THE EFFECTIVENESS AND APPLICATION OF EU AND EEA LAW IN NATIONAL COURTS

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Principles of Consistent Interpretation

Edited by
Christian N.K. Franklin

intersentia
Cambridge – Antwerp – Chicago

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
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PREFACE

This book is the result of a research project borne of a combination of coincidence, curiosity and cooperation. As an English lawyer, I have lived and worked as an academic at the University of Bergen in Norway for many years now. Turning my hand from teaching EU law to EEA law, I was fascinated to see just how differently courts in the UK and Norway seemed to approach conflicts between national and EU/EEA law – particularly through the application of the principle of consistent interpretation. Casting my net a little further, I was further surprised how little I could find (in a language that I could master) on how courts in other EU/EEA countries have dealt with such conflicts. As it turned out, thankfully there were many other like-minded academic souls out there, at relatively similar stages in their careers, who shared my interest. Approaching potential contributors was made all the more easier given the timing of this project, which seems particularly ripe – not only in light of the book's EEA dimensions in the context of Brexit, but also considering the broader discussions raised over the past few years concerning the very dialogue and cooperation between the EU and EFTA Courts and national courts in practice.

Unlike many anthologies, this book represents a truly collaborative and cooperative effort. Core members of the project group were invited to a preparatory "kick-off" seminar at the University of Bergen, where potential issues to be addressed by all of the participants were discussed, and a time-line for the project settled. Following the preparatory seminar, a comprehensive questionnaire was designed, setting out a multitude of potential research problems related to the reception of the principle of consistent interpretation. First draft contributions provided the basis for further discussion, reflection and debate at a fruitful, two-day workshop. The workshop in fact proved key to the entire process in the end, providing a tangible point of reference for developing our texts in a more cohesive and in-depth manner. As readers will note, the contributors were encouraged to write their contributions as academic articles rather than mere mechanical responses to the questions provided. The workshop also therefore helped to provide a stronger sense of direction and common purpose to our research.

That is not to say that we consider our work complete. To the contrary, as a first edition, we hope to have provided merely the start of a discussion. Our own contributions will no doubt benefit from feedback and further reflection, and further digging into national case law. We have set up a blog for this purpose,

where we would kindly invite any feedback, comments, tips on cases, etc. related to any of the issues covered in this book. The blog can be accessed at http://consistentinterpretation.blogspot.com/. We have also only been able to provide a fragment of the entire picture in this first edition. The experiences of many countries are unfortunately notable in their absence. The reasons for this are partly due to financial limitations, and partly in an attempt to keep the project to manageable proportions in its infancy. Hopefully we will be able to add experiences from more countries in the next edition. If you might be interested in taking part in this project, please do not hesitate to get in touch (christian.franklin@uib.no).

There are many people that deserve special thanks in helping to see this project come to fruition. First and foremost are the contributors themselves, without which the plans for this book would have remained on the shelf, slowly gathering dust. It has been a joy working with and getting to know you all. My heartfelt thanks for all your time, patience and efforts. Our project has also been generously funded by various Research Groups at the University of Bergen's Faculty of Law, without which our seminar and workshop would not have been possible. I would also like to thank the staff of Intersentia, and particularly Ann-Christin Maak-Scherpe and Rebecca Moffat for their enthusiasm in taking this project on, and for giving us such excellent support at all stages of the publishing process.

Christian N.K. Franklin
Bergen, August 2018

QUESTIONNAIRE

Christian N.K. Franklin*

This questionnaire is intended to provide a framework for and to stimulate national reports on the application and effectiveness of the principle of consistent interpretation under EU and EEA law at national level. The national reports will in turn serve as the basis for a general report aimed at providing a comparative analysis of the main challenges facing both the national and EU/EEA legal orders in this regard. National reporters are therefore asked to respond to the issues and questions raised in the questionnaire from the perspective of how decisions of the ECJ and/or EFTA Court pertaining to the scope and content of the principle of consistent interpretation are applied in their jurisdiction.

It is important to stress that the questionnaire should be viewed as a source of inspiration, not of strict inquiry. Not all of the questions might be relevant to your country, or have been considered by your national courts. Equally, there may well be other issues or perspectives which are not addressed by the questionnaire which you feel deserving of mention – you should naturally feel free to do so.

Reporters should also not feel bound to considering only those decisions of national courts where a referral for a preliminary ruling or advisory opinion was made to the ECJ or EFTA Court. To the contrary, in light of the project's overall aims, it is probably even more important to try to uncover practice related to cases where national courts apply the principle without making referrals.

