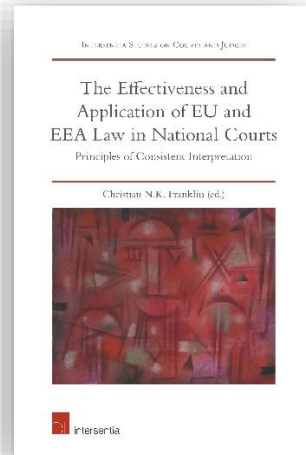


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Principles of Consistent Interpretation

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THE UK PERSPECTIVE ON THE PRINCIPLE OF CONSISTENT INTERPRETATION

Sara DRAKE*

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1. INTRODUCTION

This study of the principle of consistent interpretation, more commonly referred to as the *Marleasing* principle in UK law,¹ demonstrates the striking degree to which this method of statutory interpretation has been embedded in the practice of the UK national courts. Originating in the jurisprudence of the Court of Justice of the European Union (ECJ), and based on the principle of loyal co-operation set out in Art. 4(3) of the Treaty on European Union (TEU), the principle of consistent interpretation consists of a duty incumbent on all public authorities including national courts to interpret national law “as far as is possible to do so” in conformity with European Union (EU) law.² The principle of consistent interpretation plays a fundamental role in securing the effective enforcement of individual rights derived from EU law before a national court.³ This study reveals that the principle has been invoked in a wide range of policy areas including tax, employment, intellectual property, data protection, and health and safety in the UK. More recently, the application of this method of statutory interpretation has been consciously “assimilated” by the judiciary with the application of s. 3 of the Human Rights Act 1998 (HRA) despite their separate theoretical and schematic underpinnings.⁴

¹ Other English language terms used by academics and the UK judiciary include indirect effect, conform interpretation, and sympathetic interpretation.

² Case 14/83, *Von Colson*, [1984] ECR 1891.

³ See further S. Drake, “Twenty years after *Von Colson*: The impact of ‘indirect effect’ on the protection of the individual’s Community rights” (2005) 30(3) *European Law Review* 329–48.

⁴ This convergence was predicted by Betlem: G. Betlem, “The doctrine of consistent interpretation – Managing legal uncertainty” (2002) 22(3) *Oxford Journal of Legal Studies* 397–418, at p. 417.

This chapter makes an important contribution to the literature in three respects. First, it explores the conceptual basis and scope of application of the principle of consistent interpretation by the UK courts in a systematic manner.⁵ There has been very limited exploration of its application before UK courts by either EU or public law scholars in more recent years,⁶ and a notable absence of detailed discussion of its symbiotic relationship with s. 3 HRA.⁷ The chapter identifies three different phases in the approach of the UK judiciary, and considers (briefly) the implications of the UK's withdrawal from the EU, and predicts the emergence of a fourth phase. It is argued that the three phases in the evolution of the application of the principle of consistent interpretation by the UK courts reflect the changing perception of parliamentary sovereignty in the UK by the judiciary. Indeed, it is the tension between the traditional and "New View" of parliamentary sovereignty and its relationship with the supremacy of EU law which is the common thread in these three periods.⁸ The traditional view, embodied in the works of Dicey⁹ and Wade,¹⁰ advocates that Parliament is the supreme law-maker and cannot bind its successors. Proponents of the "New View" accept that Parliament is no longer the sole law-maker, and that it may be bound by international Treaty obligations (including those set out in the EU Treaties and European Convention on Human Rights), and that some law-making powers have been devolved to Scotland, Northern Ireland and Wales.¹¹

⁵ This analysis is qualitative in nature and broadly responds to the questionnaire distributed by the primary investigator. A quantitative study would have been too onerous within the timeframe of the study. When "Marleasing" is used as a search term (since the UK courts commonly use the term "Marleasing principle" and deem this judgment to be the leading ECJ case on the doctrine) in the Westlaw database, as of January 2017, it reveals just over 600 results.

⁶ For some examples, see Lord Mance, "The interface between national and European law" (2013) 38(4) *European Law Review* 437–56; W. Twining and D. Miers, *How to Do Things with Rules* (5th ed., Butterworths, 2010), pp. 321–25. For some analysis of earlier UK court decisions, see A. Arnull, "The Law Lords and the European Union: Swimming with the incoming tide" (2010) 35(1) *European Law Review* 57–87; Drake (n. 3); P. Craig, "Directives: Direct effect, indirect effect and the construction of national legislation" (1997) 22(6) *European Law Review* 519–38.

⁷ This is in marked contrast to the amount of ink spilt by public law scholars on the operation of s.3 (and s.4) HRA.

⁸ For more discussion of the academic debate amongst UK constitutional lawyers, see for example, P. Craig, "Britain in the European Union" in J. Jowell, D. Oliver, C. O'Cinneide (eds.), *The Changing Constitution* (8th ed., Oxford University Press, 2015), pp. 114–24; P. Craig, "Parliamentary sovereignty of the United Kingdom parliament after Factortame" (1991) 11 *Year Book of European Law* 221.

⁹ A. Dicey, *An Introduction to the Study of Law of the Constitution* (10th ed., Palgrave Macmillan, 1967).

¹⁰ H.W.R. Wade, "The basis of legal sovereignty" [1955] *Cambridge Law Journal* 172.

¹¹ A process of devolution to local government is underway in England.

Second, the chapter considers the more problematic application of the principle in two policy areas which are regulated to some degree by EU directives, namely motor insurance liability and annual leave. Third, the chapter allows for comparison with the application of the principle by the judiciary of the other Member States of the EU and EEA discussed in this volume. Over the past 40 years, there has been a gradual acceptance by the UK judiciary of its interpretative obligation under EU law. This has culminated in an approach which is more far-reaching than any of the other Member States discussed in this volume. Lord Mance has described the UK courts as being, "... more catholic than the Pope in their understanding of this interpretative duty".¹² This has been accompanied by the increasing knowledge and expertise of lawyers who have recognised that the principle of consistent interpretation can be a formidable weapon when seeking to assert EU rights on behalf of an applicant against the mightier state or an employer. It is noteworthy that the arguments of legal counsel have had a significant influence on the development of the jurisprudence.¹³

This contribution will first, and very briefly, set out the UK's position in (with) the EU in the rest of this section before exploring the nature of its constitutional settlement including the relationship between UK law and EU law (section 2). The contribution then sets out the three different phases in the application of the principle of consistent interpretation by the UK judiciary (section 3). This provides the foundation for a more detailed exploration of how the UK courts have determined the scope of their duty and applied the principle of consistent interpretation (section 4). The final section focuses on two substantive areas of EU policy where the application of the principle of consistent interpretation in relation to certain EU rights has been more problematic (section 5) before some concluding remarks are made. At the time of writing, the UK remains a full member of the EU, but is engaged in negotiating its withdrawal from EU in accordance with Art. 50 TEU. Where appropriate and possible to do so at a time of great uncertainty, reference will be made to the UK's withdrawal from the EU and the future application of the principle of consistent interpretation in the UK courts.

1.1. THE UK AS A MEMBER STATE OF THE EUROPEAN UNION

In his famous Zurich Speech in 1946, Sir Winston Churchill, who had been the UK's Prime Minister during the Second World War, called for "a kind of United States of Europe" to secure peace, safety and freedom on mainland

¹² Lord Mance (n. 6), 450.

¹³ See the impact of counsel's summary of the scope of the principle in *Vodafone 2 v. Revenue and Customs Commissioners* [2009] EWCA Civ 446, at paras. 37 and 38.

Europe. At that time, he did not envisage the UK being part of this political construct: the UK still had strong links with the Commonwealth. In 1960, the UK joined the European Free Trade Association (EFTA) with six other European states who were unable or unwilling to join the then European Economic Community (EEC).¹⁴ The UK finally joined the original six Member States to become a member of the EEC on the 1 January 1973 at the same time as the Republic of Ireland and Denmark. Two previous attempts to join in 1961 and 1963 had been vetoed by France.¹⁵ The UK, which consists of four countries, England, Wales, Scotland and Northern Ireland,¹⁶ is one of the largest Member States of the EU with a population of just over 65 million.¹⁷ To reflect its status, it has the same number of votes as France, Italy and Germany in the Council of the European Union¹⁸ and 73 MEPs¹⁹ in the European Parliament.

The UK's relationship with the EU has been complex and it has not followed the same path of integration as the other Member States. Some key developments are charted below. Not long after accession in 1973, a referendum was held on EU membership in 1975 resulting in a "yes" vote by 67 per cent with a 65 per cent turnout. In 1984, Margaret Thatcher, the British Prime Minister, successfully negotiated what has been termed the "UK rebate", a complex financial correction to the UK's annual contribution to the EU budget. In the negotiations leading up to the Maastricht Treaty, the UK secured opt-outs from Economic and Monetary Union (EMU) and the Social Chapter and was instrumental in incorporating the principle of subsidiarity into the Treaties to prevent "competence creep". The election of a new Labour Government in 1997 led to the adoption of the Social Chapter under the Treaty of Amsterdam and three opt-outs relating to the Area of Freedom, Security and Justice (AFSJ). A referendum was promised in the Labour Party manifesto on the

¹⁴ EFTA, an intergovernmental organisation, which promotes free trade and economic integration, was established in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland became an associate member in 1961 and a full member in 1986. Iceland joined in 1970. Liechtenstein joined in 1991. Many members subsequently left to join the EU. Current membership comprises of Iceland, Norway, Liechtenstein and Switzerland. To participate in the EU's Single Market, Iceland, Liechtenstein and Norway are also members of the European Economic Area (EEA) and subject to the authority of the EFTA Surveillance Authority and EFTA Court. Switzerland has a bilateral agreement with the EU.

