup> The CJEU went with the further expansion in all eleven cases, hence going directly against the will of the submitting member states in eight and a half cases.<sup>266</sup> Stein does unfortunately not provide for any explanation or hypothesis for why that was. These cases were from the beginning of the Community era; it could be reasonable to concur that the CJEU wanted to take every chance at expanding and deepening the direct effect and supremacy principles in order for the Community to live up to the “new legal order” that it had been described as.<sup>267</sup>

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<sup>259</sup> Nyikos, S., *The European Court of Justice and National Courts: Strategic Interaction within the European Union Judicial Process*, supra note 258, p. 34. This result is in line with the findings in the Kilroy study, where she found the CJEU to rule in line with the member state views in 36% of the 239 rulings studied; Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 198, referring to Kilroy, B., *Integration Through the Law: Court and Governments in the EU* (Ph.D. diss., Los Angeles, University of California, 1999).

<sup>260</sup> Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255.

<sup>261</sup> *Ibid.*, p. 25.

<sup>262</sup> In the *Reyners* case, which concerned an expansion of the principle of direct effect, Belgium, Luxembourg, Ireland and the United Kingdom were against it while Germany and, possibly, the Netherlands were for; Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255, p. 25.

<sup>263</sup> Germany's position in the *Internationale Handelsgesellschaft* case; Case C-11/70 *Internationale Handelsgesellschaft*, supra note 53.

<sup>264</sup> In the *Walrave* case, the United Kingdom only presented observations concerning one of the subquestions to the second question, not addressing the issue at large; Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* (1974) ECLI:EU:C:1974:140, p. 1412.

<sup>265</sup> The Commission were against the development of direct effect in *Walrave*, and the Advocate General was against the founding of direct effect in *van Gend*, and the expansion of Treaty-making powers in ERTA; Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255, p. 25.

<sup>266</sup> Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255, p. 25.

<sup>267</sup> Case C-26/62 *van Gend en Loos*, supra note 44, p. 12.

In a recent study made by Sieps, it was found, contrary to the results of the Stein study, that member states that made observations to the Court in fact did have a palpable chance at affecting the course of the CJEU judgements.<sup>268</sup> The study concludes that “submitting observations makes a difference, in the sense that the Court is more likely to make a decision that preserves national sovereignty where several Member States argue in that direction (and vice versa if the observations favour more legal integration).”<sup>269</sup> This study, though, does not look at the specific cases concerning direct effect or supremacy – however, as has been stated above, almost all preliminary references do concern these principles.

The findings of the studies show that the Court did not often go with the views held by member states in the earlier Community years, at least not concerning the most important cases of constitutional value. In recent years, though, it seems like the Court more often has taken member state observations into account and ruled accordingly. One hypothesis for why that is, is that in the early days of the Community and the CJEU, the Court wanted to deepen the development of, for instance, direct effect and supremacy and did not “care” too much for what the member states wanted. The frames for these constitutional principles was therefore established and set. In recent years there have been less cases before the CJEU with the same great development-possibilities. The Court could therefore allow member state submissions to carry more weight in the rulings without losing important chances of further integration. This hypothesis would, in part, be supported by Pollack.<sup>270</sup>

#### **3.2.4. Actual influence – examples**

The principles of direct effect and supremacy have been created and developed through numerous cases in the CJEU. In the original case concerning direct effect, *van Gend*,<sup>271</sup> The Netherland, Belgian and German governments submitted observations to the Court, i.e. half of the EU member states at that time. Both in the *van Gend* and the *Costa* case,<sup>272</sup> member states emphasised that the referring questions were either outside of the Court’s jurisdiction or

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<sup>268</sup> Cramér, P., et al, ‘See you in Luxembourg? EU Governments’ observations under the Preliminary Reference Procedure’, supra note 70, p. 39.

<sup>269</sup> Ibid.

<sup>270</sup> Pollack argues that it was not until after the 1970’s that the member states started seeing the CJEU rulings as a salient political issue; Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 196.

<sup>271</sup> Case C-26/62 *van Gend en Loos*, supra note 44.

<sup>272</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51.

inadmissible, rather than to argue for or against the issue at hand.<sup>273</sup> The importance for the member states were, thus, a limitation on the integration rather a specific interest in custom tariffs or production and distribution of electric energy.

