

Options between legislative intervention and judicial collaboration: improving the effectiveness and coherence of EU law?

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Abstract

This article reflects on ways to improve the effectiveness and coherence of EU law in the light of consolidation proposals emerging inter alia from the (Draft) Common Frame of Reference initiative. After supplying a map of effectiveness (section 2) and ways in which gaps in effectiveness have been addressed (section 3), the paper reflects on the reform options: ranging from legislative intervention to jurisdictional realignment (section 4). The paper illuminates the hard cases (Mangold and Abbey National) at the margins of effectiveness (section 5); cases which alert us to more collaborative ways in which to address the 'variable geometry' and fragmentation of EU and 'Europeanised' law. The paper argues for a reconceptualisation of effectiveness and challenges the EU fixation with top-down, legislative intervention.

Keywords: EU law; effectiveness; coherence; Europeanised private law; judicial collaboration

1 Introduction

This paper confronts two intertwined and essentially contested phenomena: the doctrine of effectiveness in EU law and the interface of EU law to national private law. The paper reflects on the chimerical quality of effectiveness and the compromised 'coherence' of EU law in the light of consolidation strategies and alternative suggestions for jurisdictional realignment. The acid question is whether there are more practical solutions than legislative intervention or judicial realignment; whether judicial collaboration would do more to improve the effectiveness and coherence of EU law?

Effectiveness in EU law is a fluid concept. At one level it refers to the applicability of EU norms, at another to the judicial protection of rights granted through those norms. At another level it may be seen as a legal doctrine, taking its place among a battery of interlocking doctrines, at a wider level as a governance concept, reinforcing and shaping legal doctrines.¹ Notwithstanding these multiple roles, there are important caveats to effectiveness, principally in the 'horizontal' application of EU law and the extent to which effectiveness can be invoked to obtain redress as between the 'public' and 'private' domains

* I am grateful to Professor James Devenney (Exeter) and to anonymous referees for comments on drafts of this text. The usual disclaimer applies.

1 A Arnall, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) 36 *European Law Review* 51; M Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy and Constitutional Proportionality?' (2006) 31 *European Law Review* 476; W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501.

of EU law.² Beyond these dimensions, the interplay between national and EU courts produces a ‘variable geometry’ of effectiveness.³ Similarly, the interplay of a ‘wildly unsystematic’ body of EU directives⁴ and national legal doctrine and statute⁵ has produced a new body of ‘Europeanised’ private law. Predictably, just as claims that EU law promotes a ‘complete system’⁶ of judicial protection rang hollow, so did the proposition that the traditional pattern of legislative intervention produced coherence attract scrutiny. A number of reform proposals followed:

- legislative intervention in the name of ‘greater coherence’:⁷ initiatives variously advocating a shift to ‘maximum’ harmonisation;⁸ a fully fledged EU Civil Code pursuant to the Draft Common Frame of Reference (DCFR) initiative;⁹ and/or an optional ‘Common European Sales Law’ (CESL) applicable to cross-border transactions;¹⁰
- judicial realignment: involving such steps as abandoning the Court of Justice of the European Union’s (CJEU) interpretative monopoly under the reference mechanism of Article 267 of the Treaty on the Functioning of the EU (TFEU);¹¹ and/or allowing private parties a right of appeal to the CJEU in questions of interpretation;¹²
- deeper judicial collaboration, in recognition of a ‘coordinate legal order’, between national and supranational courts.¹³

These proposals are evaluated in this piece. After mapping effectiveness (section 2) and ways in which gaps in effectiveness have been addressed/cemented (section 3) the paper reflects on the legislative and jurisdictional options (sections 4 and 5). The paper proceeds

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- 2 D Leczykiewicz, “‘Where Angels Fear to Tread’: The EU Law of Remedies and Codification of European Private Law’ (2012) 8 *European Review of Contract Law* 47. Same author: ‘Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference’ in J Devenney and M Kenny (eds), *The Transformation of European Private Law* (CUP 2013 forthcoming).
 - 3 J H H Weiler, ‘The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist view of Article 177 EEC’ in H G Schemers et al (eds), *Article 177 EEC: Experiences and Problems* (North Holland 1987) 366, at 371.
 - 4 S Weatherill, ‘The Consumer Rights Directive: How and Why a Quest for “coherence” has (largely) failed’ (2012) 49 *Common Market Law Review* 1279, at 1280.
 - 5 M Kenny, J Devenney and L Fox O’Mahony, ‘Conceptualising Unconscionability in Europe: In the Kaleidoscope of Private and Public Law’, in M Kenny, J Devenney and L Fox O’Mahony, *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (CUP 2010) 377.
 - 6 Case C-50/00 P *Unión de Pequeños Agricultores v Council* (UPA) [2002] ECR I-6677 para 40 ‘a complete system . . . where natural or legal persons cannot . . . directly challenge Community measures . . . they are able . . . either indirectly to plead the invalidity of such acts before the Community . . . or . . . national courts . . .’.
 - 7 European Commission, ‘Action Plan on a More Coherent European Contract Law’ COM(2003) 68.
 - 8 Consumer Policy Strategy 2002–2006, COM(2002) 208 final, (2002) OJ C137/2; Consumer Policy Strategy 2007–2013: Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them COM(2007) 99 final.
 - 9 C von Bar and E Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (OUP 2010).
 - 10 Introduction of the Optional Instrument, The Common European Sales Law, 11 October 2011 <http://ec.europa.eu/justice/newsroom/news/20111011_en.htm>.
 - 11 AG Villalón, Case C-173/09 *Elchinov v Natsionalna zdravnoosiguritelna kasa*, 5 October 2010, nyr Casenote: A P van der Mei (2011) 48 *Common Market Law Review* 1297.
 - 12 M Schillig, ‘Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice’s Jurisprudence on Directive 93/13 on Unfair Contract Terms’ (2008) 33 *European Law Review* 336.
 - 13 C F Sabel and O Gerstenberg, ‘Constitutionalizing an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Legal Order’ (2010) 16 *European Law Journal* 511.

to illuminate hard cases at the interface of EU and national law: German reaction¹⁴ to *Mangold*¹⁵ and the English position in *Abbey National*,¹⁶ a juxtaposition disclosing more collaborative ways of managing the Europeanisation process.