Regarding the format of the individual national reports, although the headings suggested have proven helpful in shaping the questionnaire itself, you should feel free to structure your report as you see fit. You are nevertheless encouraged to write your report more as an academic article than a strict mechanical response to each and every question and issue put forward below. The reports are to be written in English.

The national reports will form the backbone for the presentations and discussions to be held at the workshop. (…) You should view your report as

* Many thanks go to Joxerramon Bengoetxea, Sara Drake, Claes Granmar, Gunnar Thor Petursson and Grith Skovgaard Ølykke for their input and discussions on an early draft of this questionnaire, following a preparatory seminar held in Bergen at the start of the project.

a first (and not necessarily final) draft. Issues concerning common rules for formatting, annotations, citations etc. need therefore not concern us at this stage, but will naturally be addressed well before the deadline eventually set for final drafts for publishing.

BACKGROUND INFORMATION

One of the main aims of the project is to make accessible for a broader (European) public how national authorities apply EU/EEA principles in practice in their countries. In order to do so, it would be helpful for most readers to know more about the context in which EU/EEA law is applied at national level in your country. In addition to some general background information (e.g. population of your country; how long it has been a Member State of the EU/EEA, etc.), you may therefore consider providing some pointers on how your national court system is structured and how it functions in the context of your national constitutional order.

You should also aim to provide the reader with some basic, general guidance concerning the relationship between national law and international/EU/EEA law in your country – e.g. does your country take a monist or dualist view to the relationship between national and international law (or perhaps some hybrid of the two)? What are the defining constitutional (or equivalent legal) features regulating the relationship between your national legal system and the EU/EEA legal order?

It would also be helpful – both for readers and the general reporter – to know more about the empirical data forming the basis of your report, such as e.g.:

- What sources form the basis of your report (i.e. court decisions, administrative decisions, etc.)?
- How were the sources accessed and compiled – through databases available online, or manually?
- Have you focussed on a selection of data in your report? (E.g. limiting your enquiry to decisions of certain national courts; or to decisions addressed in academic literature of your home country and/or other countries?)
  - If so, how and why have you decided to delimit the decisions on which your analyses rely (e.g. to reduce the documentation to manageable proportions; due to accessibility problems; are all cases simply not reported)?
  - How (if at all) has your selection of data impacted on the overall picture presented in your report?
- How many decisions of national courts involve the application of the principle of consistent interpretation in your country? Indeed, is it possible at all (on the basis of the research tools available) to get such an overview?

- What policy areas do the cases you have looked at primarily concern – are there any patterns to be seen here?

Certain general observations concerning the relationship between national courts in your country and the EU/EEA (or EFTA) institutions may also provide helpful context, such as e.g.:

- Approximately how many cases (per year or as a whole) have been referred by national courts in your country to the ECJ or EFTA Court for a preliminary ruling or advisory opinion?
- In how many decisions of national courts in your country involving the application of the principle of consistent interpretation was a request made to the ECJ or EFTA Court for a preliminary ruling or advisory opinion?
- In cases where referrals were made to the ECJ/EFTA Court concerning the ambit and/or application of the principle, what were the final outcomes of those cases?
  - Did the reply from the ECJ/EFTA Court enable the national court to reach a final decision in the case?
  - Was the referring national court's decision appealed – and if so, what was the outcome?
  - Alternatively, have any cases been settled out of court following a reply from the ECJ/EFTA Court? If so, what is the culture for using settlement mechanisms in your country more generally – are settlements encouraged by national courts in your country, or subject solely to the wishes of the parties involved in the dispute?

THE CONCEPTUAL BASIS FOR THE OBLIGATION TO PERFORM CONSISTENT INTERPRETATIONS

Many different terms are used in the English language to describe the principle: Consistent interpretation, harmonious interpretation, conform interpretation, and indirect effect – to name but a few.

- How is the principle described in your country's language? Are various terms used, and what do they mean?

Most EU/EFTA states have long traditions in applying national principles of consistent interpretation to reconcile conflicting national and international rules. The ECJ for its part has repeatedly held that the obligation imposed on Member State authorities to interpret and apply national law in conformity

with EU law is "inherent in the Treaty", and rests on several legal bases (i.e. the duty of cooperation and the binding nature of Art. 288 TFEU).