In the second *Defrenne* case,<sup>274</sup> observations were submitted by the United Kingdom and Ireland. The case concerned a possible violation of equal treatment on grounds of gender, with a reference to art 119 EEC.<sup>275</sup> The United Kingdom argued that art 119 did not fulfil the criteria for direct effect, found by the Court in the *van Gend* case. The expressed value of equal pay for equal work was to be seen as a general statement of principle and therefore not precise enough.<sup>276</sup> The clarification was, however, made in a directive, but, the United Kingdom argued, in the case that additional legislation (required through art 8 in the directive) had not been implemented by a member state, art 119 EEC would still not be precise or clear enough as to have direct effect.<sup>277</sup> They further argued that art 119 EEC should not have direct effect because the risk of retroactive application could lead to economic devastation for the member states.<sup>278</sup> Ireland also held that art 119 EEC should not have direct effect, primarily with reference to the wording of the article and the fact that it was addressed to member states.<sup>279</sup> Ireland further stated, as the United Kingdom did, that granting art 119 EEC direct effect would result in a financial burden that, for many employers, would be impossible to bear.<sup>280</sup>

The Court addressed all observations submitted by the member states. First it stated that just because the word “principle” is used, that does not automatically preclude the possibility of direct effect.<sup>281</sup> It also denounced the argument that the article could not have direct effect only because it was addressed to member states.<sup>282</sup> Not attributing the article with direct effect would, contrarily, prevent the effectiveness of the provision.<sup>283</sup> As a result, the Court found art 119 EEC to have direct effect. It did however agree with the member states’ view that retroactive claims could lead to damning economic consequences, and therefore determined that direct effect of art 119 EEC could only be relied upon in claims after the date of the

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<sup>273</sup> Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255, p. 4-5, 11.

<sup>274</sup> Case C-43/75 *Defrenne v Sabena*, supra note 71.

<sup>275</sup> Now art 157 TFEU.

<sup>276</sup> Case C-43/75 *Defrenne v Sabena*, supra note 71, p. 459.

<sup>277</sup> *Ibid.*, p. 460.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*, p. 461.

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*, p. 474, para 28.

<sup>282</sup> *Ibid.*, p. 475, para 30.

<sup>283</sup> *Ibid.*, p. 475, para 33.

judgement, or in claims that has already been made.<sup>284</sup> The Court did, seemingly, therefore take the member states' claims into due consideration before reaching its conclusion.

In the *von Colson* case,<sup>285</sup> a case also concerning a violation of equal treatment on grounds of gender, here in relation to employment, the Court ruled in line with the submitted views of the member states. The plaintiff in the case was refused a job due to her gender. She therefore claimed a direct effective right to the employment referring to directive 76/207/EEC that was not yet transcribed into national law, also making it a question concerning supremacy. Germany, Denmark and the United Kingdom had sent their observations to the court on the interpretation of the directive. Germany held that member states have a margin of discretion, found in art 189 EEC, regarding legal consequences stemming from a breach of the principle of equal treatment.<sup>286</sup> Germany further submitted that it should be up to national courts to find adequate solutions satisfying both the principle of equal treatment and the parties' interests.<sup>287</sup> Last, Germany held, the application of equal treatment and its consequences should only follow if the victim was better qualified than the other applicants, and not if the qualifications were equal between them.<sup>288</sup> Denmark submitted that the directive left the choice of sanctions to the member states, and that breaches of equal treatment should be penalized in the same way as they penalize breaches of national rules in related areas not governed by Community law.<sup>289</sup> The United Kingdom agreed with both Germany and Denmark concerning that member states should chose appropriate measures themselves. The directive, the United Kingdom continued, did not give indications as to what kind of measures the member states should adopt.<sup>290</sup>

The Court agreed with the submitted views and concluded that the directive did not “require discrimination on grounds of sex regarding access to employment being made the subject of a sanction by way of an obligation imposed upon the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.”<sup>291</sup> The Court thus denied any direct effective right to a certain remedy under the directive. This example is not in line with the aforementioned view that the member state observations rarely affect the ruling in the CJEU. It is nevertheless a clear example that the

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<sup>284</sup> Case C-43/75 *Defrenne v Sabena*, supra note 71, p. 480-81, para 69-75.

<sup>285</sup> Case C-14/83 *von Colson*, supra note 71.

<sup>286</sup> *Ibid.*, p. 1905, para 11.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*, p. 1905, para 12.

<sup>290</sup> *Ibid.*, p. 1905-06, para 13.

<sup>291</sup> *Ibid.*, p. 1907, para 19.

CJEU indeed rules favourably to the member states in some cases of great importance, and therefore significant to highlight.

Both previous examples have primarily concerned the principle of direct effect. There are cases though that directly concerns the principle of supremacy. For instance, the Austrian state contested the effect of the principle of supremacy<sup>292</sup> in the *Ciola* case.<sup>293</sup> In their submission they held that there was no reason why the principle of supremacy should be applied “automatically and without restriction” to specific individual administrative acts.<sup>294</sup> To support their argument they referred to the enforceability of administrative acts, and specifically to the concept of procedural autonomy of the member state. The Austrian state further submitted that to claim that EU law overrides an enforceable administrative act would cause for a questioning of the principles of legal certainty, protection of legitimate expectations or protection of lawfully acquired rights.<sup>295</sup> The CJEU, however, held the view that, due to e.g. the EU Treaties being directly applicable in member states and EU law taking precedence over national law, a legal protection that is derivable from Union law, and that national courts must ensure, should be refused because of the nature of the conflicting provision of national law.<sup>296</sup> The Austrian state’s position was therefore disregarded though, seemingly, duly taken into consideration.