2 Mapping effectiveness

Every year a new cohort of law students is inducted into the central articles of faith on the effectiveness of EU law. On the one hand, these concern the forms of action: direct actions (Articles 258 and 259 TFEU); judicial review (Article 263 TFEU); preliminary references (Article 267 TFEU); and actions for non-contractual liability (Article 340 TFEU). On the other hand, these also concern the effects of EU law: direct effect and supremacy; the effects of directives;¹⁷ and state liability. EU law seminarians are soon apprised of the CJEU's duty to ensure the uniform application of EU law and the national courts' duty of 'sincere cooperation'.¹⁸ But effectiveness may also be seen from a compliance perspective:¹⁹ a perennial governance issue given that the EU operates via a system of indirect administration.²⁰ Yet, for the EU law seminarian, the main focus bears on Article 267 TFEU and state liability.²¹ Necessarily, this fixation, given the ad hoc nature of litigation and the variation in national remedies, further compromises the overall coherence of EU law.²²

Yet the more critical EU law seminarian will also be sceptical of the consistency of EU case-law itself; arguing that the jurisprudence fails to disclose a clear methodology. While one may be tempted to agree with Ole Lando that the logic of EU law is one of the simple assertion of bourgeois values,²³ closer inspection produces greater nuance. Weiler famously elaborated three strains of case-law,²⁴ and, subsequently, eras of 'public/private'²⁵ and 'constitutionalisation'²⁶ could be added to those original strains. Does clear judicial policy emerge? Can *Defrenne* be convincingly juxtaposed with the trampling of collective rights in *Laval/Viking/Riifert*?²⁷ Similarly, the treatment of public interest claims in *Altmark/Kobll/Decker* does not sit easily with the support for the relevant rights in *Schmidberger/Diego Cali*

14 GCC judgment of 6 July 2010, *Mangold-Urteil EuGH Honeywell -Az.2 BvR 2661/06*. Rs. EuZW 2010, 828. Translation <www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>.

15 Case C-144/04 *Mangold v Helm* [2006] ECR I-9981.

16 *OFT v Abbey National plc* [2009] UKSC 6. [2010] 1 AC 696.

17 P Craig and G de Búrca, *EU Law* (4th edn, OUP 2008), respectively at 279–87, 287–96 and 296–300.

18 F Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595, at 606: the national legal order reliant on the CJEU's 'unlimited patience'.

19 F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes and Techniques' (1993) 56(1) *Modern Law Review* 19, at 19–20.

20 *Ibid* 22.

21 Only recently has work emerged on the correlation of compliance and Article 267 TFEU: M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (OUP 2010) 39–46.

22 Snyder (n 19) 51: '(D)ifferences in national remedies affect the extent to which individuals can rely . . . on rights derived from Community law'.

23 O Lando, 'European Contract Law after the Year 2000' (1998) 35 *Common Market Law Review* 821, at 825: 'the guardians . . . of our law . . . grew up in well to do bourgeois homes . . . the legal values of the European brotherhood of lawyers are very similar'.

24 J H H Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

25 H Schepel and W Sauter, *State and Market in European Law* (CUP 2009).

26 Sabel and Gerstenberg (n 13).

27 Case 43/75 *Defrenne v Sabena (No II)* [1976] ECR 455; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Viking)* [2007] ECR I-10779; Case C-341/05 *Laval un Parteneri Ltd v Svenska Byggnadsarbetareförbundet and Others (Laval)* [2007] ECR I-11767; Case C-346/06 *Riifert v Land Niedersachsen* [2008] ECR I-1989.

and *Figli*.²⁸ Moreover, what is the relationship between the market-focused, precedential case-law and the revisionist, non-autolimitation jurisprudence?²⁹ EU law seminarians may question whether this law transports anything as grand as '*une certaine idée de l'Europe*'³⁰ or whether the CJEU is simply making it up as it goes along. Thus the 'beneficiaries' of the CJEU's case-law are frequently tragic figures, contributing to the Canon but, ultimately, unsuccessful.³¹ Unsurprisingly, national courts have, as a result, become wary of referring questions to what one President of the Bundesgerichtshof dismissed as a 'court of generalists'.³² Equally, perhaps more positively, weaker member states, though they could be found liable, could not be compelled into remedial action; the judicial enforceability of EU law could be decoupled from its judicial enforcement.³³

The effectiveness narrative thus emerges in a crucible of pressures.³⁴ For national systems, EU law represents a multidimensional challenge for their constitutions and (especially?) their constitutional courts.³⁵ Moreover, the 'coherence' of EU secondary law has always been compromised:³⁶ sectoral 'patchwork', 'minimum harmonisation' directives disrupting the residual provisions of national laws; and diversity in interpretation of relevant legal concepts' providing 'an unstable foundation for the internal market'.³⁷ Given these caveats, the heretical question is whether there can be an inappropriate fixation with effectiveness and coherence? Effectiveness is thus a multifaceted doctrine concerning the forms of action (principally Article 267 TFEU) and effects of EU law (direct effect and supremacy) necessary to render EU law effective. Yet a fixation with judicial (state liability) rather than administrative effectiveness and the lack of a guiding CJEU methodology has compromised effectiveness. In the next section, attention turns to the ways in which the gaps in this model have been addressed.

28 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark GmbH (Altmark)* [2003] ECR I-7747; ECJ, Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547.

29 Cases 56 & 58/64 *Consten SARL & Grundig GmbH v Commission* [1966] ECR 299; Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837; Cases C-267 & 268/91 *Criminal Proceedings against Keck & Mithouard* [1993] ECR I-6097.

30 P Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community law' (1983) 8 *European Law Review* 155, at 157. H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986); same author, 'Between Self-Restraint and Judicial Activism: A Judicial Policy for the European Court' (1988) 13 *European Law Review* 28. Cf M Cappelletti, 'Is the European Court of Justice Running Wild?' (1987) 12 *European Law Review* 3.

31 D. Nassimian, '... And We Keep on Meeting: De-Fragmenting State Liability' (2007) 32 *European Law Review* 819, at 835: '[T]he mere existence of judicial redress routes does not necessarily lead to ... the required level of protection.'

