

Resolving the Problematic Inter-Relationship between Overlapping Primary and Secondary Law in the EU Legal Order

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1. Introduction

This paper discusses certain difficulties that arise when Treaty provisions and secondary law overlap and seeks to develop a series of interpretative principles addressed to the ECJ in order to resolve these issues. Overlapping norms¹ occur when there is more than one norm of EU law which is *prima facie* applicable to a particular situation. Each norm grants the same right but diverges slightly in terms of source or substance. The right to equal treatment and non-discrimination alone is given expression in several sources of EU law - it is found in the Treaties,² the Charter,³ the general principles of EU law⁴ and EU secondary legislation⁵ - with little guidance in the Treaties or elsewhere as to how these different provisions ought to operate together. When more than one norm is *prima facie* applicable, the European Court of Justice (ECJ) – as well as national courts tasked with applying EU law – must determine which expression of the right to equal treatment to rely upon. The central submission made by this paper is that the ECJ has failed to answer this question consistently and satisfactorily.

The potential for norm overlap between Treaty provisions and secondary law stems from the structure of the Treaty. Across many different areas in the Treaty a two-pronged structure is identifiable; a general aim is followed a legislative basis empowering the legislature to act to achieve this aim. A paradigmatic example – and that adopted as the case study of this paper – is non-discrimination on grounds of nationality. Article 45 TFEU states that '[f]reedom of movement for workers shall be secured' and 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. This is then accompanied by Articles 46 and 48 TFEU empower the Council respectively to 'issue directives or make regulations setting out the measures required to bring about, by progressive stages,

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¹ A concept I develop building upon the idea of 'multi-sourced equivalent norms' discussed by Broude and Shany in the context of international law. See T Broude and Y Shany (eds), *Mutli-Sourced Equivalent Norms in International Law* (Hart 2011).

² E.g. Articles 8, 18, 153 and 157 TFEU. It also forms a part of each of the four freedoms.

³ Title III and in particular Article 21 CFR.

⁴ Joined Cases 117/76 and 16/77 *Ruckdeschel* EU:C:1977:160; Case C-144/04 *Mangold* EU:C:2005:709.

⁵ E.g. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/1.

freedom of movement for workers...’ and to ‘adopt such measures in the field of social security as are necessary to provide freedom of movement for workers’. Once the ECJ recognised the direct effect of the free movement provisions,⁶ overlap between these Treaty provisions and any secondary measures giving effect became unavoidable.⁷ Overlap is then, to a certain extent, inherent in the Treaty framework. Yet, how these overlapping norms ought to inter-relate is not, however, fully determined by the Treaty or by principles of legal interpretation.

This paper focuses on of the most fundamental questions arising from overlap between the Treaties and secondary legislation: to what extent is secondary legislation dispositive of the scope of the overlapping Treaty provision?⁸ This question is of practical, and not just theoretical importance since secondary legislation will often be narrower than the Treaty provisions it aims to give effect to.

The paper begins in Section 2 by setting out the overlaps between Treaty provisions and secondary legislation granting the right to non-discrimination on grounds of nationality. In particular, the Section highlights the differences between the norms despite. Section 3 then discusses how, *in theory*, one might expect the ECJ to interpret the inter-relationship between Treaty provisions and overlapping secondary norms. The idea in so doing is to develop a yardstick against which to compare ECJ practice. Section 4 then moves to compare ECJ practice against the orthodox approach set out in Section 3. This section demonstrates that the ECJ adopts several different approaches to the inter-relationship between primary and secondary law and that it is difficult to identify a principled approach to when the ECJ will be more or less deferential to secondary legislation. Section 5 offers some thoughts on what principles might guide the ECJ in determining how Treaty provisions and secondary legislation ought to inter-relate. Section 6 offers some concluding thoughts.

When evaluating ECJ decisions and considering how overlapping secondary legislation ought to interact, a balance must be reached between several competing factors. First, there is the need to ensure adequate protection of the primary right to equal treatment

⁶ Cite cases in which Treaty provisions became directly effective. (Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* EU:C:1974:140 (Article 45 TFEU).

⁷ Were Treaty freedoms ever intended to operate as freestanding prohibitions or were they only intended as general principles to be fleshed out by legislation? Questionable whether all the free movement provisions were intended to be directly effective. Articles 49 and 56 TFEU, for instance, state that restrictions on free movement are to be removed ‘[w]ithin the framework of the provisions set out below’.

⁸ There are many other issues arising that all concern the inter-relationship between the Treaties and overlapping secondary legislation: to what extent ought the interpretation of secondary legislation be constrained by overlapping Treaty provisions; which norm ought to form the starting point of the ECJ’s analysis. It is submitted

protected in both the Treaties and the EU Charter of Fundamental Rights.⁹ Second, there is the need to respect legal certainty in a Union based upon the rule of law. Third, there is a need to respect the allocation of powers within the EU and the greater democratic credentials of the legislature when it comes to how equal treatment is best protected. Finally, there is the need to strike the appropriate balance of powers between the EU and its Member States. Any principle of interpretation needs to reach a balance between securing a high level of rights protection, without damaging legal certainty, expanding the scope of application of EU law too far or disregarding legislative choices.