### 3.2.5. Limited use and effects?

As has been made clear through the review of the studies under the 3.2.3-subheading, this tool may not have the greatest effect on CJEU rulings. Two aspects are important to acknowledge, the lack of observations from the member states and the limited effects the submitted observations seemingly have on the CJEU judgements.

First, it is worth mentioning that in the earliest cases, for instance the *van Gend* case, the member states did not know the importance of submitting an observation. This mainly because the Court had not yet developed principles of great invasive nature before.<sup>297</sup> The fact that not

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<sup>292</sup> In the case, they refer to the principle of primacy. As has been clarified earlier in this thesis, no distinction will be made between primacy and supremacy.

<sup>293</sup> Case C-224/97 *Ciola* (1999) ECLI:EU:C:1999:212.

<sup>294</sup> This information is found in the judgment from the CJEU, why the arguments that the Austrian state supposedly have might have been altered by the Court; See supra, section 1.4.6; Case C-224/97 *Ciola*, supra note 286, para 24.

<sup>295</sup> Ibid., para 24.

<sup>296</sup> Ibid., para 26-34.

<sup>297</sup> Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 196.

all member states did use this tool in the earliest years could therefore be explained and excused. However, the fact that member states, after that first period, still did not submit observations to a greater extent could be seen as unfortunate. One member of the Commission's legal staff commented on the situation, and deemed it regrettable that it was not transcribed into the rules of the Court that member states should guarantee their participation.<sup>298</sup> Due to the amount of questions referred to the CJEU every year, it might be impossible in practice for member states to submit observations in all cases – that would possibly not be economically defensible. Member states do, however, need to use the observation tool to a greater extent, if only to aid the interaction between the CJEU and the member states. It is therefore fortunate that this tool seems to be gaining popularity.

When member states do submit observations, the actual effect on the CJEU ruling has been found to be limited. It is worth remembering that the fact that the Court ruled in favour of further integration does not automatically entail that the Court did not take the member states' arguments and wishes into account.<sup>299</sup> In other words, the view of the member states might not always be the “correct” interpretation, and the fact that the CJEU rules in opposition of the member states does not mean that the CJEU are acting wrongfully. Furthermore, as Burley and Mattli concludes, member states can often have an opposing view to a certain interpretation of a Union provision before the CJEU hands down its ruling, but afterwards not upholding this view and instead adhering to the CJEU's judgement.<sup>300</sup>

The reason for why the Court rarely rules in line with member state observations has not been established. One plausible explanation is that the Court naturally favours an increased integration (which most often is what the discrepancy is about), and member states their sovereignty. The observations should be of some importance to the Court since they sometimes provide important information on national legal traditions. It must be remembered, though, that member states do have their own interests in different areas that, for obvious reasons, will shine through in their observations. Also, member states will not always provide observations that favour the same interpretation.<sup>301</sup> The CJEU, on the other hand, is not supposed to have a

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<sup>298</sup> Stein, E., ‘Lawyers, Judges, and the Making of a Transnational Constitution’, supra note 255, p. 26.

<sup>299</sup> Cramér, P., et al, ‘See you in Luxembourg? EU Governments’ observations under the Preliminary Reference Procedure’, supra note 70, p. 33.

<sup>300</sup> A well-known example is from the *van Gend* case. Belgium, Germany and the Netherlands all strongly objected to the notion of direct effect, but none of them subsequently suggested having the decision overturned; Case C-26/62 *van Gend en Loos*, supra note 44; Burley, A., Mattli W., ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47:1 *International Organization*, 41, p. 68.

<sup>301</sup> See e.g. Case C-2/74 *Reyners v Belgian state* (1974) ECLI:EU:C:1974:68.

preferred opinion in substance, but will, as has been stated, favour increased integration. An accurate question that emerges might be: Should member state observations have a greater effect on CJEU rulings? Concerning the possible 28 (soon 27) different national interests, maybe that answer should be no.

### 3.3. *The efficiency aspect*

How efficient are the two tools concerning their influence on the development of principles? That question has been touched upon earlier, under 3.1.4. and 3.2.5, though not specifically and thoroughly in relation to the development of the principles of direct effect and supremacy. A deeper assessment will therefore be provided.