32 G Nobbe, Leipzig University, 21 January 2000, 'Der Bundesgerichtshof- Innenansichten zur Struktur, Funktion und Bedeutung' <www.uni-leipzig.de/bankinstitut/files/festvortrag.pdf>.

33 Case 387/97 *Commission v Greece* [2000] ECR I-5047; D Chalmers et al, *EU Law* (2nd edn, CUP 2010) 345.

34 J Devenney and M Kenny, 'Unfair Terms, Surety Transactions and European Harmonisation: A Crucible of Europeanised Private Law?' (2009) *Conveyancer and Property Lawyer* 295.

35 G Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998) 175.

36 M Amstutz, 'Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht' in C Joerges and G Teubner (eds), *Rechtsverfassungsrecht* (Nomos 2003) 237. Same author, 'In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Law Journal* 766.

37 Weatherill (n 4) 1279.

3 Addressing (or cementing) the gaps in effectiveness?

A. DIRECT EFFECT AND SUPREMACY

The gaps in effectiveness were soon exposed.³⁸ In *Kingsgate*, directives ‘merely restating’ treaty principles were held to possess horizontal effect.³⁹ Equally, *Marshall* and *Foster* expanded interpretation of the ‘emanation of the state’.⁴⁰ Meanwhile, ‘indirect effect’ imbued directives with yet broader effects,⁴¹ converting judicial protection itself into a ‘general principle of law’.⁴² Directives thus possessed ‘indirect horizontal effect’.⁴³ Distinctions within secondary law⁴⁴ were further eroded with the advent of ‘incidental effect’.⁴⁵ However, national procedural autonomy and divergence in remedies compromised the effectiveness of these doctrines⁴⁶ such that: ‘the complete and uniform application of Community law may . . . be crowded out, despite its direct effect and supremacy’.⁴⁷

B. STATE . . . V PRIVATE LIABILITY

State liability was also crucial in elaborating effectiveness.⁴⁸ *Brasserie du Pêcheur* extended and revised the criteria,⁴⁹ which are fulfilled where member state or EU institution *manifestly and gravely* disregards the scope of their discretion.⁵⁰ Yet no sooner is effectiveness enhanced in one dimension than another fracture erupts: state liability exposing the limits to liability in the private dimension; *Courage* elaborating that damages were only available against the individual in competition proceedings.⁵¹

C. ARTICLE 267 TFEU

Article 267 TFEU has played a critical role in elaborating effectiveness.⁵² The mechanism provides that the CJEU *interprets* and the national courts *apply* the law;⁵³ promoting both flexibility⁵⁴ and efficiency.⁵⁵ Moreover, referral depoliticises issues in that cases are raised

38 A Albers-Llorens, ‘Keeping Up Appearances: The Court of Justice and the Effects of EU Directives’ (2010) Cambridge Law Journal 455, at 456.

39 Case 96/80 *Jenkins v Kingsgate Ltd* [1981] ECR 911, paras 19–22.

40 Case 152/84 *Marshall (No 1)* [1986] ECR 723; Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.

41 Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

42 Case 222/84 *Johnston v RUC* [1986] ECR 1651.

43 Ibid paras 9 and 13.

44 Case C-316/93 *Vaneetveld v SA Le Foyer* [1994] ECR I-763; AG Jacobs at 32: ‘The consequences [of horizontal direct effect] . . . could . . . be cushioned by limiting the temporal effect’.

45 Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535; Case C-194/94 *CIA Security International SA v Signalson SA* [1996] ECR I-2201. Case C-201/02 R (*ex parte*) *Wells v Secretary of State for Transport* [2004] ECR I-723, paras 57–8.

46 D Chalmers et al, *EU Law* (CUP 2006) 390–1; Case 39/73 *Reve Zentralfinanz* [1976] ECR 1989 para 5.

47 P J G Kapteyn and P VerLoren van Themaat, *Introduction to the law of the EU* (Kluwer International 1998) 559.

48 Joined Cases C-6 & 9/90 *Francoch v Italian Republic* [1991] ECR I-5375 para 28: ‘inherent to the Treaty’.

49 Joined Cases C-46 & 48/93 *Brasserie du Pêcheur & Factortame III* [1996] ECR I-1029, para 51: ‘the rule of law . . . must be intended to confer rights . . . the breach must be sufficiently serious; and there must be a direct causal link between the breach . . . and the damage’. M Ross, ‘Beyond *Francoch*’ (1993) 56 *Modern Law Review* 55; H Toner, ‘Thinking the Unthinkable? State Liability for Judicial Acts after *Factortame III*’ (1997) 17 *Yearbook of European Law* 165.

50 Ibid *Brasserie du Pêcheur*, paras 55–7.

51 Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

52 Case 107/76 *Hoffmann-La Roche v Centrafarm* [1977] ECR 957, para 5.

53 Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, para 9: ‘a non-contentious procedure’.

54 Craig and de Búrca (n 17) 461, 528–9.

55 Chalmers et al (n 33) 152.

by private litigants. Furthermore, as the more contentious *application* of EU law remains a national matter, referral upgrades the status of the national court, while shielding the CJEU from political backlash. Simultaneously, however, instability is injected into judicial policy.⁵⁶ Equally, the importance of referral is also due to the limits of judicial review.⁵⁷ Despite criticism,⁵⁸ the traditional, restrictive approach to Article 263 TFEU was confirmed in *UPA* and *Jégo-Quéré*,⁵⁹ in which the virtues of a *complete system of remedies* were famously asserted. Clearly, this ‘completeness’ has always been limited: the individual unable to show direct and individual concern cannot, alternatively, insist on a reference.

CILFIT defined the two cases in which national courts would not have to refer: first, where a matter has already been clearly decided (*acte éclairé*);⁶⁰ second, where the correct application of EU law is ‘so obvious as to leave no scope for any reasonable doubt’ (*acte clair*).⁶¹ National courts can only decline referral where they are ‘convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice’, taking the ‘state of evolution’ of EU law into account.⁶² One can understand the resulting dilemma facing both national court, where delay may speak against referral,⁶³ and CJEU; where both overly abstract and overly specific rulings can be criticised either for a lack of guidance, or for assuming the referring court’s jurisdiction.⁶⁴ Notwithstanding attempts to clarify the margins of discretion,⁶⁵ the parameters of referral remain uncertain: dependent neither on the importance of the issue, nor the extent to which the issue depends on interpretation, but on whether the relevant interpretation is open to doubt.