2. Case Study: Non-Discrimination on Grounds of Nationality

This section sets out the case study of the paper: non-discrimination on grounds of nationality. The discussion focuses on overlaps between Articles 18 and 45 TFEU and secondary measures granting the right to non-discrimination on grounds of nationality to certain Union citizens.¹⁰ In discussing the overlaps between the Treaty provisions and the secondary legislation designed to give effect to this, the aim is to highlight the divergences between the different norms. Doing so highlights the importance of how norms of primary and secondary law inter-relate in practice.

Article 18 TFEU sets out a general prohibition of discrimination on grounds of nationality '[w]ithin the field of application of this Treaty and without prejudice to the special provisions mentioned therein'. For Article 18 TFEU to apply, the situation must fall within the scope of application of the Treaties. While the provision does not state how this is to be determined, an important question for present purposes is whether secondary legislation plays a role in determining the scope of application of the Treaties. Article 45 TFEU prohibits discrimination against workers on grounds of nationality. According to Article 45 TFEU:

1. Freedom of movement for workers shall be secured...
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

⁹ e.g. Articles 10, 18, 45(2), 157 TFEU; Articles 20, 21 CFR.

¹⁰ The reason for this focus is that – due to deadlock in the Council - there are few legislative measures (particularly those prohibiting discrimination) that overlap with the other freedoms. Some legislation was adopted, e.g. Council Directive 64/220/EEC of 25 February 1964 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1964] OJ 56/845.

The ECJ has recognised both provisions as both vertically and horizontally directly effective,¹¹ although whether Article 18 TFEU is horizontally directly effective in all situations is unclear.¹²

Several measures of secondary legislation overlap with these Treaty provisions. For over forty years, there were just two measures of secondary law granting the right to non-discrimination on grounds of nationality: Regulations 1612/68 and 1408/71. While these have now been replaced (by Regulations 492/2011 and 883/2004 respectively) and supplemented (by Directive 2004/38), they are worth considering separately. Regulation 1612/68 was based upon Article 46 TFEU (requiring legislation progressively to bring about free movement); it prohibited discrimination on grounds of nationality for workers in matters of employment and working conditions, including social and tax advantages.¹³ Regulation 1408/71 was based upon Article 48 TFEU (requiring legislation to resolve issues around aggregation and payment of social security benefits in a host Member State) and included a principle of equal treatment with workers of the host state.¹⁴ While both Regulations clearly overlap with Articles 18 and 45 TFEU in that they all prohibit discrimination on grounds of nationality, there are a number of important differences in terms of personal and material scope.

In terms of their personal scope, while all grant the right to equal treatment to workers, there are a number of pertinent differences. No reference is made to the nationality of workers in Article 45 TFEU (nor is there any such reference in Article 18 TFEU) yet both Regulations 1612/68 and 1408/71 limit the right to non-

¹¹ See Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* EU:C:1974:140, para. 18; Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463, para. 83; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* EU:C:2000:296, para. 32.

¹² M De Mol, 'The Novel Approach of the ECJ on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 *MJ* 109, 115.

¹³ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2 Article 7. To secure rights of entry and residence for employed persons, the legislature also adopted Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L 257/13. There had also been two earlier measures during the transitional phase: Règlement no 15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté [1961] OJ 57/1073 (no official English version); Règlement 38/64/CEE du Conseil du 25 mars 1964 relatif à la libre circulation des travailleurs à l'intérieur de la Communauté [1964] OJ 62/965; Directive 64/240/CEE du Conseil, du 25 mars 1964, relative à la suppression des restrictions au déplacement et au séjour des travailleurs des États membres et de leur famille à l'intérieur de la Communauté [1964] OJ 62/981.

¹⁴ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2, Article 3. This followed the structure of Règlement No 3 concernant la sécurité sociale des travailleurs migrants [1958] OJ 30/561.

discrimination to 'nationals of one of the Member States'.¹⁵ Similarly, Article 45 TFEU does not require workers to be in a host Member State, opening up the possibility of its application to situations of 'reverse discrimination'. However, the Regulations require, some form of cross border connection.¹⁶ The complexities of overlap can be highlighted here. When interpreting the Treaty, the ECJ will need to determine whether the Treaty ought to be equally limited - thereby respecting a clear political choice by the legislature to restrict equal treatment only to Member State nationals¹⁷ - or whether separate Treaty-based rights outside of secondary legislation could be created for both third-country nationals and workers in their home Member States.