- Do national courts in your country apply the principle of consistent interpretation directly, as an EU/EEA obligation in its own right; or do they apply similar national principles of consistent interpretation instead?
- If the latter, what do national courts say (if anything) about the relationship between the two? Put in another way; do national courts in your country consider the EU/EEA principle of consistent interpretation to have influenced the scope and/or application of national principles of consistent interpretation in any way; and if so, how and to what extent?
- In what way (if any) have national methods of construction needed to be adapted or modified in light of the EU/EEA principle of consistent interpretation?

Many (and presumably most) cases involving the application of the principle of consistent interpretation are raised by individuals seeking to protect their rights under EU/EEA law – either against other individuals, or against the state. In some cases, however, Member State authorities may (somewhat contradictorily) seek to rely upon the principle in a case against an individual. In principle – and subject naturally to adherence to general principles of law (legal certainty, etc.) – there should arguably be nothing to prevent this from happening under EU/EEA law: Whilst the protection of individual rights is an obvious and important facet to the very existence of the principle, so too is securing the effectiveness of EU/EEA law. And EU/EEA measures may very well have been designed, both in word and in purpose, precisely so as to impose obligations on individuals.

- Are there any examples of your country's authorities seeking to rely on the principle of consistent interpretation to their benefit in cases brought against individuals; and if so, how were they resolved by your national courts?

Where national courts face issues concerning (potentially) diverging EU/EEA rules and national law, the effectiveness of the former might naturally be secured through the possible application of several different EU/EEA principles in practice. In certain cases (such as e.g. C-282/10, *Dominguez*, ECLI:EU:C:2012:33), the ECJ has indicated a clear order of sequence for national courts to follow when seeking to apply them: Consistent interpretation, followed by direct effect, and finally state liability. In other cases, however, it has not been so clear as to the methodology (if any) which national courts should adopt in this regard.

- How do national courts in your country approach such issues – do they follow an established methodology, i.e. following a set sequence in each case?

- In cases where the principle of consistent interpretation has been applied by courts in your country, did they also consider applying the principles of direct effect and/or state liability to resolve the issue? If so, did the national court indicate any priority or preference between the application of these three principles?

THE GENERAL SCOPE OF THE PRINCIPLE OF CONSISTENT INTERPRETATION UNDER EU/EEA LAW

The ECJ has long held that the principle of consistent interpretation applies equally in vertical (state vs. private party) and horizontal situations (private party vs. private party).

- Do the national courts of your country do the same when applying national or EU/EEA principles of consistent interpretation?
- Do national courts in your country view the principle as applicable to all EU/EEA law, or only directives?

Drawing further on the duty of loyal cooperation, the ECJ has held that prior to the expiry of the implementation deadline for directives, national courts must refrain as far as possible from interpreting national law in a manner which might seriously compromise attainment of the objective(s) pursued by the Directive in question (see e.g. C-212/04, *Adeneler*, ECLI:EU:C:2006:443, para. 123).

- Have there been any cases where national courts in your country have been called upon to interpret national law in light of a directive prior to expiry of the deadline for its implementation?
- If so, how have they tackled such a task?

Although most cases will usually involve the interpretation of national legislative measures of some kind, according to the ECJ, the obligation to perform consistent interpretations extends to "national law as a whole" (e.g. C-397–403/01, *Pfeiffer*, ECLI:EU:C:2004:584).

- Are there any examples of other national legal sources – e.g. case-law, general principles, practices, contracts etc. – which national courts in your country have applied (or have considered applying) the principle to?
- In cases where they seek to perform consistent interpretations of national law, do national courts in your country treat measures specifically introduced

in order to implement EU/EEA law, and measures which are not, differently (i.e. as subjected to different standards)?

The ECJ has held that the obligation to interpret national law so far as possible in the light of EU law applies "(…) notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule" (C-371/02, *Björnekulla*, ECLI:EU:C:2004:275, para. 13.).

- What status do preparatory legislative works enjoy in your country's legal system?
- Is the extension of the duty to perform consistent interpretations regardless of what might be stated in preparatory legislative works in any way problematic under your national law (according to views of national courts)?
- Have any such issues been raised (directly or indirectly) in cases proceeding before national courts in your country – if so, how were they resolved?

Concerning the approach to consistent (and purposive) interpretation more generally: Are there any indications of national courts in your country paying more attention to the purpose of national (implementing) law (i.e. the national legislature's intent) than the purpose of the EU/EEA law with which it is to be interpreted in conformity with?