D. STATE LIABILITY AND ARTICLE 267 TFEU

Köbler further refined discourse by addressing liability for failure to refer. In the original reference the CJEU registry had intervened, challenging the referral,⁶⁶ whereupon the Austrian court withdrew the reference, deciding that the national rules were justified. *Köbler* sought review, damages and a new referral. While admitting a *potential* liability, the CJEU held that liability for failure to refer ‘can be incurred only in the exceptional case where the court has manifestly infringed the applicable law’.⁶⁷ This test involved ‘the degree of clarity and

56 J Bengoetxea, N MacCormick and L Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in *The European Court of Justice*, G de Búrca and J H H Weiler (eds) (OUP 2001) 43, at 47; J Bengoetxea, *The Legal Reasoning of The European Court Of Justice* (Clarendon 1993). Cf Rasmussen (n 30).

57 Craig and de Búrca (n 17) 460–501, 551–16, 528–30; Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95; Cases 789 and 790/79 *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949, para 9.

58 Case C-50/00 P *UPA* (n 6); AG Jacobs, para. 59.

59 *Ibid.* AG Jacobs, para 102; judgment, paras 43–5; Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425, paras 29–39.

60 Case 283/81 *CILFIT* [1982] ECR 3415, para 14.

61 *Ibid* para 16.

62 *Ibid* para 20. Cf Case C-461/03 *Gaston Schul* [2005] ECR I-10523, AG Colomer, para 58.

63 T Tridimas, ‘Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary rulings procedure’ (2003) 40 *Common Market Law Review* 9. Sir T Bingham MR, ‘The National Judge’s View’ in M Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) 43, at 46.

64 A Arnall, ‘*Arsenal Football Club plc v Matthew Reed*’ (2003) 40 *Common Market Law Review* 753, at 769.

65 M Broberg, ‘*Acte Clair* Revisited: Adapting the *Acte Clair* Criteria to the Demands of the Times’ (2008) 45 *Common Market Law Review* 1383, at 1388–9; contrasting AG Jacobs in Case C-338/95 *Wiener ST GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495; AG Tizzano in Case C-99/00 *Criminal Proceedings against Lyckeskog* [2002] ECR I-4839; and AG Colomer in Case C-461/03 *Gaston Schul Douane-expéditeur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513.

66 Following Case C-15/96 *Schöningh-Kougebetopoulos v. Freie und Hansestadt Hamburg* [1998] ECR I-47.

67 Case C-224/01 *Köbler v Austria* [2003] ECR-I 10239, para 53.

precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable . . . the position taken . . . by a Community institution and non-compliance by the court in question with its obligation to make a reference'.⁶⁸ Thus the CJEU held the infringement insufficiently serious.⁶⁹ While important implications result,⁷⁰ *Köbler* begs the question of the type of judicial error that will prove sufficiently serious. Though the abuse of *acte clair* was identified as serious, no further clarity was supplied.⁷¹

Further clarification was anticipated in *Traghetti*. The case originally concerned damages for unfair competition; claims rejected at first instance and on appeal. The applicants appealed to the Italian Supreme Court, which confirmed the previous decisions, whereupon an action was brought for errors in interpretation and failure to refer. Two questions were referred: whether failure to refer could lead to liability; and whether the Italian liability rules were compatible with EU law. Once again the CJEU registry challenged the referral and the tribunal withdrew the first question. In its judgment the CJEU confirmed *Köbler*,⁷² spurning the opportunity to extend or revolutionise liability for failure to refer.⁷³

E. PROVISIONAL CONCLUSIONS

The steps taken to address gaps in effectiveness have contributed to a variable geometry, exemplified in the piecemeal elaboration of 'indirect', 'indirect horizontal' and 'incidental' effects of directives. Meanwhile, the effectiveness of EU law has remained compromised by national procedural autonomy and national remedies. Similarly, the extension of liability into the private dimension has been constrained. Meanwhile, the place of Article 267 TFEU and the CJEU monopoly on interpretation has injected instability into judicial policy. Finally, the elaboration of judicial liability for failure to refer remains compromised, further undermining the coherence of legal remedies.

4 Reaction: between legislative intervention and jurisdictional realignment

A. LEGISLATIVE INTERVENTION

Given the *incompleteness* of EU law and the emergence of the unsystematic body of EU secondary law, many find the case for legislative intervention, for such measures as an EU Civil Code, compelling.⁷⁴ To this end the European Commission charged the Study Group on a European Civil Code (SGECC) to investigate the available options.⁷⁵ Six volumes of a DCFR subsequently emerged in 2009.⁷⁶ Meanwhile, in 2010, the Directorate-General for Justice established an 'Expert Group' to revise and restructure elements of the DCFR

68 Case C-224/01 *Köbler* (n 67) para 55.

69 Ibid paras 122–4. B Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 *Common Market Law Review* 773; S Drake, 'State Liability under Community Law for Judicial Error: A False Dawn for the Effective Protection of the Individual's Community Rights?' (2004) *Irish Journal of European Law* 34, at 35.

70 P J Wattel, '*Köbler*, *CILFIT* and *Welthgrove*. We Can't Go on Meeting Like This' (2004) 41 *Common Market Law Review* 177, at 178–9: 'if a national highest Court wants to avoid the real risk of making its government liable, it had better ask for a preliminary ruling . . . in . . . every case involving a question of EC law'.

71 A Arnulf, 'The Use and Abuse of Article 177 EEC' (1989) 52 *Modern Law Review* 622; Drake (n 69) 49–50.

72 Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177, paras 46 and 32.

73 Wattel (n 70) 182.

74 Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, Brussels 1 July 2010 COM(2010) 348 final. (see option 7).

75 M Kenny, 'The 2004 Communication on European Contract Law: Those Magnificent Men in their Unifying Machines' (2005) 30 *European Law Review* 724–42.