What is more, Articles 18 and 45 TFEU have also both been interpreted as applying to persons falling outside the personal scope of the Regulations. First, the ECJ established limited equal treatment rights for jobseekers on the basis of Article 45 TFEU. In *Antonissen*,¹⁸ the ECJ had held that limited residence rights for jobseekers could be derived directly from Article 45 TFEU outside the secondary law framework.¹⁹ The ECJ extended the rights of jobseekers in *Collins* to include a limited right to equal treatment as regard 'benefit[s] of a financial nature intended to facilitate access to employment in the labour market of a Member State'.²⁰ Similarly, in *Martínez Sala*, the ECJ held that the right to equal treatment in Article 18 TFEU extended to economically inactive Union citizens lawfully resident in a host Member State under national law, even if they lacked a right of residence under Union law.²¹ The consequence was that a Union citizen no longer needed to satisfy the personal scope of Regulations 1612/68 or 1408/71 in order to be able to claim equal treatment to the benefits falling within their material scope. If they were lawfully resident in the Member State (whether under Union or national law) they could rely upon Article 18 TFEU. This case law was later extended to student finance.²²

In terms of material scope, Regulations 1612/68 and 1408/71 and Articles 18 and 45 TFEU all prohibit discrimination when it comes to certain benefits and certain aspects of employment. Regulation 1408/71 grants the right to equal treatment to

¹⁵ Regulation 1408/71, Article 2(1). See also, Regulation 1612/68 Article 7(1).

¹⁶ Regulation 1612/68 Article 7(1).

¹⁷ An alternative argument posits that the goals on integration require free movement of *all* persons. See e.g. A Evans, 'Third Country Nationals and the Treaty on European Union' (1994) 5 *European Journal of International Law* 199, 201; D Kochenov and M Van Den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in D Thym and M Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (2015) 66-100, 71-72.

¹⁸ Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* EU:C:1991:80, paras 13-14.

¹⁹ Equal treatment did not extend to cover social benefits.

²⁰ Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172, para. 63.

²¹ Case C-85/96 *Martínez Sala* EU:C:1998:217, paras 59-63.

²² Case C-209/03 *Dany Bidar* EU:C:2005:169.

social security benefits²³ and a hybrid category of benefits known as special non-contributory benefits,²⁴ but explicitly does not cover social assistance benefits.²⁵ Regulation 1612/68 grants the right to equal access to employment and to certain social and tax advantages once in employment.²⁶ Article 45(2) TFEU prohibits discrimination 'as regards employment, remuneration and other conditions of work and employment'. Article 18 TFEU grants the right to equal treatment to those benefits falling within the scope of the Treaty. The decision in *Martínez Sala* suggests that this covers those benefits falling within the material scope of both Regulations. There is thus less divergence in terms of what is covered.

Starting in the early 2000s, this legislative framework has been added to and replaced. The Regulations 1612/68 and 1408/71 have been replaced by Regulations 492/2011 and 883/2004 respectively, although these introduce no pertinent changes for present purposes. Directive 2004/38, however, does appear to alter the existing framework. The Directive grants a general right to non-discrimination on grounds of nationality as regards benefits within the scope of the Treaty²⁷ to all Union citizens resident on the basis of that Directive. A Union citizen will be lawfully resident in the following situations: for the first three months without the need to meet any conditions;²⁸ beyond three months if they are employed or self-employed in the host Member State²⁹ or meet

²³ Social security benefits are listed exhaustively in Article 3 of Regulation 883/2004 and include benefits relating to sickness, maternity and paternity, invalidity, old-age, survivors', occupational accidents and diseases, death, unemployment, pre-retirement and family. To amount to social security, a benefit must cover one of these risks and be granted as of right to recipients in a legally defined position: Case 1/72 *Frilli v Belgian State* EU:C:1972:56, para. 14; Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* EU:C:1985:139, para. 12.

²⁴ Special non-contributory benefits were introduced by Regulation 1247/92 amending Regulation 1408/71: Regulation 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1992] OJ L 136/1. Special non-contributory benefits and are now listed in Annex X to Regulation 883/2004.

²⁵ Article 3(5). The ECJ has described national legislation on certain benefits as being akin to social assistance 'where it prescribes need as an essential criterion for its application and does not stipulate any re-quirement as to periods of employment, membership, or contribution'. See *Frilli*, para. 14; Case 187/73 *Callemeyn* EU:C:1974:57, para. 7.

²⁶ Social advantages are a broad concept covering all benefits 'whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community': Case C-207/78 *Even* EU:C:1979:144, para. 22; *Hoeckx*, para. 20; Case 122/84 *Scrivner v Centre public d'aide sociale de Chastre* EU:C:1985:145, para. 24.

²⁷ Article 24(1).

²⁸ Article 6. One caveat is that Union citizens must hold a valid identity card or passport and third country national family members must hold a valid passport.

²⁹ Article 7(1). This status can be retained in the following circumstances a) temporary inability to work due to an illness or accident; b) involuntarily unemployed after being in employment for over a

certain conditions regarding resources and sickness insurance;³⁰ and so longer as they can 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'³¹ Although, the Directive also permits derogations from the right to equal treatment. According to Article 24(2), 'The host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or [to jobseekers] nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid... to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

The Directive does appear to be narrower than Articles 18 and 45 TFEU in several ways. First, it appears to be in tension with the right to equal treatment to social benefits developed in the *Martinez Sala* case law and potentially also the case law on service recipients.³² According to *Martinez Sala*, one could benefit from Article 18 TFEU as an EU citizen lawfully residing in a host Member State under national law without any requirements of sufficient resources.³³ In contrast, Directive 2004/38 implies that only 'Union citizens residing *on the basis of this Directive* in the territory of the host Member State shall enjoy equal treatment' (emphasis added) suggesting that the conditions of sufficient resources and health insurance must be met before a claim to equal treatment on any ground can be made. Second, the Directive could be interpreted as limiting the rights of job-seekers developed via interpretations of Articles 45 and 18/21 TFEU. Article 24(2) states that 'the host Member State shall not be obliged to grant jobseekers equal treatment with regard to social assistance'.³⁴ Both strands of case law are based upon interpretations of primary law and so the ECJ is left with the question to what extent ought the secondary legislation redefine overlapping Treaty provisions.