It has been established that the Court's primary possibility to establish and develop principles is through the preliminary ruling procedure. Without questions – no further deepening of the interpretation and/or application of the principles. The effectiveness of the entire EU legal order is therefore critically dependent on this procedure.<sup>302</sup> Member states are also obliged to refer questions – this is clearly stated in the Treaties.<sup>303</sup> Not referring questions, i.e. using the non-referral tool, is therefore, in theory, very efficient if member states want to influence the development of principles. Even though the principle of supremacy, since mainly the *Costa*<sup>304</sup> and the *Simmenthal* case,<sup>305</sup> seems rather set as is, the *Ciola* case<sup>306</sup> is a clear example that the principle is still developing and expanding. Had the national court in the *Ciola* case not referred the question to the CJEU, it is highly possible that specific individual administrative acts would not be attributed supremacy in Austria. The limits to this tool have been discussed above, however, there is a point in discussing them further. Should one court refer a question to the CJEU concerning a specific matter, that question is to be seen as dealt with. Courts that did not refer questions on the same matter before are then obliged to comply with the interpretation made by the CJEU. This vastly shows the weakness of this tool. But what if certain questions do not arise in multiple cases? What if, due to specific circumstances,<sup>307</sup> certain questions only

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<sup>302</sup> Stone Sweet, A., Brunell, T., 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92:1 *The American Political Science Review*, 63, p. 66.

<sup>303</sup> E.g. in art 267 TFEU.

<sup>304</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.*, supra note 51.

<sup>305</sup> Case C-106/77 *Simmenthal*, supra note 53.

<sup>306</sup> Case C-224/97 *Ciola*, supra note 293.

<sup>307</sup> E.g. geographical, social or cultural circumstances.

arise in specific regions and only in a limited number of cases? That would indeed be a band-aid to the chip in the effectiveness of the non-referral tool.

In theory, there could probably be such cases. There could, for instance, be smaller regions where a certain type of plant or animal only exist, and an EU provision might need to be interpreted in relation to said biological being. Another example might be if only a limited number of member states have certain cultural objects, protected by EU directives. Should a question arise concerning such objects, the interest might not be vastly spread. Having said that, these cases would concern items, beings and other objects – not abstract concepts. There would be harder to argue that certain questions concerning the development of direct effect or supremacy only emerge in a significantly small number of cases. Even though, for instance, the direct effect concerning a specific provision in a specific type of legislation rarely is questioned, the Court does not only apply the possible direct effect to that provision. In the *van Duyn* case,<sup>308</sup> the Court did not only find art 3 in the Council directive 64/221/EC to have a vertical direct effect, but that all directives had if they fulfilled the criteria for direct effect. The fact that questions before other national courts might concern other matters than the free movement of workers is therefore irrelevant.

The effectiveness of non-referral in relation to the development of the principles of direct effect and supremacy is hence to be seen as immense in theory, but only barely existing in practice.

The second tool, submitting observations, might entail a different conclusion. Member states have been clear on their position, through observations, when it comes to the development of direct effect and supremacy. As was shown in the Stein study, member states have consistently been against further development of the principles, i.e. against a deeper integration, whilst the CJEU equally consistent has been for. Considering that, the effectiveness of the observations might not be as great as the member states probably want. Nevertheless, as was illustrated above with the *von Colson* case, there are examples of when the CJEU has favoured the member state proposed interpretation in cases of great importance. It is hard to know how great the actual influence is since the CJEU can, and hopefully always does, take member state observations into due consideration. The submitted observations are however only one member state's preferred input, and not what might be in the interest of either the majority of member states or of the EU as a union. In other words, the tool of submitting observations might not be able to

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<sup>308</sup> Case C-41/74 *van Duyn*, supra note 71.



fulfil the purpose of giving member states a possibility to efficiently influence the development of principles. Having said that, it nevertheless still might be important for the member states.

As has been stated above, submitting observations is a possibility for member states to get certain topics on the table that they might not have been able to do on the political arena. This is a very important function. Even though, in practice, the observations do not have the desired impact on CJEU rulings, they can still influence the debate. Because member state observations, just like the order for references, are sent to all member states,<sup>309</sup> the submitting member state can force a discussion on the possible development of direct effect and supremacy. If the referring questions concern said principles and e.g. risk an expansion of their impact, member states who submit observations can use that opportunity to reach out to other member states and either seek support, or bluntly force the other member states to join the discussion. That can, in turn, spark a discussion on other levels, e.g. on a higher political level. The flaw with this, however, is that no member state is forced to submit observations. Should a member state want to stay out of the discussion on a possible deepened integration, for any reasons, they are free to do so. This kind of use of the tool has however been both verified and recognised as significant.<sup>310</sup>

The effectiveness of the submitting observations-tool in relation to the development of the principles of direct effect and supremacy is hence to be seen as limited. It might, however, fill another important function on the matter, namely as an incentive for other member states to engage in the discussion, and to maybe get it up on the political table.