¹⁵ The French President Charles de Gaulle was suspicious of the UK's close relationship with the US.

¹⁶ Note that Great Britain (GB) refers to England, Wales and Scotland.

¹⁷ The UK's Office for National Statistics annual mid-year estimate released on 23 June 2016 stood at 65,110,000 as of 30 June 2015. <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>>.

¹⁸ 29 votes each. See also the Committee of the Regions and the Economic and Social Committee with 24 votes each.

¹⁹ The 73 MEPs are divided as follows: Wales (4), Scotland (6), Northern Ireland (3) and England (60).

Constitutional Treaty 2004, but this was withdrawn once France and the Netherlands had failed to ratify the Treaty. A similar promise to offer a referendum was not pursued for the Treaty of Lisbon 2009.²⁰ The UK secured opt-ins in relation to the AFSJ and Schengen. A Protocol was agreed on the application of the EU Charter of Fundamental Rights in the UK courts.²¹ With the new Conservative-Liberal Democrat Coalition Government 2010–2015, the European Union Act 2011 was passed, which requires any amendment to the TEU or Treaty on the Functioning of the EU (TFEU) made by Treaty, and any use of the *passerelle* provisions,²² to be approved by an Act of Parliament at least, and that a referendum should be held in a number of cases where this would enlarge EU competence or reduce safeguards such as unanimous voting.²³

1.2. THE UK'S EXIT FROM THE EUROPEAN UNION

In January 2013, the British Prime Minister, David Cameron delivered his “Bloomberg speech” in which he promised to seek renegotiation of the UK’s membership of the EU and subsequently hold a referendum on UK membership if a Conservative Government was elected to office in 2015. This was indeed the case and the European Union Referendum Act 2015 was enacted committing to an advisory referendum to be held by the end of 2017.²⁴ In November 2015, David Cameron presented his proposals for renegotiation to the EU. These were accepted by Donald Tusk, President of the European Council, in February 2016. This arguably “minimalist” new settlement for the UK within the European Union centred on four themes: economic governance, competitiveness, sovereignty and immigration. A referendum was held on 23 June 2016 which asked voters whether they wished to remain as a member of the EU or leave the EU. It is no exaggeration that the result in which 51.9 per cent voted to

²⁰ The European Union (Amendment) Act 2008 was enacted to give effect to the Treaty of Lisbon.

²¹ Protocol 30 which also applied to Poland.

²² A number of new *passerelle* provisions were inserted into the Treaties by the Treaty of Lisbon. They allow for revision of the voting requirements (e.g. from unanimity to QMV) or legislative procedures (from special legislative procedure to the ordinary legislative procedure) by the European Council or Council without having to resort to Treaty revision. The Treaties now contain a general *passerelle* provision (Art. 48(7) TEU) and six sectoral *passerelle* provisions (Art. 153(2), last subpara., TFEU; Art. 192(2) last subpara., TFEU; Art. 31(3) and (4) TEU; Art. 312(2) 2nd subpara., TFEU; Art. 81(3) TFEU; Art. 333 TFEU).

²³ For consideration of the legal and political complexities of the Act, see P. Craig, “The European Union Act 2011: Locks, limits and legality” (2011) 48 *Common Market Law Review* 1915–44.

²⁴ The Act did not contain any provisions setting out the procedure for leaving the EU if this was the result of the referendum vote.

leave and 48.1 per cent to remain with a 71.8 per cent²⁵ turnout sent shockwaves throughout the world and had immediate economic, political, constitutional, sociological, cultural and psychological ramifications for the four countries which make up the UK, with the potential for further tremors hitting the UK and rest of the EU for some time, probably years.

The UK will be the first Member State to leave the EU (often referred to as “Brexit”). Art. 50 TEU is the Treaty provision introduced by the Treaty of Lisbon which sets out the procedure for withdrawal by a Member State from the EU. Art. 50(1) TEU states that “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. In the aftermath of the referendum result, a legal vacuum was revealed in the UK constitutional settlement, and different political and legal views emerged as to the nature of the UK’s “constitutional requirements” in this situation,²⁶ and the scope of parliamentary sovereignty. The UK Government considered that it had the power to invoke Art. 50 TEU and inform the European Council of its intention to withdraw from the EU triggering the negotiation process through the exercise of its prerogative (executive) powers in international affairs. This view was challenged successfully before the High Court of England and Wales in *Miller v. Secretary of State for Exiting the European Union*.²⁷ In a surprise decision, the court ruled that the Government could not proceed without the prior authorisation of Parliament.²⁸ A leap-frog appeal directly to the Supreme Court was permitted. In January 2017,²⁹ the Supreme Court upheld the decision of the High Court confirming that the Government could not trigger Art. 50 TEU unilaterally and needed the authority of the Westminster Parliament. However, it ruled that the consent of the three devolved assemblies was not required. The Government promptly introduced the European Union (Notification of Withdrawal) Bill 2017, a mere 133 words. It was passed by both Houses of Parliament and received Royal Assent on 16 March 2017. Its enactment paved the way for the Prime Minister to inform

²⁵ More than 30 million people voted and it was the highest turnout in a UK-wide vote since the 1992 general election.

²⁶ For a range of views, see S. Douglas-Scott, “Brexit, Article 50 and the contested British Constitution” (2016) 79(6) *Modern Law Review* 1019–40; R. Craig, “Casting aside clanking medieval chains: Prerogative statute and Article 50 after the EU referendum (2016) 79(6) *Modern Law Review* 1041–63; G. Phillipson, “A dive into deep constitutional waters: Article 50, the prerogative and Parliament” (2016) 79(6) *Modern Law Review* 1064–89.

²⁷ *Miller v. Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin). The judgment was delivered on 3 November 2016, and its light of its huge importance, it was made available immediately online at <www.judiciary.gov.uk>.

²⁸ Both parties in the proceedings agreed that it was not possible for Art. 50 TEU to be revoked once triggered. This common agreement was accepted by both the High Court and the Supreme Court, and no referral for a preliminary ruling was made to the ECJ under Article 267 TFEU.

²⁹ The fully televised hearing was held for four days in December 2016: <www.supremecourt.uk>.

the European Council on the 29 March 2017 of the UK's intention to leave the EU in accordance with Art. 50 TEU triggering the two-year timeframe for negotiating a withdrawal agreement by 29 March 2019. At the time of writing, this complex and highly political process is on-going, and a detailed account is outside the scope of this contribution.

2. THE UK AND ITS CONSTITUTIONAL SETTING

The constitutional setting of the UK has some unique characteristics which need to be considered in order to appreciate the context within which the principle of consistent interpretation has been applied by the UK judiciary, and to allow for comparison with the application of the principle in other Member States as set out in this volume.

2.1. A CONSTITUTIONAL MONARCHY

The UK can be characterised as having a constitutional monarchy similar to some other EU Member States: Belgium, Denmark, the Netherlands, Spain and Sweden.³⁰ The monarch is nominally the head of government, but the incumbent, currently Queen Elizabeth II, does not exercise any effective political power in reality.³¹

2.2. AN UNWRITTEN CONSTITUTION

One of the most striking characteristics of the UK's constitutional settlement is the absence of a codified constitution: there is no one document which sets out the authority of the main organs of government or the relationship between these organs or with the people. The UK is "virtually unique" in this respect³² and it reflects "the absence of a historical break such as a civil war or independence" which elsewhere has normally led to a new written constitutional settlement.³³ That said, the UK does have a constitution in the much wider sense in that it has a whole system of government established and regulated by a collection of rules.³⁴ The system is founded on a complex mix of statutes, court judgments, constitutional principles, constitutional conventions and international treaties.

³⁰ K. Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (2nd ed., Palgrave, 2014), p. 132.

³¹ *Ibid.*, p. 132.

³² *Ibid.*, p. 9.

³³ *Ibid.* Syrett also notes that although the English Civil War of the 1640s did see the adoption of two successive documents which could have been described as constitutions, these did not survive the restoration of the monarchy in 1660.

³⁴ Bradley and Ewing, *Constitutional and Administrative Law* (14th ed., Pearson, 2007), p. 4.

The written constitution of the majority of the EU's Member States set out a number of key features including the division of tasks of government, whether unitary or federal, a list of fundamental rights beyond the reach of the organs of government and adhere to the separation of powers. In the UK, these gaps are filled by the doctrine of the legislative supremacy of Parliament and the rule of law. Fundamental rights protection was enhanced by the introduction of the Human Rights Act 1998. It made the fundamental rights set out in the European Convention on Human Rights (ECHR) legally enforceable before UK courts for the first time.