What this section has aimed to demonstrate is how Articles 18 and 45 TFEU overlap with Regulations 1612/68, 1408/71, 883/2004 and 492/2011 and with Directive 2004/38.

year; (c) unemployed after less than a year of working; (d) after embarking on a period of study or vocational training

³⁰ According to Article 7(1)(b), Union citizens who are not working or self-employed on-economically active EU citizens will only be granted a right of residence if they can prove they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover. According to Article 7(1)(c) students must have comprehensive sickness insurance and be able to 'assure' the national authority that they have sufficient resources for themselves and their family members.

³¹ Citizens Rights Directive, Article 14(4)(b).

³² Both lines of case law are grounded in interpretations of primary law. The *Martinez Sala* case law is grounded in an interpretation of Article 18 TFEU whereas the service recipient case law is grounded in an interpretation of both Articles 21 and 56 TFEU.

³³ Although, in *Bidar*, the ECJ did recognise that Member States might require 'a certain degree of integration into the society of that State' before granting maintenance grants for students. See *Bidar*, para. 57.

³⁴ Directive 2004/38 Article 14(4)(b).

While each norm discussed grants the right to non-discrimination on grounds of nationality there are important differences in terms of both to whom and as regards what equal treatment is granted. This makes the inter-relationship between these norms particularly important.

3. Legal Orthodoxy: The Hierarchy of Norms

The differences between Articles 18 and 45 TFEU and overlapping secondary legislation prohibiting discrimination on grounds of nationality highlight the importance of their inter-relationship. To what extent, then, should the overlapping secondary measures be understood as exhaustive of the Treaty provisions? Given the potentially broader scope of the Treaty provisions in several ways the answer to this question can affect a Union citizen's right to equal treatment. This Section examines how one would expect this question to be answered *in theory*.

It should first be noted that the Treaty framework lacks guiding principles that can fully explain the inter-relationship between primary and secondary law within the EU. It is axiomatic that secondary legislation can be invalidated for its incompatibility with the Treaty, but that does not explain the role of the Treaty when secondary legislation *is* compatible. Secondary legislation in this area is specifically intended to 'bring about',³⁵ free movement, but this does not explain its relationship to Treaty provisions. In fact, it was once questioned whether certain Treaty freedoms were ever intended to operate as freestanding prohibitions or were they only intended as guiding principles to be fleshed out by legislation? In *Van Binsbergen*, for instance, the Irish government argued that freedom of establishment and the free movement of services required 'a detailed and careful process of analysis and consideration' and so should be achieved only within the limits of directives issued.³⁶

In the absence of any specific provisions, legal orthodoxy suggests that the principle of the hierarchy of norms ought to apply here. According to legal convention,³⁷ the maxim of *derogat legi inferiori* - i.e. the hierarchically superior rule should trump the hierarchically inferior rule - should determine the inter-relationship between Treaty provisions and measures of secondary law. So, the default assumption of many lawyers would be that turning to consider the Treaty is unproblematic and that 'primary law does and should take priority over secondary law, and that the adoption of secondary legislation should not affect the way in which primary law is

³⁵ Article 46 TFEU.

³⁶ Case 33/74 *Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid* EU:C:1974:131; [1974] ECR 1299, 1302.

³⁷ On the principle but also in both national and international legal theory. See R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in T Broude and Y Shany (eds), *Mutli-Sourced Equivalent Norms in International Law* (Hart 2011) 23

interpreted.³⁸ In theory, then, should e.g. Regulation 1612/68 not extend to cover a particular situation, the ECJ ought to turn to consider whether Articles 18 or 45 TFEU might be interpreted as so doing.

The broad wording of the Treaty provisions means, however, that there are very few situations they might not be interpreted as covering. Davies has discussed how many Treaty norms take the form of ‘purposive powers’ i.e. powers defined in terms of a particular aim to be achieved (in this instance, securing the internal market and prohibiting discrimination on grounds of nationality).³⁹ When interpreting such norms the ECJ is constrained by specific goals but not as regards the subject matter and breadth of impact.⁴⁰ Thus, while the ECJ could use its interpretative role to limit the breadth of the Treaty freedoms,⁴¹ it is equally able to interpret the provisions very broadly. What is more, once the ECJ has acted to bring a particular situation within the scope of the Treaties, the doctrines of direct effect and supremacy make it very difficult for the legislature to re-regulate the situation and reach a different conclusion at a later point.⁴²

The broad wording of the Treaties combined with the implications of finding that a situation falls within the scope of the Treaties, suggest that hierarchy as the default solution to overlaps between the Treaty and secondary legislation may be insufficiently nuanced. While it might ensure the protection of the right to equal treatment, recent scholarship has highlighted how recourse to the Treaty has the potential to diminish the role of the EU legislature with its clearer democratic credentials.⁴³ What is more, turning to the Treaty in situations not covered by secondary law has the potential to further expand the scope of application of EU law. As has been increasingly highlighted, this has negative consequences from the perspective of solidarity and from the standpoint of democratic contestability.⁴⁴

³⁸ P Syrpis, ‘The Relationship between Primary and Secondary Law in the EU’ (2015) 52 *CML Rev* 461, 461.