It is important to remember that other tools in the member state tool box might affect the effectiveness of non-referral and submitting observations. For instance, there are studies<sup>311</sup> that

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<sup>309</sup> Curia "Notes for the guidance of counsel", February 2009, available at [https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9\\_2008-09-25\\_17-37-52\\_275.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf) p. 11.

<sup>310</sup> Myers, W., Buti, E., 'Domestic Legal Infrastructures and Member State Observations', supra note 253, p. 8.

<sup>311</sup> See e.g. Carrubba, C., Gabel, M., Hankla, C., 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102:4 American Political Science Review, 435.

show that the Court may rule in line with member state observation to avoid the risk of non-compliance<sup>312</sup> or override.<sup>313</sup>

All in all, the two studied tools are important and integral to the member states concerning their possible influence on the CJEU's development of principles, but might not be the most efficient tools available.

### 3.4. Summary

In this section the two tools – non-referral and submitting observations – have been examined. Both tools stem from the preliminary ruling procedure. The preliminary ruling procedure is regulated primarily by art 267 TFEU.

Courts may refrain from referring questions to the CJEU if the provisions in question fulfil certain criteria. The most common exempt is if the provisions are clear and in no need of interpretation, i.e. the *acte clair* doctrine.

There are several examples of national courts that did not refer a question to the CJEU when that would have been in order. The reason for the lack of questions is most likely due to the national courts' fear of losing influence and authority. When national courts refrain from posing questions to the CJEU, they effectively limit the Court's power to develop the Union legal order, including e.g. the principles of direct effect and supremacy. Non-referral could therefore be seen as an important tool for national courts. However, it only takes one question from one court for the CJEU to have the possibility rule on delicate matters. As has been shown, courts of lower instances do have several incentives for referring questions. All in all, the non-referral tool, when used by all courts are both important and effective but, in practice both weak and not as effective as the national (higher) courts might want.

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<sup>312</sup> Concerning non-compliance, see e.g. Pollack, M., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, supra note 151, p. 178; Conant, L., *Justice contained: Law and politics in the European Union* (The United States of America, Cornell University Press, 2002), especially in ch 2.; Rasmussen, H., *On law and policy in the European Court of Justice. A comparative study in judicial policy making*, supra note 9, p. 400-ff; Kilroy, B., *Integration Through the Law: Court and Governments in the EU*, supra note 259, p. 6.; Garrett, G., Weingast, B., 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market' in Goldstein, J., Keohane, R., (eds.). *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, Cornell University Press, 1993), p. 178.

<sup>313</sup> Override, i.e. revising or amending the Treaties, has also been called "the nuclear option"; See e.g. Pollack, M., 'Delegation, Agency, and Agenda Setting in the European Community', supra note 151, p. 118-19, however, described as an ineffective instrument and a noncredible means of member state control. Also Garrett, G., Weingast, B., 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market', supra note 306, p 202.

The second tool, to submit observations to the CJEU, is a possibility for member states to argue their favoured interpretation of the Union law and possibly affect the Court's rulings. Different interpretations of EU provisions could result in a loss of member state's sovereignty, and further deepen the integration, why member states have an incentive to submit observations.

Even though the incentive might be great, the possibility to submit observations has been scarcely used. In the period 1962-1978, member states submitted observations in 37,5% of all cases where their own national court referred the question to the CJEU, and in 5,59% of the cases when a court from another member state posed the question. That number has gone up over the years, but it still far from a hundred percent.

In cases where member states do submit observations, the Court does not rule accordingly in a majority of cases. Nyikos found, in her study of cases between 1961-1995, that the CJEU ruled in line with member state observations in 44,1% of the cases. In the Stein study, where eleven of the most important cases from a constitutional perspective were examined, the Court ruled directly against the wishes of the member states in eight cases. In all eleven cases, the Court ruled in favour of further integration and a deepening of the principles of direct effect and supremacy. In the more recent study by Sieps, the result showed that member state observations nevertheless had the power to affect the CJEU ruling.

Three examples, that clearly show the situation and relationship between the CJEU and member states are the *Defrenne II*, the *von Colson*, and the *Ciola* case. In *Defrenne II*, the court ruled against the member state observation in the main question, but acknowledged the possible effects of the ruling and limited the retroactive effect in line with the member states. In *von Colson*, the Court ruled in line with the member state observations, denying the possible direct effect to an EU provision. In *Ciola*, the Court disregarded the submitted observation and ruled against the wishes of the member state.

Concerning the submitting observations-tool, it does not seem to have the greatest influence on CJEU rulings. Member states have not been using the tool to its fullest extent. There seem to be a rise in the number of submitted observations now in relation to the earlier Community years, which is an important aid in the interaction between the CJEU and the member states.