2.3. LEGISLATIVE SUPREMACY OR PARLIAMENTARY SOVEREIGNTY

The concept of legislative supremacy is of fundamental importance. It is also referred to as the doctrine of parliamentary sovereignty. Traditionally, Parliament is deemed to be the supreme law-maker. Importantly, this concept is encapsulated by the common law doctrine of implied repeal.³⁵ This means that any Act of Parliament may be changed by a subsequent Act on the same subject matter without the need to explicitly repeal the earlier statute. In essence, Parliament cannot bind its successors. This raises the question as to how the doctrine of parliamentary sovereignty can be reconciled with EU law, particularly where it has been well established by the ECJ that in the event of a conflict between EU and national law, EU law is supreme.³⁶ This is discussed below in section 2.6.

2.4. DEVOLUTION

The Blair Administration 1997 introduced devolution in Scotland and Wales and was committed to a peace deal for Northern Ireland under the terms of The Good Friday Agreement (1998). There are now three devolution settlements which differ quite considerably in nature, and which confer law-making powers on the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly. The legislative power of Parliament can extend to all of the UK (or just to Great Britain or just to one or more of the countries within the UK).

The UK referendum on withdrawal from the EU has given rise to political tensions between the Westminster Government and its devolved counterparts. The majority of voters in England and (surprisingly) Wales voted to leave

³⁵ *Ellen Street Estates v. Minister for Health* [1934] 1 KB 590.

³⁶ *Case 6/64 Costa v. ENEL* [1964] ECR 585.

the EU.³⁷ In contrast, in both Scotland and Northern Ireland, the majority of the electorate voted to remain a member of the EU.³⁸

2.5. A COMMON LAW SYSTEM

The UK, together with the Republic of Ireland, were the first countries with common law legal systems to join the EEC.³⁹ A common law system is where court judgments are a source of the constitution. It is accepted that judges make law through the development of the case-law. This judge-made law can take the form of common law (laws and customs declared to be law by judges since early times) and interpretation of statute law. Different rules on statutory interpretation have emerged from the case-law, including their interface with the EU principle of consistent interpretation. In accordance with the doctrine of precedent, the decisions of the superior courts are binding on inferior courts (and may bind other superior courts). It should be noted that within the hierarchy of legal norms, legislation takes precedence over common law because Parliament is supreme.⁴⁰

There are three different legal systems in the UK. Scotland and Northern Ireland have their own legal systems/jurisdiction. At present, England and Wales have a combined legal jurisdiction, although there is a continuing debate about whether Wales should have a separate jurisdiction in view of the emergence of Welsh law post-devolution.⁴¹

The UK has a unitary court system,⁴² but there are specialised courts and tribunals in the fields of employment, immigration, tax, intellectual property and competition which have all embraced the application of the principle of consistent interpretation.⁴³ The Supreme Court (since 2009, formerly the

³⁷ England: Remain 46.6% (13,266,996); Leave 53.4% (15,188,406); Turnout 73%; Wales: Remain 47.5% (772,347); Leave 52.5% (854,572); Turnout 71.7%. The result in Wales came as a surprise to the political establishment since Wales is a net beneficiary of EU funding.

³⁸ Scotland: Remain 62% (1,661,191); Leave 38% (1,018,322); Turnout 67.2%. Northern Ireland: Remain 55.8% (440,707); Leave 44.2% (349,442); Turnout 62.7%.

³⁹ They have since been joined by Cyprus. Note that Scotland has a hybrid system which is a mix of common law and civil law elements.

⁴⁰ Syrett (n. 30), p. 214.

⁴¹ See further, Alan Trench, "A legal jurisdiction for Wales?" at <www.devolution.matters.wordpress.com> accessed 06.11.17.

⁴² High Court of England and Wales, Court of Appeal of England and Wales, Supreme Court, Senior Courts in Northern Ireland (High Court and Court of Appeal) and Scotland (High Court of the Justiciary and Court of Sessions). Other jurisdictions: Isle of Man, Channel Islands, Privy Council – Commonwealth countries elect to use this body, whose members are made up of Supreme Court judges, as a final court of appeal.

⁴³ Employment Appeal Tribunal, VAT and Duties Tribunal, Crown Court, Immigration Appeals Tribunal, employment tribunals, magistrates, Social Security Commissioner and specialist competition courts.

House of Lords) is the final and highest court in the UK (in all matters bar criminal law in Scotland). Only the higher courts (the High Court, Court of Appeal and Supreme Court in England and Wales) have powers of judicial review. There are some cases in which the principle of consistent interpretation has been applied in the Northern Irish and Scottish courts and the approach taken by the judiciary is the same.

2.6. THE RELATIONSHIP BETWEEN UK LAW AND INTERNATIONAL LAW (INCLUDING THE EU TREATIES AND THE EU ACQUIS)

The UK has a dualist system requiring an Act of Parliament to be adopted in order for an international treaty to have legal effect. The European Communities Act (EC Act) 1972 was enacted to give internal effect to EU law in the UK and has been amended on subsequent occasions to give effect to all the amendments to the original EEC Treaty. Section 2(1) states that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions shall be read as referring to one to which this subsection applies.

This provision makes the concept of direct applicability and direct effect part of UK law and places an obligation on the UK courts to enforce any directly effective EU measures without any further acts of implementation.

Section 2(2) provides for the implementation of EU obligations (such as directives), even where this requires national legislation and Acts of Parliament to be replaced by an Order in Council or statutory instrument rather than by primary legislation.

Section 3 amounts to a constitutional instruction to the domestic courts to act as “Union courts”⁴⁴ and renders judgments of the ECJ authoritative in the UK courts. It states that:

For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for

⁴⁴ See T. Horsley, “Brexit and the UK courts” in M. Dougan (ed.), *The UK after Brexit: Legal and Policy Challenges* (Intersentia, 2017).

determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto).

There is no provision in the EC Act 1972 which declares that EU law is supreme in the event of a conflict. Instead, there is a “rule of construction” contained in s. 2(4). The relevant part states that “any enactment passed or to be passed [subject to certain exceptions] ... shall be construed and have effect subject to the foregoing provisions of this section”. This section, in conjunction with s. 2(1), has enabled the UK courts to interpret national law to comply with EU law.

In relation to the principle of consistent interpretation, Arden LJ in *IDT Card Services* stated that “The 1972 Act thus contains the mandate for the English courts to interpret domestic legislation in accordance with applicable Union directives”.⁴⁵

There has been considerable debate in the UK as to how parliamentary sovereignty can be reconciled with the supremacy of EU law. Prior to the *Factortame*⁴⁶ judgment of the House of Lords, the approach of the UK courts and the extent to which they felt bound to apply the principle of consistent interpretation was directly entwined with their view of parliamentary sovereignty, and is reflected in the first period of case-law identified in this contribution and discussed below (section 3.1). A direct conflict between the doctrine of parliamentary sovereignty and (putative) directly effective EU law rights emerged during the *Factortame* litigation and had been the subject of a preliminary ruling.⁴⁷ Lord Bridge famously stated that:

Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitations of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment,

⁴⁵ *R (IDT Card Services Ireland Ltd) v. Customs and Excise Commissioners* [2006] EWCA Civ 29, at [74].

⁴⁶ *Factortame Ltd v. Secretary of State for Transport* [1991] 1 AC 603.

⁴⁷ Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433.

to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.⁴⁸

Thus, the conceptual basis for the acceptance of the supremacy of EU law lies with national constitutional law rather than an acceptance of the monist view of supremacy of the EU's Court of Justice.⁴⁹ EU law is supreme over conflicting national law on the basis of the Parliament's enactment of the EC Act 1972.

In the subsequent case of *Thoburn*,⁵⁰ (also known as the “Metric Martyrs case”), Laws LJ considered that some statutes have special significance. These so-called “constitutional statutes” are not subject to the doctrine of *implied* repeal (discussed earlier) and must be *expressly* repealed in a later statute with the clear intention of Parliament. This approach was confirmed by the Supreme Court in its *HS2* judgment.⁵¹ The EC Act 1972 and HRA, as well as the statutes setting out devolution are considered to fall within this category of “constitutional statutes” and must be expressly repealed by Parliament.

2.7. THE STATUS OF EU LAW FOLLOWING THE UK'S WITHDRAWAL FROM THE EU

Withdrawal from the EU requires Parliament to expressly repeal the EC Act 1972. The Prime Minister, Theresa May, announced plans for a “Great Repeal Bill” at the Conservative Party Conference in October 2016 which would repeal the EC Act 1972 on the date that any withdrawal agreement with the EU comes into force. The Government introduced the European Union (Withdrawal) Bill to Parliament in July 2017. It received Royal Assent on 26 June 2018. The main aim of the Act is to put in place a legal framework which will maximise legal

⁴⁸ Ibid., 658.

⁴⁹ See P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (6th ed., Oxford University Press, 2015), p. 300.

⁵⁰ *Thoburn v. Sunderland City Council* [2003] QB 151.