³⁹ G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21(1) *European Law Journal* 2, 2.

⁴⁰ Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ 3.

⁴¹ Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ 5.

⁴² Dehousse, *European Court of Justice* (n 177) 81; Davies, ‘Legislative control of the European Court of Justice’ (n 66) 1584.

⁴³ See P Syrpis, ‘Theorising the Relationship between the Judiciary and the Legislature in the EU Internal Market’ in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012); G Davies, ‘Legislative control of the European Court of Justice’ (2014) 51(6) *CML Rev* 1579; P Syrpis, ‘The Relationship between Primary and Secondary Law in the EU’ (2015) 52(2) *CML Rev* 461.

⁴⁴ See e.g. J Weiler, ‘Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12 *International Journal of Constitutional Law* 94.

4. The Approach of the ECJ

This section discusses the approach of the ECJ when faced with overlapping provisions of the Treaty and secondary legislation; does the ECJ treat secondary legislation as exhaustive of the Treaty or is the hierarchy of norms determinative in this situation? In cases in which Articles 18 and 45 TFEU and secondary legislation prohibiting discrimination on grounds of nationality overlap, four different approaches of the ECJ are identifiable:

- 1) After establishing that secondary legislation does not cover the situation, the ECJ will then turn to consider whether the Treaty can be interpreted as so doing.⁴⁵
- 2) The ECJ will (re)interpret secondary legislation in line with the Treaty.⁴⁶
- 3) After considering secondary legislation, the ECJ does not turn to consider whether the situation might fall within the scope of the Treaty.⁴⁷
- 4) The ECJ interprets the Treaty in line with secondary legislation.⁴⁸

However, not only does the ECJ adopt several different approaches, but it is also difficult to identify when the ECJ will adopt one approach over another.

Whether Legislation Gives an Answer

One argument is that where legislation actually gives an answer (as opposed to simply not covering the situation) the ECJ ought to be more deferential to the choices of the legislature.⁴⁹ Yet this does not appear consistent with ECJ practice.

In both the recent case of *Dano* and the earlier cases of *Martínez Sala* and *Trojani*, the situation fell outside the personal scope of the relevant secondary legislation, yet the

⁴⁵ E.g. Case 152/82 *Forcheri v Belgian State* EU:C:1983:205, [1983] ECR 2323, para. 17; Case 293/83 *Gravier v Ville de Liège* EU:C:1985:69, paras 21-25; *Martínez Sala* (n 21), paras 45, 63; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* EU:C:2000:296, paras 27-28; Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* EU:C:2000:530, paras, 41, 45-45, 50; Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* EU:C:2002:16, paras 28, 34; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172, para. 63; Case C-456/02 *Trojani* EU:C:2004:488; Case C-209/03 *Dany Bidar* EU:C:2005:169.

⁴⁶ E.g. Case 23/71 *Janssen v Landsbond der Christelijke Mutualiteiten* EU:C:1971:101; Case 75/63 *Hoekstra* EU:C:1964:19, [1964] ECR 177; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* EU:C:2009:344.

⁴⁷ E.g. Case 16/72 *Ortskrankenkasse Hamburg v Landesversicherungsanstalt Schleswig-Holstein* EU:C:1972:100; Case 75/76 *Kaucic* EU:C:1977:46; Case C-23/92 *Grana-Novoa v Landesversicherungsanstalt Hessen* EU:C:1993:339; Case C-204/01 *Klett* EU:C:2002:634; Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597.

⁴⁸ E.g. Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630; *Vatsouras* (n 46); Case C-45/12 *Office national d'allocations familiales pour travailleurs salariés (ONAFTS) v Radia Hadj Ahmed* EU:C:2013:390.

⁴⁹P Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52(2) *CML Rev* 461, 484.

ECJ did not turn to consider the relevance of the Treaty in both cases. In the latter cases, both Ms Martínez Sala and Mr Trojani claimed equal access to social benefits that fell within the material scope of either or both Regulations 1612/68 and 1408/71.⁵⁰ However, they both fell outside the personal scope of the Regulations – both lacked the status of worker.⁵¹ They were, however, lawfully resident under national law.⁵² In *Martínez Sala*, the ECJ considered that the dual factors of her EU citizenship -with the corresponding right to move and reside⁵³ - and her lawful residence in Germany⁵⁴ meant that '[a]s a national of a Member State lawfully residing in the territory of another Member State' she fell within the personal scope of EU citizenship⁵⁵ and so could invoke the right not be discriminated against on grounds of nationality in all situations within the material scope of EU law.⁵⁶ Similar reasoning was adopted in relation to Mr Trojani. The result was that while Ms Martínez Sala and Mr Trojani fell outside the personal scope of the Regulations, the ECJ still granted them the right to equal treatment to the benefits covered by those measures on the grounds of their lawful residence in the host Member State *by turning to consider Article 18 TFEU*.