76 DCFR (n 9).

relevant for contract law.⁷⁷ Finally, in October 2011, proposals were tabled for a regulation-based ‘optional instrument’ for a CESL, recycling the 2008 proposal on a consumer rights directive as an opt-in second regime of cross-border contract law.

It is beyond the remit of this paper to address all aspects of this *Professorenrecht* save to note, first, that a *legislative* response to the lack of systematicity in EU law at its interface with national private law is under review.⁷⁸ Second, that it has been German academics, notwithstanding (or because of?) the contributions of the German judiciary to the networked case-law, who have driven this process forward.⁷⁹ Thirdly, that the CESL initiative, to the extent that it would drive further fragmentation between purely domestic and Europeanised private law, would ultimately serve as a stalking horse for wider codification. Indeed, as the European Law Institute has already confirmed in its 2012 Statement on the CESL, the CESL already requires comprehensive upgrading.⁸⁰ Finally, codification would extend EU liability rules into the private law domain; begging further questions as to which norms of EU law, hitherto unenforceable against individuals, would henceforth become so enforceable;⁸¹ codification thus threatens to unpredictably realign the whole reach of EU law.

Meanwhile, a more pragmatic response, a shift to measures of ‘maximum’ harmonisation has been adopted to target the ‘unsystematic’ legislative *acquis*, exemplified inter alia in the 2011 Consumer Rights Directive.⁸² Yet review of the legislative history of this measure describes the emergence of a ‘mouse of a directive’.⁸³ While the original 2008 proposal advocated replacing the eight consumer rights directives with a single instrument,⁸⁴ Directive 2011/83 simply replaced the doorstep (Directive 85/577) and distance-selling directives (Directive 97/7) and modestly amended the Unfair Terms (Directive 93/13) and Sale of Consumer Goods and Associated Guarantees Directive (Directive 99/44). Revealingly, no resort was made to the array of interpretative aids of the DCFR and the Expert Group’s Feasibility Study. A *quid pro quo* emerges, in recognition of the fact that: ‘[c]oherent EU law comes at a cost: incoherent national law’.⁸⁵

77 Expert Group of a Common Frame of Reference in the Area of European Contract Law, Commission Decision 2010/233/EU (2010) OJ L105/109. Subsequently, the feasibility study: <http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf>.

78 B Markesinis, ‘Why a Code is Not the Best Way to advance the Cause of European Legal Unity’ (1997) 5 *European Review of Private Law* 519; P LeGrand, ‘Antivonbar’ (2006) *Journal of Comparative Law* 1.

79 C von Bar, ‘Die Funktionen des Gemeinsamen Referenzrahmens aus der Sicht der Verfasser des wissenschaftlichen Entwurfs’ in M Schmidt-Kessel (ed), *Der Gemeinsame Referenzrahmen. Entstehung, Inhalte, Anwendung* (Sellier 2009) 23–33; H Schulte-Noelke, ‘The Way Forward in European Consumer Contract Law: Optional Instrument Instead of Further Deconstruction of National Private laws’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010) 131–46.

80 Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Common_European_Sales_Law.pdf>.

81 Leczykiewicz (n 2).

82 Directive 2011/83/EU on consumer rights (2011) OJ L304/64.

83 Weatherill (n 4) 1290.

84 Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31; Directive 90/314 on package travel [1990] OJ L158/59; Directive 94/47 on the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83 (replaced by Directive 2008/122/EU, [2009] OJ L33/10); Directive 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (amended by Directive 2007/64/EU, [2007] OJ L319/1); Directive 98/6 on consumer protection in the indication of the prices of products offered to consumers [1998] OJ L80/27; Directive 98/27 on injunctions for the protection of consumers’ interests [1998] OJ L166/51; Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

85 Weatherill (n 4) 1315.

B. JURISDICTIONAL REALIGNMENT

While Article 267 TFEU has provided the catalyst for constitutionalisation, an important caveat has been the CJEU's monopoly over EU law interpretations. As the CJEU underscored in *Rheinmühlen I*, the constitutionalisation of EU law is limited: national provisions do not trump the lower courts' ability to refer; the procedural autonomy of national courts is bypassed to promote effectiveness.⁸⁶ In *Elchinov* Advocate-General Villalón called for a nationalisation of Article 267 TFEU jurisdiction, asserting that the growth of the EU had transformed the national judicial role such that the higher courts now constituted a 'keystone' in judicial cooperation.⁸⁷ Furthermore, EU law had reached a 'level of maturity which allows it to ensure its own practical effectiveness before the (national) courts'.⁸⁸ In drawing these conclusions the Advocate-General found his case supported by the availability of flanking doctrines: *Köhler*-based state liability;⁸⁹ *Commission v Italy*-based infringement actions;⁹⁰ and *Kühne & Heitz*-style review of administrative decisions.⁹¹ Yet the court declined to follow the Advocate-General, maintaining that: 'national courts are . . . free to exercise . . . discretion at whatever stage of the proceedings they consider appropriate'.⁹² In contrast, an alternative, more modest jurisdictional realignment might be the institution of an interpretative right of appeal from the national court to the CJEU.⁹³ Yet just as the nationalisation of Article 267 TFEU would undermine judicial collaboration, so might the institution of such a right appear disproportionate.

C. CAVEATS

Given the caveats identified to legislative intervention and jurisdictional realignment, we need to turn to the hard cases at the margins; to reassess the depth of judicial collaboration. In the next section, the variation in judicial approaches is elaborated, an analysis marking ways in which the effectiveness and coherence of EU law could be improved.

5 Margins of effectiveness

A. MANGOLD: COLLABORATIVE APPLICATION OF EU LAW

In *Mangold*, it was held that where directives implemented 'general principles' of EU law they possessed horizontal direct effect. German labour law thus infringed Directive 2000/78/EC, notwithstanding that the implementation date had not expired.⁹⁴ The directive established a non-discrimination right recognised as a 'general principle of Community law',⁹⁵ outranking any national policy discretion. The national legislator, as an

86 Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33 para. 4: 'a rule of national law . . . cannot deprive the inferior courts of their power to refer to the Court'.