LIMITS TO THE PRINCIPLE OF CONSISTENT INTERPRETATION

The ECJ has often stated in its case-law that it is for the national courts to interpret and apply national law in conformity with the requirements of EU law, the general limitation being that they will only be required to do so "as far as possible". Of course, who is to determine what is possible or not – the national court or the ECJ – remains a debated issue to this very day. In many cases, the ECJ will be content to leave the issue for the national courts to decide by themselves. In certain cases, however, it will be much more forceful in its guidance to the national courts – e.g. either requiring a particular interpretative outcome in the case, or dismissing potential interpretations of national law put forward by the parties to the case and/or the referring national court. This raises inevitable questions concerning the outer limits and reach of the principle itself. According to the ECJ, the principle does not extend so far as to require interpretations in breach of general principles of law. Consequently, and connected to the general principle of legal certainty, national courts are, for example, not (generally) required to provide interpretations that the national law in question simply cannot bear (so-called *contra legem*-interpretations). There are nevertheless numerous examples from the case-law which indicate

that the ECJ will not always be sympathetic to such claims (see e.g. C-404/06, *Quelle*, ECLI:EU:C:2008:231; C-18/13, *Maks Pen*, ECLI:EU:C:2014:69; and C-306/12, *Spedition Welter*, ECLI:EU:C:2013:650). It is also difficult to know whether the "general principles" acting as limitations in this connection are those developed under EU/EEA law, or those existing under the national laws of the Member States, and what (if any) differing results their application might lead to in practice.

LIMITS TO NATIONAL METHODS OF INTERPRETATION AND OF THE JUDICIAL FUNCTION OF NATIONAL COURTS

- How far are national courts in your country willing to go to bring national law into line with EU/EEA law obligations?
- Have they given any indications (explicitly or implicitly; general or specific) as to how they read the "as far as possible"-limitation – e.g. as fashioned and tamed by national principles of construction and interpretation, or the role that national courts play in your legal system? Do they tend to focus on what may be possible in order to achieve consistent interpretations, or do they tend to focus on what is not possible (i.e. limitations to the principle)?
- Are there any examples of national courts neglecting to bring national law in line with EU/EEA obligations on grounds of lack of competence (i.e. because this was in some way beyond the limits of the judicial function of the courts under the national legal system)?
- Are there any examples of national courts neglecting to bring national law in line with EU/EEA obligations because the limits to national rules of interpretation were viewed as reached?
- Are there any examples of national courts performing consistent interpretations of national law in spite of any misgivings they may have had owing to fears of lack of competence and/or stretching the boundaries of national rules of construction/interpretation?
  - If so, are there any indications (explicit or implicit) as to whether they felt forced or (alternatively) empowered to do something they otherwise (normally) could not, under reference to their EU/EEA obligations?
- If any of the above, how open or transparent are national courts in your country in detailing the reasons underlying its decisions in such cases?

GENERALLY CONCERNING GENERAL PRINCIPLES AS LIMITATIONS

- Are there any examples from the case-law of your national courts where general principles of law (e.g. legal certainty, non-retroactivity, equity,

equality, *nulla poena sine culpa*, proportionality, etc.) were relied upon to limit application of the principle of consistent interpretation?
- If so, did the national court take national principles or equivalent EU/EEA law principles as their point of departure?
  - If the former, did the national court (explicitly or implicitly) further discern the scope and application of the national principles in light of their EU/EEA law equivalents?
  - If national general principles were applied, would/could the application of their EU/EEA equivalents have led to different results being reached?

SPECIFICALLY CONCERNING THE *CONTRA LEGEM*-LIMITATION AND LEGAL CERTAINTY

The term "*contra legem* interpretation" is used here to describe situations where national law is given "a meaning which clearly deviates from an initial (literal) reading of the provision concerned",[1] and interpretations "which cannot reasonably be supported by the relevant national texts".[2]

- Do national courts in your country use the same (or a similar) term, and if so, how do they define it in practice?
- Are *contra legem*-interpretations (as defined above) permitted more generally in your national legal order? If not, how are they prohibited (e.g. by express statute, constitutional provision or convention, precedent)?
- Are there any examples from the case-law of your national courts where strained/artificial interpretations of national law were carried out in order to avoid/resolve conflicts between two or more measures of *national law*?
- Are there any examples from the case-law of your national courts where the *contra legem*-limitation has been relied upon (explicitly or implicitly) to prevent the resolution of a conflict between two or more measures of *national law*?
- Are there any examples from the case-law of your national courts where strained/artificial interpretations of national law were carried out in order to achieve an interpretation consistent with EU/EEA law?
- Are there any examples from the case-law of your national courts where the *contra legem*-limitation has been relied upon (explicitly or implicitly) to rule out an interpretation of national law consistent with EU/EEA law?
- Are there any examples from national case-law in your country where specific interpretative results were required by the ECJ or EFTA Court

1 S. Prechal, *Directives in EC Law*, 2nd edition 2005, p. 207.

2 M. Dougan, "When worlds collide! Competing visions of the relationship between direct effect and supremacy", 44 (2007) *Common Market Law Review*, 931–963.