In *Dano*, the factual scenario was quite similar to that in *Martínez Sala* and *Trojani*. Ms Dano claimed equal treatment as regards certain social benefits⁵⁷ in a host Member State. However, she was not a worker (and so she fell outside the personal scope of Regulation 1612/68), was not searching for employment and did not have sufficient resources to support herself (and so fell outside the personal scope of Directive 2004/38).⁵⁸ Ms Dano was, therefore, not entitled to equal treatment under any of the secondary measures. Yet, the ECJ did not then turn to discuss Article 18 TFEU.⁵⁹ While Ms Dano and her son had been issued residence certificates,⁶⁰ Nic Shuibhne notes 'there was no discussion in the judgment of whether [Ms Dano] was lawfully resident under national law, activating equal treatment rights under *Martínez Sala*...

⁵⁰ The child-raising allowance claimed by Ms Martínez Sala was both a snbc and a social advantage. The minimex claimed by Mr Trojani was a social advantage only (Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* EU:C:1985:139, para. 15, Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458, para. 27).

⁵¹ *Martínez Sala* (n 21), para. 45

⁵² *Martínez Sala* (n 21), para. 60.

⁵³ *Martínez Sala* (n 21), para. 59.

⁵⁴ *Martínez Sala* (n 21), para. 60.

⁵⁵ *Martínez Sala* (n 21), para. 61.

⁵⁶ *Martínez Sala* (n 21), para. 63.

⁵⁷ The subsistence benefit claimed by Ms Dano amounts to 'social assistance' under the Citizenship Directive and a 'special non-contributory cash benefit' under Regulation 883/2004.

⁵⁸ She may have fallen within the personal scope of Regulation 883/2004, but this relates more to the inter-relationship between Regulation 883/2004 and Directive 2004/38.

⁵⁹ *Dano*, para. 82.

⁶⁰ *Dano*, para. 36.

[i]nstead, the Court concentrated *exclusively* on Directive 2004/38'.⁶¹ The ECJ barely considered Union primary law, focusing instead on provisions of secondary legislation it claimed give 'specific expression' to Article 18 TFEU.⁶²

In each of *Dano*, *Martínez Sala* and *Trojani*, then, the applicant fell outside the personal scope of the relevant secondary measure(s) yet the ECJ took an opposite approach to the role of the Treaty. One might argue that the approach in *Dano* is preferable because it better respects the intention of the EU legislature to limit equal treatment as regards social benefits to a certain category of Union citizens.⁶³ The difficulty with this argument is that it is very difficult to infer a specific intention from what is not included in secondary legislation. What is more, where secondary legislation does not aim to harmonise the rights of Union citizens, it would seem contrary to the primary nature of the right to non-discrimination to assume that the EU legislature specifically intended to preclude recourse to the Treaty in order to fill gaps in the legislative framework. The argument is far stronger, however, where secondary legislation does provide an answer. Yet, even here, the ECJ does not adopt a consistent approach to the role of the Treaty. This is evident if one contrasts *Hendrix* with *Alimanovic*.

The applicant in *Hendrix* - a Dutch national - was both working and residing in the Netherlands while in receipt of the *Wajong* (a special non-contributory benefit⁶⁴ and a social advantage).⁶⁵ Upon moving his place of residence to Belgium, but continuing to work in the Netherlands, his *Wajong* payments were stopped.⁶⁶ The ECJ had to answer the question: did the Netherlands act lawfully in stopping Mr Hendrix's entitlement to the benefit?⁶⁷ The ECJ began by considering Regulation 1408/71 and found the decision to stop paying the benefit compatible with EU law. As a special

⁶¹ N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *CML Rev* 889, 908 (emphasis added).

⁶² *Dano*, para. 62.

⁶³ For similar arguments in relation to other cases see: M Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 119-165, 139; H Verschueren, 'The EU social security co-ordination system: A close interplay between the EU legislature and judiciary' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012) 199.

⁶⁴ Case C-287/05 *Hendrix* EU:C:2007:494, paras 17-18.

⁶⁵ *Hendrix*, para. 49.

⁶⁶ *Hendrix*, para. 19. In Case C-112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-00429, the ECJ held that 'reverse frontier workers' fell outside the scope of the free movement provisions. However, in *Hartmann* and *Hendrix*, the ECJ confirmed that a person who transfers their residence, but not their place of employment falls within the scope of the free movement provisions. See Case C-212/05 *Hartmann* EU:C:2007:437, paras 17-20; *Hendrix*, para. 46. See further M Cousins, 'Free Movement of Workers, EU Citizenship and Access to Social Advantages' [2007] 14(4) *MJ* 343, 344.