⁵¹ *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3, [79], [203]–[205]. See further P. Craig, “Constitutionalizing constitutional law: HS2” [2014] *Public Law* 373; M. Elliott, “Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution” (2014) 10 *European Constitutional Law Review* 379.

certainty on the day that the UK leaves the EU (exit day). In summary, the key features of the Act are as follows:

- It repeals the EC Act 1972 on exit day.
- It incorporates the EU *acquis* in force in the UK on exit day into national law.
- It grants delegated powers to Ministers to amend/repeal retained EU law which does not operate effectively or is deemed deficient.
- It allows the UK Government to freeze the power for the devolved assemblies to amend retained EU law.
- It removes the jurisdiction of the Court of Justice of the European Union.
- It removes the general principle of supremacy of EU law.
- It removes the EU Charter of Fundamental Rights.
- The principle of state liability will expire two years after exit day.

In November 2017, the Minister for Exiting the European Union announced that a separate Withdrawal Agreement and Implementation Bill would be enacted in order to give effect to the final Withdrawal Agreement between the UK and the EU in domestic law including any implementation (or transition) period that is agreed.

It is unsurprising that huge political and constitutional controversy afflicts each stage of the UK's exit from the EU.⁵² Withdrawal from the EU represents a new chapter in the history of the UK. It requires the UK's constitutional framework to be re-drawn and new relationships with the EU and non-EU States to be forged. This will not only pave the way for the “de-Europeanisation” of UK law, but also the development of new regulatory frameworks. In the 2017 Queen's Speech, the UK Government announced that it would introduce a number of Bills to re-regulate key policy areas such as immigration and trade in order to ensure that the UK “makes a success of Brexit”⁵³

3. THE APPLICATION OF THE PRINCIPLE OF CONSISTENT INTERPRETATION IN THE UK COURTS

It has been asserted by Sir Rupert Cross that the approach of members of the judiciary to statutory interpretation at any one time will reflect their own

⁵² Over 400 amendments to the Bill were tabled by parliamentarians as it proceeded through the House of Commons.

⁵³ The Queen's Speech 2017 includes proposals for a Customs Bill, Trade Bill, Immigration Bill, Fisheries Bill, Agriculture Bill, Nuclear Safeguards Bill and International Sanctions Bill.

perception of their constitutional role.⁵⁴ This study identifies three phases in the application of the principle of consistent interpretation by the UK courts.

3.1. PHASE ONE: INITIAL REACTION OF THE UK COURTS POST-VON COLSON

This first phase illustrated the challenge facing the judiciary and its approach to statutory interpretation where there was a conflict between a literal reading of national law and EU law. Where the national law at issue had been enacted expressly by Parliament to give effect to EU law, the UK courts followed the *Von Colson* judgment and interpreted national law to comply with the later EU law. The principle was first applied by the House of Lords in *Pickstone v. Freemans plc* in 1989,⁵⁵ to bring the Equal Pay Act 1970 which had been amended by the Equal Pay (Amendments) Regulations⁵⁶ in line with the (broader) interpretation of the principle of equal pay enshrined in Art. 157 TFEU⁵⁷ and fleshed out in Directive 75/117 (the “Equal Pay Directive”). The use of the principle was confirmed by the House of Lords in *Litster* in 1990⁵⁸ in which the TUPE (the Transfer of Undertakings (Protection of Employment)) Regulations 1981) had been expressly enacted to give effect to Directive 77/187 (the “Acquired Rights Directive”).⁵⁹ The House of Lords had no qualms in adapting the national law to give effect to the Directive and where necessary “implying words which would achieve that effect.”⁶⁰

In contrast, and at the same time, the House of Lords refused to interpret *pre-existing national legislation* to comply with EU law that had been enacted at a later date. While the court recognised the interpretative duty, in both *Duke v. GEC Reliance* in 1988⁶¹ and *Finnegan v. Clowney Youth Training Programme Ltd* in 1990,⁶² the House of Lords denied any role to the Equal Treatment Directive 76/207 in the interpretation of the Sex Discrimination Act 1975 because it had been adopted *after* the enactment of the Act of Parliament,

⁵⁴ J. Bell and G. Engle (eds.), *Cross's Statutory Interpretation* (3rd ed., Butterworths, 1995), p. 10.
⁵⁵ [1989] AC 66.

⁵⁶ The Equal Pay Act 1970 had been amended by the Equal Pay (Amendment) Regulations 1983 in order to bring UK law in line with EU law. The Regulations had been presented to Parliament as intending to give effect to the ECJ's ruling in Case 61/81, *Commission v. UK* where the ECJ had ruled that the UK law did not comply with EU law in place.

⁵⁷ Previously Art. 119 EEC and Art. 141 EC.

⁵⁸ *Litster and Others v. Forth Dry Dock & Engineering Co Ltd (In Receivership) and Another* [1990] 1 AC 546.

⁵⁹ This provides for the safeguarding of employees' rights on the transfer of a business.

⁶⁰ Indeed, the House of Lords implied words into the national regulations.

⁶¹ [1988] 1 All ER 626.

⁶² [1990] 2 AC 407.

even though the UK accepted that the 1975 Act represented fulfilment of its obligations under the 1976 Directive.⁶³ As a consequence of this policy by the UK courts (and the lack of horizontal direct effect of directives), in both cases the female employees were denied their EU rights as they were unable to rely on the Directive against their *private* employer's retirement policy which they claimed was discriminatory. These gaps in the protection of individuals' EU rights were compounded by a failure to refer to the ECJ for a preliminary ruling under Art. 267 TFEU. Docksey and Fitzpatrick argued that "the House of Lords has ensnared itself in a principle of statutory interpretation which is entirely, [and now after ... *Marleasing*,] erroneously dependent upon notions of parliamentary intent which are inconsistent with the principle of supremacy of Community law".⁶⁴ For them, the House of Lords had failed to appreciate that a new canon of construction had been introduced by the ECJ in *Von Colson* which overrides both constitutional limitations and the doctrine of *stare decisis*⁶⁵ and which takes precedence over other canons of interpretation.⁶⁶ It is for this reason that the judiciary entered into a second phase in its relationship with the principle of consistent interpretation.

3.2. PHASE TWO: ACCEPTANCE OF THE PRINCIPLE POST-MARLEASING

Following the judgment of the House of Lords in *Factortame* in October 1990 and the ECJ's ruling in *Marleasing* the following month, in which it expressly confirmed that the interpretative obligation set out in *Von Colson* applied to *pre-existing* national law, the full scope of the obligation as a method of statutory interpretation being accepted by the UK judiciary can be seen. This is illustrated by the House of Lords 1993 decision in *Webb (No. 2) v. EMO Air Cargo (UK) Ltd*,⁶⁷ a legal dispute between two private parties involving the correct interpretation of the Equal Treatment and Pregnancy Directives. Following a referral to the Court of Justice,⁶⁸ the House of Lords interpreted the Sex Discrimination Act 1975 to include direct discrimination on the grounds of pregnancy. Significantly, the House of Lords was required to ignore any reference to a male comparator in discrimination cases, as required by national law. This was despite the fact that the Court of Appeal had earlier considered

⁶³ Ibid., 115.

⁶⁴ C. Docksey and B. Fitzpatrick, "The duty of national courts to interpret provisions of national law in accordance with Community Law" (1991) 20 *Industrial Law Journal* 113.

⁶⁵ A. Arnall, "The incoming tide: Responding to *Marshall*" (1987) *Public Law* 383.

⁶⁶ Ibid., p. 117.

⁶⁷ [1993] 1 CMLR 259, at paras. 19–21 (Lord Keith of Kinkel).

⁶⁸ Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd* [1994] ECR I-3567.

that this could only be achieved “by distorting the meaning of the British statute”,⁶⁹ a view not expressly rejected by the House of Lords prior to making a reference.

3.3. PHASE THREE: IMPACT OF SECTION 3 OF THE HUMAN RIGHTS ACT 1998

A third phase can be identified in the approach of the UK courts since the House of Lords 2004 judgment in *Ghaidan v. Godin-Mendoza*.⁷⁰ This case concerned the scope of another new interpretative obligation placed on UK courts by s. 3 of the Human Rights Act 1998 (HRA), which requires UK legislation to be interpreted in a manner which is compliant with the HRA.⁷¹ The House of Lords considered at length the scope of the interpretative obligation set out in s. 3 and drew parallels with the EU principle of consistent interpretation. Lord Steyn referred expressly to the fact that the drafters had modelled s. 3 on the EU interpretative obligation.⁷² He also recalled the judgments of the House of Lords in *Pickstone* and *Litster* to illustrate the strength of the interpretative obligation.⁷³ For Lord Rodger, it was significant that Parliament had adopted the same wording for the HRA as that expounded by the Court of Justice in *Marleasing* and he considered that the judiciary should follow a similar approach to that adopted in *Pickstone* and *Litster*. Consequently, *Ghaidan* is now seen by the judiciary as the leading authority on the EU principle of consistent interpretation in the UK courts. In its 2014 decision in *Jessemey v. Rowstock Ltd*, the Court of Appeal referred to the fact that the decision of the House of Lords in *Ghaidan* amounts to an “assimilation” of the interpretative obligations set out in *Marleasing* and s. 3 HRA.⁷⁴

This assimilation is interesting given that there are differences in the construction and operation of the interpretative obligations. The EU principle of consistent interpretation is a judge-made constitutional principle of EU law established by the ECJ. It does not have an explicit legal basis in the Treaties, but the Court has based its reasoning on the rule of law, Art. 4(3) TEU (together with Art. 288 TFEU), the principle of *effet utile*, and in *Pfeiffer*, it even went as far as to say that the duty was “inherent in the system of the [Treaties]”.⁷⁵

⁶⁹ *Webb v. EMO Air Cargo (UK) Ltd* [1992] 1 CMLR 793, para. 53.