87 Case C-173/09 *Elchinov* (n 11), AG Opinion, para 23.

88 Ibid AG para 31.

89 Ibid AG para 24.

90 Ibid AG para 24; Case C-129/00 *Commission v Italy* [2003] ECR I-14637.

91 Ibid AG para 27; Case C-453/00 *Kühne & Heitz v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.

92 Ibid Judgment paras. 26, 27 and 31.

93 Schillig (n 12).

94 §14(3) TzBfG (*Gesetz über Teilzeit und befristete Arbeitsverträge*). Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

95 Case C-144/04 *Mangold* (n 15) para 75. 'Editorial: Horizontal Direct Effect – A Law of Diminishing Coherence' (2006) 43 Common Market Law Review 1; D Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional relevance of Community Equality Legislation' (2006) 35 Industrial Law Journal 329, at 333–4.

'agent' of EU law, could not pass measures incompatible with general principles.⁹⁶ Despite criticism,⁹⁷ this approach was confirmed in *Küçükdereci* where the relevant national measures were also disapplied.⁹⁸ Despite criticism of incompatibility with the German Constitutional Court's (GCC) *Lisbon* ruling,⁹⁹ the GCC confirmed this approach,¹⁰⁰ underscoring the importance of non-discrimination¹⁰¹ and elaborating the balancing necessary between CJEU interpretation and GCC review:

ultra vires review must be exercised reservedly by the [GCC] . . . [I]n each case . . . the task and status of the independent supranational case-law must be safeguarded. This means, on the one hand, respect for the Union's own methods of justice . . . Secondly, the [CJEU] has a right to tolerance of error. It is hence not a matter for the [GCC] in questions of the interpretation of Union law . . . to supplant the interpretation of the [CJEU] with an interpretation of its own.¹⁰²

Intriguing is the 'tolerance of error' allowed the CJEU: the national court must desist from ruling that the CJEU selected the wrong interpretation, or replace its own interpretation for that of the CJEU. National procedural autonomy emerges from this jurisprudence not as an absolute but as subject to general principles; the principle of effective judicial protection being recognised as a general principle of EU law.¹⁰³ What is revealed in such cases is a profound collaboration in which national and supranational tribunals: 'agree to defer to each other's decisions'.¹⁰⁴ Sabel and Gerstenberg trace further collaboration in *Schmidberger*¹⁰⁵ and *Omega*,¹⁰⁶ noting the *reciprocal monitoring* by national courts and private parties of the EU legal system.

The case for improving judicial coordination is further enhanced given the implications of EU accession to the European Convention on Human Rights (ECHR). In this regard Protocol 8 TEU specified that accession should 'make provision for preserving the specific characteristics of the (EU) and (EU) law'¹⁰⁷ thereby focusing attention on the relationship between CJEU and the ECHR. Predictably, in its discussion document of 5 May 2010, the CJEU asserted its monopoly: '[t]o maintain uniformity in the application of EU law and to

96 *Mangold* (n 15) paras 77–8.

97 Chalmers et al. (n 33) 538–40. Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245; Case C-227/04 P *Lindorfer v Council of the European Union* [2007] ECR I-6767. Critique: Case C-411/05 *Felix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; AG Mazák, para 94, P Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349.

98 Case C-555/07 *Küçükdereci*, 19 January 2010 nyr paras 30 and 56. Casenote (2010) 47 *Common Market Law Review* 1161.

99 GCC judgment of 30 June 2009 <www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>; A Fischer-Lescano, C Georges and A Wonka, 'The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives', ZERP Discussion Paper 1/2010 <www.zerp.uni-bremen.de>.

100 GCC (n 14).

101 C O Lenz, 'Erfreuliche Momentaufnahme— Zum Mangold-Urteil des GCC' (201) *EWS* 9, 1.

102 GCC (n 14) para 66.

103 Case C-432/05 *Unibet v Justiekansler* [2007] ECR I-2271, para 37; N Reich, 'Rights without Duties? Reflections on the State of Liability Law in the Multilevel Governance System of the Community: Is There a Need for a More Coherent Approach in European Private Law?' *EUI Working Paper Law* 2009/10; C Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?' (1997) 34 *Common Market Law Review* 1389.

104 Sabel and Gerstenberg (n 13) 511.

105 Case C-112/00 *Schmidberger* (n 28) para 93: '[T]he national authorities were . . . entitled . . . to consider that the legitimate aim . . . could not be achieved . . . by measures less restrictive of intra-Community trade.'

106 Case C-36/02 *Omega Spielballen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paras 37 and 38.

107 Protocol 8 TEU, Article 1.

guarantee the necessary coherence of the Union's system of judicial protection'¹⁰⁸ adding: 'the possibility must be avoided of the ECHR . . . [deciding] on the conformity of an EU act with the Convention without the [CJEU] first having had an opportunity to give a definitive ruling'.¹⁰⁹ Yet such a 'reservation' of jurisdiction is questionable, amounting to a privileging of the CJEU.¹¹⁰ More persuasively, the case can be made that the ECHR should be bound to uphold the central rights to a fair trial and effective remedy under Articles 6 and 13 ECHR. However, the stability of judicial protection on offer can be questioned: are national courts up to the task? How sophisticated are national approaches to referrals under Article 267 TFEU?

B. *ABBEY NATIONAL*: THE 'NATIONAL APPLICATION' OF EU LAW?

Abbey National, in disclosing an almost mirror-image of the judicial technique in *Mangold*, flags up the limits of judicial collaboration. The case arose pursuant to complaints to the Office of Fair Trading (OFT)¹¹¹ on the extent of bank charges.¹¹² Many consumers challenged the fairness of these charges under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR); regulations transposing the Unfair Terms' Directive (UTD) (93/13/EEC).¹¹³ The UTCCR adopted a full 'copy-out' transposition to 'reflect more closely the wording of the Directive'.¹¹⁴ Regulation 6(2), implementing Article 4(2) UTD, provided:

In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate—

- (a) to the definition of the main subject matter of the contract, or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.¹¹⁵

As CJEU case-law confirms, the UTCCR must be interpreted in the light of the purpose of the UTD.¹¹⁶ The question facing the court pursuant to Regulation 6(2) UTCCR¹¹⁷ was thus whether the terms and charges represented core 'subject matter' or 'adequacy of price' terms exempt from review, or were peripheral terms and subject to the unfairness test. While the freedom of the court to pursue a pro-consumer application of the UTCCR had, previously, been heavily constrained in *Kleinwort Benson*,¹¹⁸ *First National* had appeared to

108 CJEU Discussion document on certain aspects of the accession of the EU to the ECHR of 5 May 2010, para 8, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf>. T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025.