⁶⁷ *Hendrix*, para. 34.

non-contributory benefit⁶⁸ the Netherlands did not have to extend the Wajong to non-residents.⁶⁹ However, the ECJ then went on to consider whether the refusal to grant Mr Hendrix the benefit was nevertheless contrary to Article 45 TFEU, holding that any residence condition required objective justification.⁷⁰ Even though Regulation 1408/71 specifically permitted the Netherlands to deny Mr Hendrix the benefit, the ECJ still turned to consider whether a different conclusion could be reached under the Treaty.

This contrasts with *Alimanovic*. As will be recalled, Directive 2004/38 includes an explicit derogation from the right to equal treatment for EU citizens and Article 24(2) explicitly states that ‘the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for [jobseekers]’. This restriction appeared somewhat inconsistent with earlier case law in which the ECJ held that jobseekers had a right to equal treatment as regards social benefits that facilitate access to the host State labour market.⁷¹ Yet, in *Alimanovic*, the ECJ accepted the limits in Directive 2004/38 holding that the right to equal treatment to social assistance did not need to be extended to jobseekers.⁷² The ECJ does so without even mentioning how the position of jobseekers is governed by Article 45 TFEU.

When secondary legislation gives an answer, there would seem to be a stronger argument for deferring to the outcome prescribed by secondary legislation. When legislation does prescribe a particular result, however, a legislative compromise has been reached and the ECJ ought to be more sensitive to this. In *Hendrix*, for instance, the ECJ essentially overrode a fraught political compromise. The decision to make special non-contributory benefits non-exportable, for instance, came about amidst considerable controversy.⁷³ The ECJ had held in several cases that mixed benefits (with characteristics of both social security and social assistance) fell within the scope of Regulation 1408/71 and so could be exported.⁷⁴ The French government, in particular, objected to this and refused to grant mixed benefits to any non-residents; a decision that culminated in infringement proceedings before the ECJ.⁷⁵ When

⁶⁸ *Hendrix*, para. 35.

⁶⁹ *Hendrix*, para. 38.

⁷⁰ *Hendrix*, para. 50. While the residence condition was considered justified (paras 54-56), but this does not detract from the ECJ's willingness to depart from the rules set out in Regulation 1408/71.

⁷¹ Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172, para. 63.

⁷² *Alimanovic*, para. 58.

⁷³ AP Van Der Mei, ‘Regulation 1408/71 and co-ordination of special non-contributory benefit schemes’ (2002) 27(5) *EL Rev* 551, 557; AP Van Der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart 2003) 151-56.

⁷⁴ e.g. Case 24/74 *Caisse régionale d'assurance maladie v Biason* EU:C:1974:99, para. 22; Case 139/82 *Piscitello* EU:C:1983:126, para. 16.

⁷⁵ Case C-236/88 *Commission v France* EU:C:1990:303, paras 5-6. See also Van der Mei, ‘Regulation 1408/71 and co-ordination of special non-contributory benefit schemes’ 557.

France eventually lost,⁷⁶ the Council began to take legislative action towards limiting the exportability of mixed benefits.⁷⁷ Eventually, the rules on special non-contributory benefits were introduced by Regulation 1247/92⁷⁸ amending Regulation 1408/71. Non-exportability of special non-contributory benefits still retains considerable support in the legislature: when codifying and amending Regulation 883/2004 the policy decision to restrict their exportability was reaffirmed at all stages of the legislative process.⁷⁹

Where the secondary measure does prescribe a particular result, then, this is clear evidence of legislative intent. While this does not mean the ECJ ought to treat the legislation as exhaustive in all situations (particularly where it may limit the right to equal treatment), the allocation of powers within the Treaty does suggest greater respect for the political compromise reached.

Article 21 TFEU

Another argument potentially explaining greater deference to secondary legislation relates to the special role played by Article 21 TFEU in cases relating to economically inactive Union citizens. Article 21 TFEU states that 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.' One argument is that in cases relating to the economically inactive such as *Dano* and *Alimanovic*, the ECJ is actually imputing the capacity of Article 21 TFEU to be limited by secondary legislation 'back to Article 18 indirectly by way of Article 21 TFEU as a "special provision" in the Treaty.'⁸⁰

⁷⁶ *Commission v France*, para. 20.

⁷⁷ A Commission proposal had been sent to the Council earlier, but there had been a lack of action. See Van der Mei, 'Regulation 1408/71 and co-ordination of special non-contributory benefit schemes' 558.

⁷⁸ Regulation 1247/92 .

⁷⁹ The Commission, in explaining its proposal, noted that such benefits 'are an exception to the residence rule - they cannot be exported' Commission, *Proposal for a Council Regulation (EC) on coordination of social security systems COM(1998) 779 final* (1998) 14. The Council, in the parameters it set out for reforming Regulation 1408/71 agreed that 'certain benefits should not be exportable, particularly when they are closely linked to the social context of a specific Member State ("mixed-type non-contributory benefits") or should be exportable only within certain limits or in certain situations (unemployment benefits). However, it is important to delimit and define clearly the category of benefit to which the principle of exportation would not apply or would apply in a restricted manner, while respecting the principle of freedom of movement.' Council, *2392nd Council meeting, 3 December 2001* . See also European Parliament, 'Minutes Wednesday 3 September 2003' [2004] OJ C 76E/117ß ; Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on coordination of social security systems' COM(2003) 596 final (2003); Council, *2535th Council meeting, 20 October 2003*

⁸⁰ Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (n 61) 909 (emphasis in original).