⁷⁰ [2004] UKHL 30, [2004] 2 AC 557.

⁷¹ There is also a duty to ensure that all new law enacted is compliant with the HRA.

⁷² Per Lord Steyn, para. 45.

⁷³ Per Lord Steyn, para. 48.

⁷⁴ Per Underhill LJ, para. 40.

⁷⁵ Joined Cases C-397/01–403/01, *Pfeiffer* [2004] ECR I-8835. See further, S. Drake, “Twenty years after *Von Colson*: The impact of ‘indirect effect’ on the protection of the individual’s Community rights” (2005) 30 *European Law Review* 329–48.

The ECJ has recognised its limitations, particularly where it may conflict with general principles of law (e.g. non-retroactivity in criminal matters),⁷⁶ or where an outcome compliant with EU law would require the court to overstep its interpretative role and venture into the domain of policy-making which would be contrary to the doctrine of the separation of powers. In *Wagner Miret*, the ECJ implied that a national court is not required to interpret national law *contra legem*.⁷⁷

In contrast, the HRA was enacted by Parliament in 1998 to enable national courts to give effect to the ECHR and came into force in 2000. An election manifesto commitment of the Blair Administration, it required national courts to interpret national law “as far as possible” in compliance with the ECHR. Where an interpretation is not “possible” under s. 3, the national court⁷⁸ has a discretionary power to make a “declaration of incompatibility”. It is then for Parliament to remedy any failure of compliance on the part of national law with the “Convention right” set out in the HRA. The legislation in question remains valid and there is no obligation on Parliament to take any action.⁷⁹ Thus, in direct contrast to directly effective EU law under the EC Act 1972 (and more recently the EU Charter of Fundamental Rights), national courts do not have the power to set aside primary legislation emanating from the Westminster Parliament, only devolved legislation. O’Cinneide describes the HRA as achieving a “delicate constitutional balance: it leaves parliamentary sovereignty intact, while modifying the legal framework which governs how British courts interpret and give effect to primary legislation”.⁸⁰

To date, the courts have refuted any arguments put forward by legal counsel which try to differentiate between the two methods of interpretation in terms of their scope. It is suggested that the extent to which the principle of consistent interpretation has been embedded in the practice of the UK courts reflects the fact that the judiciary are more comfortable anchoring a method of statutory interpretation derived from EU law, with its contested legal basis and fluid nature, to a national method which has a statutory basis in an Act of Parliament. The national courts are impliedly reinforcing the view of the centrality of the Parliament in the UK constitutional system, particularly in determining the UK’s relationship with the EU.

⁷⁶ Case 80/86, *Kolpinghuis Nijmegen* [1987] ECR 3969.

⁷⁷ Case C-334/92, *Wagner Miret* [1993] ECR I-6911.

⁷⁸ Not all of them.

⁷⁹ Nevertheless, it is intended that Parliament respond to the declaration of incompatibility. The HRA makes provision for the offending legislation to be amended by a fast-track parliamentary procedure: s. 10 of, and Sched. 2 to, the Act. It is important to note that a declaration of incompatibility does not prevent an individual from pursuing their claim in Strasbourg in an attempt to seek a determination from the European Court of Human Rights that the UK has breached the European Convention on Human Rights.

⁸⁰ *Ibid.*, 82. For an insight into the drafting of the HRA, see F. Klug, *Values for a Godless Age: The Story of the UK’s New Bill of Rights* (Penguin, 2000).

3.4. PHASE FOUR: THE APPLICATION OF THE PRINCIPLE OF CONSISTENT INTERPRETATION POST-BREXIT

Since the UK's withdrawal from the EU will entail the express repeal of the EC Act 1972, the current mandate on the UK judiciary to interpret national law to comply with EU law will disappear. There is no doubt that a fourth phase in the application of the principle of consistent interpretation by the UK judiciary will emerge post-Brexit. It is argued that this will be predicated on the judiciary's understanding of Parliament's intention as expressed in the EU (Withdrawal) Act 2018. It is possible to discern some broad guidance on how the national courts should interpret "retained EU law" in the Act itself.

The EU (Withdrawal) Act provides for the EU acquis which is in force in the UK on exit day to be retained in the UK legal order. This "nationalised" law will be called "retained EU law". It includes directly applicable law including regulations, decisions, delegated and implementing acts, domestic law enacted to give effect to EU directives, and directly effective (Treaty) rights. It also includes the jurisprudence of the ECJ as on exit day, and general principles of EU law as recognised by the ECJ. The Act expressly excludes the application of the principle of supremacy to any law made on or after exit day, but it continues to apply in the event of a conflict between national law and retained EU law. The Act expressly excludes the EU Charter of Fundamental Rights and the principle of state liability has been strictly curtailed. Despite giving the appearance that the existing EU acquis will be retained providing legal certainty, it is highly likely that it will be substantially amended to give effect to the Withdrawal Agreement, either through primary or secondary legislation.

One major concern has been the potential loss of rights which have been enjoyed by individuals as a result of the UK's membership of the EU. The Act expressly provides that directly effective rights in force before exit day will remain part of UK law. However, the Act expressly excludes rights which are derived from EU directives and which are "not of a kind" recognised by the ECJ or a national court in a case decided before exit day. This clause could limit the protection of individuals' rights if interpreted as meaning that provisions which are sufficiently clear and precise to be justiciable may not be enforceable by an individual *simply because this status had not yet been recognised by the ECJ or national court on exit day*.

The Act, when read in conjunction with the Explanatory Notes, includes a new mandate for the national judges to continue to apply the principle of consistent interpretation when interpreting retained EU law. The Explanatory Notes state that:

The principle of supremacy ... means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant

directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.⁸¹

The Act also states that the principle of supremacy (and, it is argued the principle of consistent interpretation), applies to pre-exit law which is amended on or after exit day if that is the intention of the modifications. This would be in keeping with the UK courts' approach to statutory interpretation which is to give effect to Parliament's intention.

The Explanatory Notes state further that when interpreting retained EU law, national court can adopt

... a purposive approach to interpretation where the meaning of the measure is unclear (i.e. considering the purpose of the law from looking at other relevant documents such as treaty legal base for a measure, its recitals and preambles, and the '*travaux préparatoires*' (working papers) leading to the adoption of the measure). It also means applying an interpretation that renders the provision of EU law compatible with the treaties and general principles of EU law. Non-binding instruments, such as recommendations and opinions, would still be available to a court to assist with interpretation of retained EU law after exit. In these circumstances, the principle of supremacy continues to apply to EU retained law *enacted before exit day*.⁸²

Pre-Brexit case-law of the ECJ will be considered binding precedent for the lower courts. The Supreme Court will not be bound to follow retained EU case-law, but if it wishes to depart from it, it must follow the same (strict) rules that apply when it wishes to depart from one of its own precedents.

There is less certainty with regard to the status of the post-Brexit case-law of the ECJ. This jurisprudence will no longer bind the UK courts, and they will not be able to request a preliminary ruling from the ECJ if they require assistance in interpreting retained EU law. The original version of the Bill permitted national courts to refer to ECJ case-law if it considers it "appropriate to do so". In response to calls for clearer instructions by senior members of the judiciary⁸³ and legal scholars,⁸⁴ the Government agreed to amend the text to state that national courts could refer to ECJ judgments where "relevant." There was clearly a concern

⁸¹ Explanatory Notes, at para. 104.

⁸² Explanatory Notes, at para. 111. Para. 112 states that the UK courts will also be required to interpret retained EU law by reference to the limits of the EU competence.

⁸³ Lord Neuberger (out-going President of the Supreme Court), "UK judges need clarity after Brexit", *BBC News*, 8 August 2017; Lady Hale (incoming President of the Supreme Court), "UK's new supreme court chief calls for clarity on ECJ after Brexit", *The Guardian*, 8 October 2017.

⁸⁴ T. Horsley, "In (domestic) courts we trust: The European Union (Withdrawal) Bill and the interpretation of retained EU law" *UK Constitutional Law Blog* (27 November 2017). Available at <<https://ukconstitutionallaw.org>>.

that any reference to judgments of the ECJ by the UK judiciary, however “appropriate” from a legal perspective, could be deemed politically unacceptable.