109 CJEU (n 108) para 9.

110 N Reich, 'Beitritt der EU zur ERMK- Gefahr für das Verwerfungsmonopol des EuGH' (2010) *EuZW* 641.

111 J P Devenney, 'Gordian Knots in Europeanised Private law: Unfair Terms, Bank Charges and Political Compromises' (2011) 62 *Northern Ireland Legal Quarterly* 33. OFT, *Personal Current Accounts in the UK* (OFT 918, April 2007) 2; OFT, *Personal Current Accounts in the UK: A Market Study* (OFT 1005, July 2008).

112 OFT's joint reply and defence (11 November 2007) <www.offt.gov.uk/shared_offt/personal-current-accounts/OFTs-joint-reply-and-def.pdf>.

113 Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29; M Kenny, 'Orchestrating Sub-prime Consumer Protection in Retail Banking: *Abbey National* in the Context of Europeanised Private Law' (2011) 19 *European Review of Private Law* 43; C Twigg-Flesner, 'Time to Do the Job Properly: The Case for a New Approach to EU Consumer Legislation' (2010) 33 *Journal of Consumer Policy* 355.

114 Explanatory Notes, UTCCR.

115 Regulation 6(2), UTCCR.

116 Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; *Office of Fair Trading v Foxtons* [2009] EWCA Civ. 288, para. 42; *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, para 31.

117 UTCCR 1999, SI 1999/2083; Regulation 6(2).

118 *Kleinwort Benson Ltd v Lincoln City Council and Others* [1998] UKHL 38; [1999] 2 AC 349.

settle the matter in favour of a restrictive reading of Regulation 6(2) UTCCR.¹¹⁹ Yet, while the High Court and Court of Appeal followed *First National*,¹²⁰ the Supreme Court distinguished the case.¹²¹ Analysis of the legislative history of Article 4(2), it was held, uncovered intent to enhance contractual freedom rather than contractual fairness.¹²² Moreover, the extent of the charges, representing over 30 per cent of revenue, proved that the terms were core parts of the bargain and therefore exempt from an assessment for fairness.¹²³ Nevertheless, and somewhat opaquely, the court refrained from holding that bank charges could *never* be challenged:

I do not believe any challenge to the fairness of the Relevant Terms has been made on the basis that they cause the overall package of remuneration paid by those in debit to be excessive . . . It may be that, if and when the OFT challenges the fairness of the Relevant Terms, issues will be raised that ought to be referred to Luxembourg.¹²⁴

This confusion begs the question, especially stark in the wake of *Tragbetti*, of why reference was not made to the CJEU.¹²⁵ Here, the Supreme Court's assertion that, where a court of last resort was unanimous that appeal be allowed, a point should be treated as *acte clair*,¹²⁶ drastically reformulates *CILFIT*. More fundamentally, however, the Supreme Court made an important concession for, as Devenney observes:

the conclusion that the Court of Appeal wrongly applied its interpretation of Article 4(2) is dependent on a *particular view* of the core/ancillary terms dichotomy which, surely, is partly a question of law. There is also a wider issue: this argument . . . concedes that the Supreme Court may have been wrong on the question of interpretation!¹²⁷

The judgment thus concedes its own fragility. Moreover, the Law Commissions of England and Wales and of Scotland, alarmed by the approach taken, subsequently dealt with exempt terms in their 2012 Issues Paper, highlighting the conflicting elements in *Abbey National* which allow differing interpretations of the UTCCR, a complexity subsequently augmented with *Ashbourne Management Services*¹²⁸ to produce a kaleidoscope of unfairness approaches: seen in *First National* and *Abbey National* in bank charges; in *Singh* and *Kufner* in suretyships' law,¹²⁹ *Newham v Khatun* in social housing¹³⁰ and *Bairstow Eves* in agents' fees¹³¹ and making

119 *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 (HL), cl 8, para 2. Cf *DGFT v First National Bank plc* [2000] 1 WLR 98 (HC), *DGFT v First National Bank plc* [2000] QB 672 (CA); E Macdonald, 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: *DGFT v First National Bank*' (2002) 65 *Modern Law Review* 763.

120 *OFT v Abbey National plc* [2008] EWHC 875 subsequently: [2009] EWCA Civ 116. E MacDonald, 'Bank Charges and the Core Exemption: *OFT v Abbey National plc*' (2008) 71(6) *Modern Law Review* 987.

121 *Abbey National* (n 16) per Lord Walker, para 43.

122 H Collins, 'Good Faith in European Contract Law' (1994) *Oxford Journal of Legal Studies* 229.

123 *Abbey National* (n 16), per Lord Walker, para 41.

124 *Ibid* per Lady Hale, para 91.

125 Law Commissions, Issues Paper, *Unfair Terms in Consumer Contracts: A New Approach*, 25 July 2012 <http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_issues.pdf> paras 5.64–7.

126 *Abbey National* (n 16) per Lord Walker para 49.

127 Devenney (n 111) 51.

128 *OFT v Ashbourne Management Services* [2011] EWHC 1237 (Ch), [2011] ECC 31. Law Commissions (n 125) paras 5.74–83 and 5.93.

129 *Bank of Scotland v Singh*, 2005 (unreported, 17 June 2005, HC) suretyships outside scope of UTCCR. *Barclays Bank v Kufner* [2008] EWHC 2319; suretyships within scope of UTCCR, Devenney and Kenny (n 34) 297.

130 *London Borough of Newham v Khatun* [2004] EWCA Civ 55.