(such as e.g. in C-106/89, *Marleasing*, ECLI:EU:C:1990:395; and C-306/12, *Spedition Welter*, ECLI:EU:C:2013:650; where the national courts were precluded from interpreting national law in a way which did not comply with the directive)?

- Are there any examples from national case-law in your country where the ECJ or EFTA Court suggested that a consistent interpretation might be possible (such as e.g. in C-105/03, *Pupino*, ECLI:EU:C:2005:386; C-282/10, *Dominguez*, ECLI:EU:C:2012:33; and C-42/11, *Lopes Da Silva Jorge*, ECLI:EU:C:2012:517)?
  - If so, how was this dealt with by the national court in question when the case was returned for its final decision (i.e. what was the practical outcome of the case)?
- If any of the above, was it (theoretically and/or practically) possible to ensure the effectiveness of the EU/EEA rule in question by some other means in those cases (i.e. direct effect or state liability)?

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LIST OF ABBREVIATIONS

CSDP	Common Security and Defence Policy
DDA	(UK) Disability Discrimination Act 1995
EAT	(UK) Employment Appeal Tribunal
EAW	European Arrest Warrant
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ/CJEU	European Court of Justice/Court of Justice of the European Union
ECSC	European Coal and Steel Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EMU	Economic and Monetary Union
ESA	EFTA Surveillance Authority
ET	(UK) Employment Tribunal
EU	European Union
EUCFR	EU Charter of Fundamental Rights
EURATOM	Treaty Establishing the European Atomic Energy Community
FD	Framework Directive
FSAC	Finnish Supreme Administrative Court
FSC	Finnish Supreme Court
GFCC	German Federal Constitutional Court
IO	International Organisation
ItCC	Italian Constitutional Court
JHA	Justice and Home Affairs
OHIM	Office for Harmonisation in the Internal Market
OLW	Overleveringswet (Dutch Surrender Act)
SCA	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice
TEC	Treaty Establishing the European Community
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TUPE	(UK) Transfer of Undertakings (Protection of Employment) Regulations 1981

LIST OF CONTRIBUTORS

Judit Altena-Davidsen
Assistant Professor at Leiden University, the Netherlands

Vincent Couronne
Lecturer at the University of Versailles and Sciences Po Saint-Germain, France

Małgorzata Cyndecka
Postdoctoral Research Fellow at the University of Bergen, Norway

Sara Drake
Senior Lecturer in Law at Cardiff University, Wales, United Kingdom

Mohor Fajdiga
University of Ljubljana, Slovenia

Christian N.K. Franklin
Professor at the University of Bergen, Norway

Nils Grosche
Postdoctoral Research Fellow at Johannes Gutenberg-Universität Mainz, Germany

Tatiana Guarnier
Senior Researcher at the University of Camerino, Italy

Katerina Kalaitzaki
PhD Candidate and Research Fellow at the University of Central Lancashire, Cyprus

Elisabetta Lamarque
Associate Professor at the University of Milan Bicocca; Clerk of the Vice-President of the Constitutional Court, Italy

Stéphanie Laulhé Shaelou
Professor at the University of Central Lancashire, Cyprus

Samuli Miettinen
Associate Professor at Tallinn University, Estonia; Lecturer and Adjunct Professor at the University of Helsinki, Finland

Grith Skovgaard Ølykke
Associate Professor at the Copenhagen Business School; Director at Kammeradvokaten, Denmark

Gunnar Thor Petursson
Professor at Reykjavik University, Iceland; Director of the Internal Market Affairs Directorate, EFTA Surveillance Authority

Omar Berg Runarsson
Legal Officer at the Immigration and Asylum Appeals Board, Iceland

Christina D. Tvarnø
Professor at the Copenhagen Business School, Denmark

Saša Zagorc
Associate Professor at the University of Ljubljana, Slovenia