4. THE SCOPE OF THE DUTY OF CONSISTENT INTERPRETATION IN THE UK COURTS

4.1. STATUTORY INTERPRETATION IN THE UK COURTS

Historically, three common law methods of statutory interpretation have evolved before the UK courts: (a) the literal rule in which the normal meaning is conferred on the statutory words; (b) the golden rule which starts with a literal approach, but it is amended if the result would be absurd or inconsistent with the rest of the statute; (c) the mischief rule whereby the court identifies a deficiency (or “mischief”) in the law and interprets the rule to stop the mischief reoccurring.⁸⁵ More contemporary practice also incorporates a fourth method, (d) the purposive approach where if the wording is unclear or ambiguous,⁸⁶ the contested provision(s) should “be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment”.⁸⁷ In *Pepper v. Hart*,⁸⁸ the House of Lords ruled that a broad range of materials may be taken into account to ascertain the true meaning of a provision as intended by Parliament, including the official record of parliamentary proceedings in *Hansard* subject to certain limitations.⁸⁹

The principle of consistent interpretation derived from EU law is seen as *additional* to the standard rules on statutory interpretation which have developed through the case-law. It is also broader and more flexible going beyond the limitations set out in *Pepper v. Hart*, and may apply even if the national law is not ambiguous.⁹⁰ It has been considered by Arden LJ to be the standard approach to interpreting legislation enacted to give effect to international treaties.⁹¹

⁸⁵ Syrett (n. 30), p. 215. For a brief discussion of their evolution, see Cross (n. 55), Chapter 1.

⁸⁶ This adoption of the purposive approach followed a proposal made by the Law Commission in 1969 following a review of statutory interpretation: *The Interpretation of Statutes* (Law Com no 21; Scottish Law Com no 11).

⁸⁷ See Lord Bingham in *R (Quintavalle) v. Secretary of State for Health* [2003] 1 AC 687, para. 8.

⁸⁸ [1993] AC 593.

⁸⁹ Parliamentary materials (which are limited to clear statements by the minister or other promoters of the Bill directed to the very point in question in the litigation) are admissible only where (1) the question in issue between the parties is the true construction of a provision in the relevant statute; (2) the provision is ambiguous or obscure or its literal meaning leads to an absurdity; or (3) the statements are directed to the specific statutory provision under consideration.

⁹⁰ *Three Rivers District Council v. Governor of the Bank of England (No. 2)* [1996] 2 All ER 363, per Clarke J.

⁹¹ Arden LJ in *IDT Card Services Ireland Ltd v. Customs and Excise Commissioners* [2006] EWCA Civ 29, at para. 75.

The most recent UK cases refer to *Pfeiffer*⁹² and accept the full scope of the obligation imposed on them under EU law. In the latter case, the ECJ clearly stated that the interpretative obligation applies not only to national law that implements the directive, but to the national legal system as a whole. It held that to ensure that a directive is fully effective: "... the principle of interpretation in conformity with Community law thus requires the referring court to do *whatever lies within its jurisdiction, having regard to the whole body of rules of national law*."⁹³

The UK courts also adopt a number of presumptions when engaging in statutory interpretation including the principle of legality which assumes that legislation created by Parliament is in accordance with the rule of law and does not infringe fundamental principles of constitutional or administrative law. It is now accepted that there is a parallel presumption that assumes that legislation is adopted to comply with international treaties and EU law (unless there is an express intention to the contrary).⁹⁴

There has been some confusion in the UK case-law before the Supreme Court on the application of the *Pupino* variant of the principle of consistent interpretation.⁹⁵ In *Assange*,⁹⁶ the Supreme Court found that the *Pupino* judgment was not binding on UK courts and could not be applied to interpret national law (Extradition Act 2003) in line with the European Arrest Warrant (EAW) Framework Decision despite having been applied in previous decisions of the final court in *Dabas* and *Calderelli*.⁹⁷ The EAW had been adopted under Title VI of the Third Pillar, and had not been given effect under s. 2 of the EC Act 1972. At the time, it constituted an intergovernmental measure subject to domestic methods of statutory interpretation including the presumption that Parliament has legislated to give full effect to the UK's international legal obligations. So while the adoption of the domestic approach did not change

⁹² Cases C-397-403/01, *Pfeiffer* [2004] ECR I-8835.

⁹³ *Ibid.*, para. 118. Emphasis added.

⁹⁴ *Assange v. Swedish Prosecution Authority* [2012] UKSC 22.

⁹⁵ Case C-105/3, *Criminal proceedings against Pupino* [2005] ECR I-5285. In this case, the ECJ extended the principle of consistent interpretation to Framework Decisions which had been enacted under the Third Pillar in accordance with Art. 34(2)(b) TEU, an analogous provision to Art. 249 EC (now Art. 288 TFEU) which defines the characteristics of directives. The ECJ based the obligation on the principle of loyalty set out in Art. 10 EC (now Art. 4(3) TEU). The judgment was of significant constitutional importance as the Member States had expressly prohibited Framework Decisions from having direct effect. See M. Fletcher, "Extending 'indirect effect' to the third pillar: the significance of *Pupino*?" (2005) 30(6) *European Law Review* 862–77.

⁹⁶ *Assange v. Swedish Prosecution Authority* [2012] UKSC 22, per Lord Mance, paras. 198–218.

⁹⁷ *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 AC 31, per Lord Bingham at para. 5; *Calderelli v. Judge of Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, per Lord Bingham at para. 22.

the outcome of the case itself, it reveals the constitutional complexities arising from the UK's differentiated integration with the EU in some policy areas.⁹⁸

4.2. METHODOLOGY OF THE UK COURTS IN CASES INVOLVING EU LAW

It is important at the outset to understand the approach of the national judge when engaging in interpretation in a case involving EU law. First, the judge will be required to ascertain the correct meaning of the EU source of law at issue. This may (but not always) require a reference under Art. 267 TFEU to the ECJ if the meaning is unclear.⁹⁹

It is at the second stage that the national judge will need to give effect to EU law. Early on in the UK literature, Docksey and Fitzpatrick argued that the principle of consistent interpretation should be the first obligation that the national court must address.¹⁰⁰ It is only if it fails that resort should be had to direct effect.¹⁰¹ They concluded that "... the application of the indirect effect principle can be perceived as the natural basis upon which the rights in a directive reach Community citizens. It can also be seen as a significant alternative to direct effect, given that it is untrammelled by the vertical/horizontal effect distinction".¹⁰² However, in general, the approach of the UK courts is to first consider whether the application of direct effect is possible before turning to the principle of consistent interpretation. In later cases, there tends to be no mention of the doctrine of direct effect if the dispute arises between two private parties.¹⁰³

For the most part, the UK courts have embraced their EU interpretative duty and have not referred questions to the ECJ specifically on the scope of the principle itself. For the UK courts, the focus is very much on achieving an EU-compliant outcome rather than on the process of interpretation itself.¹⁰⁴ Further, following a preliminary ruling on an interpretation of a substantive provision, the national courts have followed the interpretation set out by the ECJ. There is some evidence in the case-law that where possible, judges may

⁹⁸ Post-Lisbon, and following the expiry of the transitional five-year period in Protocol 36, the UK opted-in to the European Arrest Warrant (along with 34 other police and criminal justice measures) on 1 December 2014, and currently accepts the full jurisdiction of the Court of Justice and the sanctioning power of the European Commission under Art. 258 TFEU.

⁹⁹ Case 283/81, *CILFIT* [1982] ECR I-3415.

¹⁰⁰ C. Docksey and B. Fitzpatrick, "The duty of national courts to interpret provisions of national law in accordance with Community Law" (1991) 20 (2) *Industrial Law Journal* 113–120.

¹⁰¹ *Ibid.*, 117–18.

¹⁰² *Ibid.* 118.

¹⁰³ See e.g. *Attridge, Jessemey and Google*.

¹⁰⁴ See discussion of the "process-product" dichotomy in the Dutch report.

determine that it is more legitimate to adopt a national statutory method of interpretation, as was the case in *White v. White* (discussed in section 5). It is not clear why this is the case, although it was suggested in *Jessemey* obiter by Underhill LJ that this would avoid future litigation, for example, where a dispute arises over the same part of the statute but in a domestic only case which would need to be re-litigated.

4.3. THE RELATIONSHIP BETWEEN THE EU DUTY OF CONSISTENT INTERPRETATION AND SECTION 3 HRA

It is in determining the scope of the obligation of the duty of consistent interpretation that an “assimilation” with the approach adopted under s. 3 of the HRA can be seen. A summary given by legal counsel on the scope of the duty was approved by Sir Andrew Morritt C in the Court of Appeal in *Vodafone 2 v. Revenue and Customs Commissioners*¹⁰⁵ and has since become the principal reference point for the judiciary.¹⁰⁶ It was endorsed by the Supreme Court in *Swift*¹⁰⁷ and *Nolan*.¹⁰⁸ It stated that:

In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

- (a) It is not constrained by conventional rules of construction (per Lord Oliver in *Pickstone* at 126B);
- (b) It does not require ambiguity in the legislative language (per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32);
- (c) It is not an exercise in semantics or linguistics (see *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48–49; Lord Rodger at 110–115);
- (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31);
- (e) It permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in *Pickstone* at 120H–121A; Lord Oliver in *Litster* at 577A); and
- (f) The precise form of the words to be implied does not matter (per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para. 122; Arden LJ in *IDT Card Services*, at 114).

¹⁰⁵ [2009] EWCA Civ 446, paras. 37–38.

¹⁰⁶ The summary is restated in full by Underhill LJ in the Court of Appeal in 2014 in *Jessemey v. Rowstock Ltd* [2014] 3 CMLR 24.

¹⁰⁷ *Swift v. Robinson* [2014] UKSC 50.

¹⁰⁸ *United States of America v. Nolan* [2015] UKSC 63.