The possibly limited effect that observations have on CJEU rulings might be misleading. The fact that the Court often rules in favour of further integration does not automatically entail that the Court did not take the member states' arguments into account before handing down its

ruling. In other words, the fact that the CJEU rules in opposition of the member states does not mean that the CJEU are acting wrongfully. The reason for this limited effect has, however, not been established. One explanation could be that the Court naturally favours an increased integration, and member states their sovereignty. Member states do also have their own interests in different areas that will shine through in their observations. Since the EU has 28 member states, with 28 possible interpretational preferences, maybe this tool should not have a greater effect on CJEU rulings than it already has.

If one looks at the tools from an efficiency point of view, it is clear that using the non-referral tool is, in theory, very efficient if member states want to influence the development of principles. In practice, though, it is enough that one court within the Union refers a question on a certain topic for that to be seen as dealt with by the Court, and for every national court with cases concerning the same legal question to follow the CJEU interpretation. When it comes to member states' possible influence on the CJEU development of the principles of direct effect and supremacy it barely exists in practice, and is therefore not efficient.

For the submitting observations-tool, it has been shown through studies that the CJEU infrequently rules in line with the member state interpretation. Member states have been submitting observations against a further integration, and against an expansion of the principles of direct effect and supremacy whilst the CJEU consistently has ruled in favour of this. From that perspective, the effectiveness of the observations might not be as great as the member states probably want. Although, the CJEU has ruled in line with member state wishes in some cases of great importance, like the *von Colson* case. The observations do, however, also fill the function of giving the member states a possibility to get certain topics on the table that they might not have been able to do on the political arena.

## 4. Legal certainty and democracy – applying perspectives

Under the second section the two theories – legal interpretivism and legal positivism – was introduced. Their views were applied to the CJEU’s development of principles. It is, however, time to use the same legal theories on the non-referral and submitting observations-tools. The tools will be examined in relation to the perspectives of legal certainty and democracy, referring back to the theories in the second section.

### 4.1. *Legal certainty*

The principle of legal certainty here, as has been stated, will depart from legitimate expectations in relation to legal interpretivism and legal positivism.<sup>314</sup> The principle of legal certainty is not found in the EU Treaties, or any other EU provision. Instead it can be found in the CJEU case law, by a derivation of member state legal traditions,<sup>315</sup> and is considered as a general principle of EU law.<sup>316</sup>

#### 4.1.1. **Legal interpretivism**

First, when the CJEU found the principles of direct effect and supremacy, that was rightfully done from a legal interpretivist perspective. It is what the Court was supposed to do, and therefore in line with legal certainty. Now, looking at the two member state tools, both of them were designed to interfere with this court practice. Non-referral removes the Court’s possibility to rightfully do its job. When national courts refrain from referring questions on direct effect and supremacy, it is thus not to be seen as legally certain, since it risks affecting the jurisprudence that already is in line with legal certainty. The same can be said for the submission of observations. Through the observations, member states try to affect an already legally certain development, which undermines the system.

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<sup>314</sup> See supra, section 1.4.5.

<sup>315</sup> Raitio, J., ‘The Principle of Legal Certainty as a General Principle of EU Law’, supra note 62, p. 48.

<sup>316</sup> See e.g. case C-13/61 *De Geus en Uitdenbogerd v Bosch and Others* (1962) ECLI:EU:C:1962:11, para 52, Case C-323/88 *Sermes*, supra note 64, p. 3050; Raitio, J., ‘The Principle of Legal Certainty as a General Principle of EU Law’, supra note 62, p. 52-69.

#### **4.1.2. Legal positivism**

The CJEU's development of principles, from a legal positivist perspective, can be seen as in line with what judges are supposed to do, and thus what to be expected from them. It is hard to argue that the CJEU would not fulfil Hart's rule of recognition when developing the principles of direct effect and supremacy, even though a legal positivist would argue that the CJEU created the principles rather than "found" them within the system. The development of principles can therefore be seen as in line with legal certainty. For member states to refrain from referring questions to the CJEU can, however, also be in line with legal certainty. This because a decision of a non-referral comes from a national court, and the national judge does have discretionary powers. The second tool, to submit observations could also be in line with legal certainty. The judges of the CJEU, when finding a gap of which they need to create proper norms, are supposed to do so as if they were the legislator. They are supposed to look at all arguments and information that is available to them in order to create the most fitting norms. Member state observations would then be a great source of information; information that the legislator would have had if the question came up in the political sphere. To submit observations, and provide the Court with valid interpretations would then be in line with the principle of legal certainty. This also because, ultimately, the Court has the discretionary power of deciding what interpretation would be correct.

### **4.2. Democracy**

As has been established, the principle of democracy has been transcribed into the Treaties, and the different interpretations of the principle of democracy have been presented under section 2.4. The question here is thus if the member state tools are in line with democracy.