The difficulties with this argument are threefold. Firstly, it is not only in cases relating to the right to move and reside for economically inactive Union citizens that the ECJ adopts a deferential approach to Union legislation.⁸¹ Second, this fails to recognise the fundamentality of the principle of equal treatment to the EU legal order.⁸² Finally, it does not fit the wording of Article 18 TFEU since, as Van der Mei notes, this provision 'clearly refers to derogations contained in the Treaties, not to limitations contained in EU legislation.'⁸³

Summary

The demonstrates that the ECJ has adopted an inconsistent approach to the inter-relationship between overlapping Treaty provisions and secondary measures. Not only does the ECJ adopt an inconsistent approach, but it is also difficult to identify any guiding principles behind when the ECJ adopts one approach over another.

5. The Need for (New/Refined) Interpretative Principles

The previous Section demonstrated that the ECJ adopts an inconsistent approach to how overlapping provisions of the Treaty and secondary legislation. The overlap between the different norms seems to allow the ECJ to choose between regimes without having to justify its choices.⁸⁴ Certainly, the hierarchy of norms cannot account for the Court's case law.

It is submitted that in a Union based on the rule of law there is a need for greater clarity about when the ECJ will treat secondary legislation as exhaustive or interpret the Treaty in line with the limits therein and when the ECJ will interpret secondary legislation in line with the Treaty and when it is appropriate to turn to the Treaty. Given the differences between the Treaty provisions and overlapping secondary measures how the measures inter-relate can affect a Union citizen's fundamental right to equal treatment. It is the responsibility of the ECJ to develop greater clarity in this regard.

⁸¹ See e.g. *Ortskrankenkasse Hamburg* ; *Kaucic* ; *Grana-Novoa*; *Klett. X ref*

⁸² Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (n 61) 909-10.

⁸³ AP Van Der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship' (2011) 18 *MJ* 62, 73.

⁸⁴ C.f. the notion of 'judicial borrowing' as set out by Broude and Shany: Broude and Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' 10. See also, B Pirker, 'Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011).

Different considerations pull in different directions in terms of exactly when limits set out in secondary legislation should be respected and when it is appropriate to turn to the Treaty.

One might praise approaches that interpret secondary legislation in line with the Treaty or which turn to consider the Treaty (approaches 1 and 2 above) for ensuring protection of the fundamental right to equal treatment and respecting the hierarchy of norms. The difficulty is that, in particular where the legislation prescribes a particular result adopting an approach based on hierarchy can disrupt legislative compromises with their arguably greater democratic credibility. What is more, such an approach is contrary to the allocation of powers under the Treaty. The EU legislature has been given a clear role in securing free movement and where it has spoken this ought not be overridden without serious consideration.

What is more, when turning to the Treaty if secondary legislation does not apply the ECJ expands the scope of application of EU law. When interpreting the Treaty, the ECJ ought to be cognisant of overlapping secondary legislation and its limits, even if it does not cover the situation at hand. In particular, the ECJ might be wary of applying Treaty provisions horizontally in situations outside of the legislation. In *Ferlini*, for instance, the ECJ turned to the Treaty after finding that secondary legislation did not apply and by doing so brought private operators within the scope of application of Article 18 TFEU.⁸⁵ Similarly, in *Angonese*, the ECJ relied upon Article 45 TFEU to bypass Regulation 1612/68 and thereby brought the hiring practices of private companies within the scope of application of EU law.⁸⁶ The discretion of the ECJ in interpreting the Treaty extends so far as to include the horizontal and vertical direct effect of Treaty provisions as well as their substantive scope. The implications for legal certainty are far greater when private operators are concerned. If existing legislation does not extend this far, the ECJ might be wary of doing so.

6. Conclusion

This paper has demonstrated the difficulties that stem from overlapping Treaty provisions and secondary legislation in the EU legal order. While legal orthodoxy

⁸⁵ Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* EU:C:2000:530, para. 50.

⁸⁶ Horizontal direct effect of the Treaty provisions had been recognised in earlier cases but only as regards a measure 'aimed at regulating in a collective manner gainful employment and the provision of services'. E.g. *Walrave, Bosman*. *Angonese* confirmed it applied outside of those situations. See P Caro De Sousa, 'Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms' (2013) 2 *Cambridge Journal of International and Comparative Law* 479, 483-84.

suggest that the principle of the hierarchy of norms ought to govern, the ECJ's does not consistently adopt this approach and nor does it satisfy competing interests such as respect for institutional balance and the scope of application of EU law. It is submitted that there is a need for the ECJ to articulate when it will show greater deference to secondary legislation and when it will interpret it in line with the Treaty or turn to analyse the situation legislation. It is suggested in particular that when legislation prescribes a particular result the ECJ ought to be more deferential.