It is also clear to the UK judiciary that it is for them to determine whether or not domestic legislation can be interpreted in a way which conforms with the applicable EU law.¹⁰⁹ Limitations on this interpretative duty are recognised by the national judiciary, and these are a matter for the national court. In *Vodafone 2 v. Revenue and Customs Commissioners*, it was held that:

The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

- (a) The meaning should “go with the grain of the legislation” and be “compatible with the underlying thrust of the legislation being construed.” (per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in *EB Central Services*, at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110–113; Arden LJ in *IDT Card Services* at 82 and 113) and
- (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in *IDT Card Services* at 113.)

4.4. APPLICATION OF THE DUTY IN PRACTICE

The strong interpretative obligation set out in EU law has led the UK courts to what may seem to some to be surprising results. To illustrate the strength and lengths to which the UK courts are prepared to interpret national law, a few examples are given. What is clear is that (i) the principle is applied in parallel with s. 3 of the HRA and (ii) the scope of the duty is broader and more flexible than methods of interpretation set out in national law. Lord Mance, writing extra-judicially, considers that the *Marleasing* principle goes beyond the domestic (common) law presumptions, and allows a “quite radical reading in, out or down of words in legislation in the field of EU law”.¹¹⁰

4.4.1. *Writing New Provisions into a Statute*

When exercising their interpretative duty, national courts are permitted to add words to a statute which are not there. This is not considered by the

¹⁰⁹ See *IDT Card Services Ireland Ltd v. Customs and Excise Commissioners* [2006] EWCA Civ 29.

¹¹⁰ *Ibid.*

UK judiciary as going beyond a court's interpretative role (i.e. interpretation *contra legem*) as long as the interpretation is consistent with the "grain" of the legislation (discussed below). It was evident from the earliest phase that the House of Lords¹¹¹ considered it within its remit to imply the words necessary to construe national law in accordance with EU law. The *Litster* case concerned the correct interpretation of Acquired Rights Directive¹¹² which safeguards the rights of employees when their employer's undertaking is transferred to another company. The UK implementing legislation protected persons who were "employed immediately before the transfer". The employer in question had become insolvent and had entered receivership. At issue was whether the national provision set out above covered employees who were dismissed by receivers one hour before the transfer. The House of Lords held that, to give effect to the underlying directive as interpreted by the Court of Justice, there had to be read into the words "a person so employed immediately before the transfer" the words "or who would have been so employed if he had not been unfairly dismissed in the circumstances described in regulation 8(1)".¹¹³ A literal interpretation would not suffice. In other words, the House of Lords made a significant change to the wording of the legislation by adding words that were not there, even where the wording of national law was not ambiguous. Arden LJ later noted that this would not be possible under purely domestic law and would probably be regarded as "impermissible judicial legislation."¹¹⁴

Moving to our third phase, the judgment in *EBR Attridge Law LLP v. Coleman*¹¹⁵ is a good example of how far the national courts are willing to go to give full effect to EU law. In this case, the national court was prepared to write a new paragraph into the statute in order to give full effect to the principle of non-discrimination on grounds of disability in a dispute between an employee and her employer.

Mrs Coleman worked for a law firm and was the principal carer for her disabled son. She had resigned from her post claiming that she had been the victim of unlawful discrimination by her employer on account of her son's disability (so-called "associative discrimination"). Mrs Coleman brought legal proceedings in 2005 against her employer for unlawful discrimination contrary to the Disability Discrimination Act 1995 (DDA) and unfair dismissal. The DDA did not apply to associative discrimination, but Mrs Coleman argued the statute should be construed to include associative discrimination which, in her view, was unlawful under Directive 2000/78, which establishes a general

¹¹¹ *Litster v. Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546.

¹¹² Directive 77/187/EEC.

¹¹³ *Litster v. Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, at 577.

¹¹⁴ *IDT Card Services Ireland Ltd v. Customs and Excise Commissioners* [2006] EWCA Civ 29, Arden LJ.

¹¹⁵ *EBR Attridge Law LLP v. Coleman* [2010] 1 CMLR 28.

framework for equal treatment and occupation (the “Framework Directive”).¹¹⁶ The DDA had been amended to give effect to the Framework Directive with effect from 1 October 2004.¹¹⁷

The Employment Tribunal (ET) referred the matter to the ECJ¹¹⁸ which confirmed that the effectiveness of the Directive would be undermined if it did not outlaw associative discrimination.¹¹⁹ On return to the ET, and in line with her original decision, the judge was of the view that the DDA could be interpreted to give effect to the Directive by “supplying words if necessary” unless it contained “an express and unambiguous indication to the contrary”.¹²⁰

This judgment was appealed to the Employment Appeal Tribunal (EAT) on the grounds that (a) the judge had “distorted and rewritten” the DDA by reading in words to render associative discrimination unlawful; and (b) the judge had erred in stating that the duty to interpret applied from the date that the UK had given effect to the Directive through the enactment of amending legislation (1 October 2004) and that any duty arose only after the final and extended date for implementation of the Directive which was later (2 December 2006). In their view, this date had not passed at the time of the alleged acts or omissions took place.¹²¹

The EAT dismissed both grounds of appeal.¹²² With regard to the principle of consistent interpretation, Underhill J referred to *Marleasing* as the leading authority from the ECJ. He acknowledged that the UK courts and tribunals had accepted that the duty may in certain circumstances allow the national court to “read words into a statute in order to give effect to EU legislation which the statute was evidently intended to implement”¹²³ and cited the earlier cases of *Pickstone* and *Litster*. Yet, he also acknowledged that such an approach is not always legitimate and that determining what is or is not possible is a difficult task.¹²⁴ The judge considered in depth the approach of the House of

¹¹⁶ Council Directive 2000/78/EC. Member States had until 2 December 2003 to implement the Directive, subject to a right to an extension, “in order to take account of particular conditions” for a further three years. Hence, the final date for implementation was 2 December 2006.

¹¹⁷ Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) which came into effect on 1 October 2004. As a consequence, the claimant was required to rely on acts or omissions which occurred after this date to substantiate her claim.

¹¹⁸ The respondents’ appeal against the order to refer to the ECJ was dismissed by the Employment Appeal Tribunal: [2007] ICR 654.

¹¹⁹ Case 303/06, para. 48.

¹²⁰ November 2008.

¹²¹ The respondents relied on *Lloyd-Briden v. Worthing College* [2007] 3 CMLR 27.

¹²² *EBR Attridge Law LLP v. Coleman* [2010] 1 CMLR 28. Although the case was remitted back to the employment tribunal to consider the merits of the claim by Mrs Coleman, the case was settled. The settlement agreement included terms requiring no further appeals to be made and for payment to Mrs Coleman of an undisclosed sum for “injury to feelings”, see <www.cloisters.com>.

¹²³ Para. 11.

¹²⁴ Para. 11.

Lords in *Ghaidan* referring to the judgments of Lords Nicholls, Steyn and Rodgers, and noted that the *Ghaidan* approach had been applied subsequently by the Court of Appeal in the context of an EU law case, *IDT Card Services Ireland Ltd v. Customs and Excise Commissioners*. He applied the approach to the *EBR Attridge Law LLP v. Coleman* case and confirmed the duty to interpret the DDA in accordance with the meaning of the Directive as now interpreted by the ECJ. Underhill J stated that:

there is nothing “impossible” about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in *Ghaidan* make clear, that is not in itself impermissible (see, e.g. per Lord Nicholls as paras. 32-33). The real question is whether it would do so in a manner which is not “compatible with the underlying thrust of the legislation” (per Lord Nicholls at para.33) or which is “inconsistent with the scheme of the legislation or its general principles” (per Lord Rodger at para 121). In *Ghaidan* the majority were prepared to interpret the words “wife or husband” in Schedule 1 of the Rent Act 1977 as extending to the same-sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went “with the grain of the legislation” (in Lord Rodgers’s phrase). In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination “on the ground of disability” will remain central.¹²⁵

The judge also referred to the fact that other discrimination statutes in the UK, as interpreted by the UK courts *without reference to EU law*, outlaw associative discrimination, which for him demonstrated that such a result was in line with UK policy on anti-discrimination legislation.¹²⁶ In relation to the actual text, the judge recommended inserting an additional and distinct provision to the statute to give effect to the ECJ’s interpretation of the Framework Directive in the particular circumstances.

On the issue of when the duty arises, he dismissed the arguments based on the case of *Lloyd-Briden v. Worthing College* in which the ET and EAT had both refused to apply the ECJ’s (controversial) decision in *Mangold*¹²⁷

¹²⁵ Underhill J, at para. 14.

¹²⁶ *Ibid.*, citing the EAT decision in *Showboat Entertainment Centre Ltd v. Owens* [1984] ICR 65 approved by the Court of Appeal in *Weathersfield Ltd v. Sargent* [1999] ICR 425. He noted that this view was not undermined by the fact that the Disability Discrimination Act referred to “a disabled person”.