#### **4.2.1. Legal interpretivism**

For legal interpretivists, the goal with democracy is freedom. The tool of non-referral is often used by member states as a way of not losing sovereignty. This can especially be said about cases concerning the principles of direct effect and supremacy. Withholding the CJEU's possibility to develop two principles, which directly give individuals freedom, would therefore be a practice that goes against the legal interpretivists notion of democracy. Turning to member states submitted observations, it is first necessary to restate that member state observations in cases concerning the development of direct effect and supremacy has mostly concerned a

limitation to said principles. Since these limitations do not increase freedom for individuals, but rather the opposite, it cannot be seen as in line with democracy. The Court, according to legal interpretivists, only finds principles that are already there and thus rightfully give EU members their existing right to freedom.

Should member state observations, however, be in line with the principles of direct effect and supremacy, those observations as such do not go against the principle of democracy. It is, however, impossible to judge a tool based on the “best case scenario”. A knife is a tool that could be used for “good” things, but when it comes to discussing the use and possible limitation of their use, one must look at the risk of people misusing them, for example to injure others. The tool of submitting observation creates a possibility for member states to influence the CJEU in its development of principles. Since the Court already has been described as Dworkian, and time and again has shown its inclination to expand the freedom and rights for EU members, member state observations are not needed for fostering this. Instead, it seems like they, in practice, only fill the role of trying to reduce individuals’ rights. Therefore, the tool is not considered in line with the legal interpretivists concept of democracy.

In sum, both instruments available for member states restrict the freedom that CJEU, by creating principles, ensures. The use of them are therefore not in line with the principle of democracy.

#### **4.2.2. Legal positivism**

From a legal positivist perspective, the goal with democracy is unity. Non-referral often happens due to not wanting to lose sovereignty. A development of the principles of direct effect and supremacy would entail a sovereignty-loss for the member states which, from the perspective of the state would limit the unity. In that sense, non-referral could be good even when being ambitiously (and even wrongfully) used, because for national courts to refer everything concerning direct effect or supremacy would decrease the stability of the unity. However, if one applies an EU-perspective instead of a national one, the non-referral tool might not be in line with the concept of democracy. Non-referral would risk leading to different outcomes in different national courts that are handling the same legal questions. This would in turn ensure uncertainty within the Union, not in line with the value of unity. From that perspective, the non-referral would not be considered to be in line with the concept of democracy.

Concerning the submission of observations, it could be seen as in line with the legal positivist notion of democracy. From the perspective of the state, having the possibility to argue their favoured interpretation of EU provisions would secure the unity within the state. Also, not being able to submit observations, and thus not being able to argue their case, would risk triggering non-compliance within the member states, which would lead to a form of anarchy within the union. This partly since member states would have a significantly limited chance at influencing the development of principles, in relation to the creation of “regular” legislation. There would thus be a point to adhering to the unity of the sovereign state – without a clear view from the member states, the unity cannot be upheld.

#### *4.3. Possible deductions, or what this means*

It is clear that the tools of non-compliance and submitting observations mostly favour member state interests rather than EU members, i.e. on a unity-level rather than from an individual perspective. The tools, therefore, seem to be in line with legal certainty and democracy from a legal positivist perspective. Concerning the creation of principles in the first place, that is more in line with the legal interpretivist view on legal certainty and democracy.

It is clear that, depending on what standpoint one prefers, both the development of principles and member states’ potential influence through the two tools can be legitimized, even if one disregards them being legal through EU provisions and customary practice. The point is to satisfy as many parties as possible, on a union, state and individual level. The CJEU creating principles, and member states having the possibilities to influence that phenomenon, might then be a fair implementation of the Goldilocks principle, i.e. the only possible design as to not be too totalitarian or extreme in any direction.

#### *4.4. Summary*

The concept of legal certainty and democracy, from the perspective of legal interpretivism and legal positivism has been applied to the two tools of non-referral and submitting observations. Concerning legal certainty from a legal interpretivists point of view, the two tools are not in line with it. This because the development of principles by the CJEU *is* in line with legal certainty and the two tools actively limits the Court’s possibility to rightfully do its job of finding principles. For legal positivist, however, the two tools can be seen as in line with the



principle of legal certainty. Non-referral because that tool is used by a national court and national judges do have discretionary powers, and submitting observations because it provides the CJEU with valid information that, had the question been brought before the legislator, would have been provided, and thus expected.

On the concept of democracy, the legal interpretivist notion is a strive towards freedom. The non-referral tool is often used by member states to ensure their sovereignty, and, as a consequence, withholding the CJEU the possibility to develop principles that directly give individuals freedom. That is not in line with the principle of democracy. Concerning member state observations, the same can be concluded. The tool of submitting observations risks limiting the development of principles, and thus freedom, and is therefore not in line with democracy.