131 *Bairstow Eves London Central Ltd v Smith* [2004] EWHC 263, Gross J, para 25: 'Reg. 6(2) must be given a restrictive interpretation; otherwise a coach and horses could be driven through the Regulations'.

it difficult to demarcate exempted from assessable terms.¹³² Moreover, as the Law Commissions note, given that the ultimate arbiter of the UTCCR is the CJEU, any future interpretation may change the way the UTD should be applied,¹³³ thus the ‘current law’ lulls traders into a false sense of security.¹³⁴ Moreover, any future CJEU interpretation is liable to be informed by the pro-consumer tenor of CJEU case-law exemplified in *Océano*¹³⁵ and *Pannon*.¹³⁶ The Law Commissions recite the shortcomings of *Abbey National* in graphic terms: the scope of the exemption is ‘unacceptably uncertain’ and there is an urgent need to render UTD implementation ‘certain enough’.¹³⁷ The Law Commissions conclude that a new approach, affording a *higher* level of protection by *narrowing* the scope of the exemption, is needed.¹³⁸ However, whether the Law Commissions’ solution to these shortcomings, reliance on improving the *transparency* and *prominence* of the relevant terms,¹³⁹ is equal to this task is open to considerable doubt, given the limits of the information model in protecting consumers, especially in financial services.¹⁴⁰ Yet the position in which the Law Commissions were placed by *Abbey National* was invidious: left to perform a poorly choreographed veiled dance between contradictory coordinates; ensuring the *clear and precise* implementation of the directive,¹⁴¹ *restricting* the exemption pursuant to *Abbey National*, appearing to faithfully invoke the cause of consumer protection as expressed in *Océano* and *Pannon*, and, while appearing to invite, seeking to evade *Traghetti*-liability by relying on transparency and prominence to effectively defuse the importance of Regulation 6(2).

C. SYNTHESIS

Rather than the ‘tolerance of error’ attached to the collaborative approach in *Mangold*, the ‘national application’ of EU law in *Abbey National* led to a multiplication of error. In private law terms, the judgment left an uncertain demarcation of the scope of exemption, a demarcation ‘difficult to reconcile’ with *Océano*. While the Law Commissions have explicitly underscored the fragility of the judgment and the countervailing tenor of CJEU case-law, *Abbey National* appears implicitly reversed even within the modest framework provided by the new Consumer Rights Directive.¹⁴² Meanwhile, in public law terms, the spectre of state liability for failure to refer arises, strengthened by the Law Commissions’ interventions. Spectacular in this interplay are the ‘hospital passes’ passed on by both the Supreme Court

132 Law Commissions (n 125) para 1.17.

133 *Ibid* para 7.73.

134 *Ibid* para 8.12.

135 Joined Cases C-240–244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* and *Salvat Editores SA v José M Sánchez Alcón Prades and Others* [2000] ECR I-4941, para 26; Casenote: T Corthaut, (2002) 8 *Columbia Journal of European Law* 293; Case C-473/00 *Cofidis v Fredout* [2002] ECR I-10875 para 33.

136 Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* [2009] ECR I-4713, para 35: ‘the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary . . . Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application’.

137 Law Commissions (n 125) para 8.13.

138 *Ibid* para 7.75.

139 *Ibid* paras 8.2–3, 8.22–4, 8.25–8, 8.40–2, 8.70–3.

140 P Rott, ‘Effective Enforcement of Consumer Law: The Comeback of Public Law and Criminal Law’, 64–81, and C Willett and M Morgan-Taylor, ‘Recognising the Limits of Transparency in EU Consumer Law’, 143–63, in J Devenney and M Kenny (eds), *European Consumer Protection: Theory and Practice* (CUP 2012).

141 Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, para 17; Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, para 18: ‘[I]t is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear.’

142 Articles 19 and 22, Consumer Rights Directive (n 82).

and the Law Commissions. The cause of legislative intervention is aided by such 'national applications' of EU law.

6 Conclusions

The 'complete system' of judicial protection averred to in *UPA* contains important gaps which lend the effectiveness of EU law a chimerical quality. Similarly, EU legislative intervention has provided an unstable foundation for the internal market. Unsurprisingly, calls for enhanced effectiveness and greater coherence have followed. This paper has argued that further legislative intervention cannot be expected to deliver greater coherence and that measures of judicial realignment are also unequal and/or disproportionate to the task. Indeed this survey questions the attraction of 'greater coherence' and a 'complete system of legal remedies'. By contrast the chimerical quality of effectiveness exists for a number of important reasons: the polycontextual nature of legal doctrine across the EU; subsidiarity and the need for the respect of national identities. EU law in this light requires something more than the responsorial psalm of orthodox functionalism, requiring instead discretion, competition, margins of appreciation *and* incompleteness; and this, not least, to accommodate the instability of CJEU judicial policy and the outer margins of the effectiveness of state liability in the context of the 'bailout states'. In this regard, a critical review of what sort of internal market is being created and how far it is appropriate to surrender national regulatory autonomy is needed.¹⁴³

Instead, this paper has advocated enhancing collaboration to improve the judicial interplay and interface between national and EU law. Yet the juxtaposition of *Mangold* and *Abbey National* reveals higher national courts travelling in opposite directions, begging the questions of whether greater sophistication in national approaches to EU law can be promoted and the extent to which, in the wake of *Tragbetti*, state liability for failure to refer might play an important (if in part symbolic?) role in this. Fundamentally, these cases flag up the need for taking the administrative dimension of effectiveness more seriously. Such a strategy would focus on enhancing the European Commission's compliance role, encouraging robust rather than 'copy-out' national implementation and strengthening judicial methodology at national and EU level.

In terms of policy development, the way events have conspired to support the introduction of a CESL and, by implication, the wider cause of codification, most recently exemplified in the European Law Institute's lobbying on the need to significantly upgrade the CESL, is sobering; especially so as a handful of practical steps might otherwise obviate the need for intervention altogether. Moreover, given that extension of the EU regime into broad areas of private law would entail the uncertain application of liability rules between private parties *inter se* and further reduce the margins of discretion and the field of application of national law, such intervention would produce further demarcational instability at the nexus of EU and national constitutional and private law. The danger of such policy development is clear with, once again, pragmatism and method being subverted by the imperative of the European grand design. Equally troubling, however, is the domestic policy context: caught between the allure of exiting the EU and the countervailing perception of EU obligations as essentially elective items, the branches of UK governance appear unable to resist a legally delusional and damaging dalliance with non-Europe.

143 Weatherill (n 4) 1279.