From a legal positivist perspective, the goal with democracy is unity. In that sense, non-referral could be in line with democracy since it can be used by member states to increase stability and unity within the state. If one, however, applies an EU-perspective instead of a national one, the non-referral tool might not be in line with the concept of democracy since it would risk leading to different outcomes in different national courts, causing uncertainty and instability.

Submitting observations could be seen as in line with democracy from a legal positivist perspective. For states to not being able to argue their case, there is a risk of triggering non-compliance and thus create a form of “anarchy” within the Union.

Both the development of principles by the CJEU and the member states’ potential influence through the two tools can be seen as legitimate, depending on which theory one emanates from. In order to satisfy as many parties as possible, both on a union, state and individual level, this construction might be the fairest, and thus in line with the Goldilocks principle.

## 5. Concluding remarks

This thesis has had three targets. First, to examine the legal interpretivist and legal positivist views on principles and to connect that to the CJEU's development of the principles of direct effect and supremacy. The view on the CJEU's development of principles, whether it is an act of creating or "finding" existing norms and whether or not it is in line with democracy, is demonstrably different if the answer comes from a legal interpretivist or a legal positivist. What can be said though, is that both theories acknowledge the Court's right to develop principles, and use them the way that the CJEU does.

Second, the goal was to scrutinise the member states' possible influence on the CJEU's process to develop principles, especially the principles of direct effect and supremacy, through the preliminary reference procedure, focusing on the tools of non-referral and submitting of observations. Member states do have a palpable chance at influencing the Court's development of principles, even though both instruments might leave some for the member state to desire concerning their efficiency.

Third, the last target of the thesis was to apply the concepts of legal certainty and democracy, from the legal interpretivist and legal positivist point of view, on the tools of non-compliance and submitting observations. In short, the tools can be seen as conform with democracy and legal certainty to legal positivists, and oppose to them to legal interpretivists. This result might seem insignificant or even futile, but should rather be seen as the contrary. It clearly delineates the fact that there is no "right" answer when discussing the development of principles. To establish that is of a great theoretical value, how trivial it might seem. The thesis has also, in substance, provided with the views of two of the principal legal philosophical theories in the field, on the subject of principles in relation to the CJEU and the EU member states, which has been a tentative endeavour to make a small contribution to the legal philosophical sphere. Hopefully this has also resulted in a deeper understanding for the reader, concerning the CJEU's development of principles and member states' influential possibilities, creating somewhat of a full circle.

## 6. Future directions

This thesis has dealt with eight concepts; legal interpretivism, legal positivism, direct effect, supremacy, non-referral, observations, legal certainty and democracy. With eight focal points, there is a risk that the text, instead of following a red thread, turns into a ball of rainbow-colored scraps of yarn. Hopefully that has not been the case.

Since the thesis has been constructed around these eight concepts, in four different categories, there are four palpable ways of further expanding this thesis.

*Theories:* Even though, when talking about principles, legal interpretivism and legal positivism seem like two of the most well-equipped theories for dealing with this topic, there are several other theories worth looking at. If one, for example, would apply critical legal studies or legal realism on the matter, a completely different conclusion would probably be reached.

*Principles:* This thesis has emanated from the principles of direct effect and supremacy, two principles that are characteristic for the EU. Had one instead looked at other principles, like the principle of non-discrimination on the grounds of age, established by the CJEU in the *Mangold* case,<sup>317</sup> one would most likely get a different result in relation to the compatibility of the legal interpretivist and legal positivist view on the creation of principles and democracy, which, in turn, would affect the theories' take on the member state tools.

*Tools:* As has been mentioned earlier, there are several other tools available for member states when wanting to influence the CJEU's development of principles. If one had examined, for example, the non-compliance concept or the instrument of override, they might render different results concerning their compatibility with the theories' understanding of legal certainty and democracy.

*Perspectives:* Last but not least are the perspectives, here legal certainty and democracy. They are certainly not the only perspectives of value to apply in a thesis like this. In the preamble of the Treaties, other concepts, like freedom, equality and the rule of law, are described as important values for the Union. Had one examined the member state tools from those perspectives, it is not certain that the same results would have been reached.

Having delved into the possibilities of expanding the thesis further, it might have left a lingering question about the thesis actual universal application. If the results are, seemingly, completely

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<sup>317</sup> Case C-144/04 *Mangold*, supra note 142.

dependent on the eight concepts being present, can they at all be applicable to other situations, where one or more of them are replaced? Maybe not. But that was never the intention of the thesis. Having said that, it is absolutely possible to draw parallels between the results of this thesis and other situations that involves principles, the CJEU and member state influence. The results, in that sense, would thus have, if not a universal application, a role as a source of inspiration for other scholars. And that is all a thesis writer could hope for, is it not?

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Jag, Natalie Schwarz, registrerades på kursen första gången höstterminen 2017. Jag har inte omregistrerats någon gång och detta är det första examinationstillfället jag deltar i.