¹²⁷ Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981. In this case, the ECJ held that the principle of age discrimination at issue was not derived from the Directive but reflected the principle of equal treatment which is found in international instruments and in the

to disapply national law that conflicted with the principle of age discrimination in relation to events which occurred prior to the date for implementation of the Directive (i.e. 2 December 2006). In his view, *Mangold* was distinguishable. He also dismissed the argument that the interpretative duty did not arise until the date for implementation had passed as held by the ECJ in *Centrosteeel*.¹²⁸ For Underhill J, these cases were distinguishable as the UK had implemented legislation purporting to give effect to the Directive within the implementation deadline. For him,

the “*Marleasing* obligation” must bite at the moment when those Regulations came into force: it is logically irrelevant that the legislator chose to act rather sooner than he was obliged to. I would also add that it would be bizarre if the (amended) 1995 Act meant one thing on 2 December 2006 but something different on 3 December.¹²⁹

The case was subsequently returned to the lower ET for damages to be assessed, but was settled out of court. The UK subsequently enacted the Equality Act 2010 which amalgamated all of the UK’s discrimination legislation under one statute and expressly includes protection against associative direct discrimination.¹³⁰

4.4.2. Correcting Drafting Errors

It is recognised that UK courts may not only engage in statutory interpretation to resolve ambiguities in statutes, but also to correct obvious drafting errors. This may include adding, substituting or omitting words.¹³¹ In these circumstances, the judicial role is confined to construing the law and judges should not give the appearance of engaging in “judicial legislation”.¹³² In *Jessemey v. Rowstock Ltd*,¹³³ the principle of consistent interpretation was utilised by the Court of Appeal to correct drafting errors made by Parliament when consolidating legislation on discrimination in the shape of the Equality Act 2010 to bring it into line with EU law.¹³⁴

Mr Jessemey had been dismissed by his employer, Rowstock Ltd, on the ground that he was over 65 years old. Mr Jessemey brought proceedings under

constitutional traditions of the Member States. As such, it could be relied upon by the individual litigant irrespective of the lack of horizontal direct effect of directives or the fact that the time limit for implementing directives had not passed.

¹²⁸ Case C-456/98, *Centrosteeel Srl v. Adipol GmbH* [2000] ECR I-6007, para. 21.

¹²⁹ *Ibid.*, para. 22.

¹³⁰ See S. Fredman, “The reason why – unravelling indirect discrimination” (2016) *Industrial Law Journal* 231–43.

¹³¹ *Jessemey v. Rowstock Ltd* [2014] EWCA Civ 185, per Underhill LJ at p. 558.

¹³² See *Cross* (n. 54), p. 103.

¹³³ *Jessemey v. Rowstock Ltd* [2014] EWCA Civ 185.

¹³⁴ Note that the leading judgment was delivered by Underhill LJ, who was also the single judge who delivered the EAT decision in *ETR Attridge v. Coleman*, discussed above.

national employment law for unfair dismissal and age discrimination. When he tried to find another job, his former employer gave him a poor reference. Mr Jessemey believed that the poor reference was in response to the legal claims that he had brought and so instigated a further claim against his employer for victimisation.

The EAT¹³⁵ held that while post-employment discrimination and harassment was explicitly prohibited under the Equality Act 2010,¹³⁶ which implemented the Framework Directive and Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), post-employment victimisation was not. According to the EAT, there was no equivalent provision proscribing victimisation which was only referred to in s. 108(7). The EAT was of the view that it was not “possible” to interpret such behaviour as unlawful when the statute clearly states that is not unlawful. This would go beyond the duty to interpret “as far as possible” set out in *Ghaidan*. Two months later, in *Onu v. Akwivu*,¹³⁷ a differently-constituted EAT held that the 2010 Act *did* prohibit acts of victimisation against former employees.

A clear lack of clarity had arisen in the law which may in itself seem surprising in light of the earlier decision of the Court of Justice in *Coote*.¹³⁸ In the latter case, the ECJ had held that protection from discrimination on grounds of equality in employment matters conferred on employees by the Equal Treatment Directive¹³⁹ also applied to victims of sex discrimination who had been victimised on account of making a claim of sex discrimination either while employed or after the employment relationship had ended. When the preliminary ruling returned to the EAT, the referring national court, the principle of consistent interpretation was utilised to interpret national law to comply with the Directive in this dispute between two private parties. It was held that the phrase “in the case of a woman employed by him” covered the case of a former employee. The interpretation of EU law set out in *Coote* had subsequently been applied by the House of Lords in a number of appeals heard together relating to all three “first generation” discrimination statutes – the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.¹⁴⁰

When *Jessemey* came before the Court of Appeal, Underhill LJ, now promoted from the EAT, and clearly familiar with the scope of the principle of consistent interpretation, held that since post-employment victimisation was unlawful prior to the enactment of the Equality Act 2010, the failure of the

¹³⁵ [2013] ICR 807.

¹³⁶ See s. 108(1) and (2).

¹³⁷ [2013] ICR 1039.

¹³⁸ Case C-185/97, *Coote v. Granada Hospitality Ltd* [1998] ECR I-5199.

¹³⁹ Council Directive 76/207/EEC.

¹⁴⁰ *Rhys-Harper v. Relaxion Group plc* [2003] 1 CMLR 44.

statute to proscribe this behaviour was a drafting error and did not reflect the intention of Parliament.¹⁴¹ Indeed, this would have been contrary to EU law as confirmed in *Coote*. The Court of Appeal was of the view that the *Ghaidan* approach permits words to be implied into the Equality Act 2010 to achieve the result of rendering post-termination employment victimisation unlawful since it would be “consistent with the fundamental principles of the Act itself and ‘go with its grain’”.¹⁴² The Court of Appeal rejected the approach of the EAT and recalled the need to consider the flexibility of the *Ghaidan* approach and the broader context in which the law has evolved.¹⁴³

4.5. LIMITATIONS: “GOING AGAINST THE GRAIN”

It is important to consider the circumstances in which the national courts have considered that it is not “possible” to interpret national law to comply with EU law and the legal and practical consequences that ensue. It should be recalled that in *Vodafone 2*, the Court of Appeal set out two key limitations. First, the national court should ensure that:

The meaning should “go with the grain of the legislation” and be “compatible with the underlying thrust of the legislation being construed.” (per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in [*EB Central Services Ltd v. Revenue and Customs Commissioners* [2008] EWCA Civ 468] at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110–113; Arden LJ in *IDT Card Services* at 82 and 113).

Second, that the:

exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in *IDT Card Services* at 113.)

4.5.1. *Determining the Boundaries*

These limitations are clearly designed to preserve the boundaries between the role of the national courts as interpreters of the law rather than as law-makers.

¹⁴¹ The Court of Appeal confirmed at para. 32 that Explanatory Notes are in principle admissible as an aid to interpretation by the courts: *R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38, per Lord Steyn at paras. 2–6 (pp. 2958–59).

¹⁴² *Jessemy v. Rowstock Ltd* [2014] EWCA Civ 185, at para. 42.

¹⁴³ *Ibid.*, at para. 44.

For the judiciary, the objective or purpose of the national legislation is paramount, and even if a consistent interpretation is possible in principle, if it entail practical consequences which the national court does not have the competence to address, the national court should refrain from adopting the *Marleasing* principle.

Where the boundary lies was discussed by the Court of Appeal in 2015 in *Google Inc v. Vidal-Hall*¹⁴⁴ in which it was held that the *Marleasing* principle could not be applied. In this case, a dispute had arisen between two private parties, and concerned the transposition of the Data Protection Directive into UK law. The Court first sought to determine whether on a literal interpretation, the national implementing law correctly transposed the relevant EU law. It considered that the national provision¹⁴⁵ was more restrictive than EU law,¹⁴⁶ i.e. that the term “damage” contained in the Data Protection Act should not be restricted to pecuniary damage only and prohibit claims for non-pecuniary loss or moral damages. It followed that the Directive had not been effectively transposed,¹⁴⁷ and denied the claimant of an effective remedy for breach of her privacy as protected by the Directive as well as Art. 7 and 8 of the EU Charter of Fundamental Rights. The second issue was whether it was possible to interpret national law in such way as to give full effect to Directive which it purported to implement. The Court of Appeal was of the view that the application of the *Marleasing* principle in this case was not possible. In her judgment, Sharp LJ recalled Lord Rodger’s phrase in *Ghaidan*,¹⁴⁸ namely that the interpretation should not led to a change that “goes against the grain” of the legislation. She went on to set out the litmus test:

The question must always be whether the change that would result from the proposed interpretation (whichever interpretative technique is adopted) would alter a fundamental feature of the legislation. It will not be “possible” to interpret domestic legislation, whether by reading in, reading down or disapplying a provision, if to do so would distort or undermine some important feature of the legislation.¹⁴⁹

The Court of Appeal held that the exclusion of the right to damages for distress where certain conditions are not satisfied is a fundamental feature of the statute, and this reflected a deliberate intention on the part of Parliament to limit the compensation available in the event of a breach. The national court could not find an explanation in the statutory text itself or in Hansard to explain the restriction. There was no evidence that could be provided that could indicate

¹⁴⁴ *Google Inc v. Judith Vidal-Hall* [2015] EWCA Civ 311.

¹⁴⁵ Section 13(2) of the Data Protection Act.

¹⁴⁶ Art. 23 of Directive 95/46/EC.

¹⁴⁷ See *Google Inc. v. Judith Vidal-Hall* [2015] EWCA Civ 311, at para. 84.

¹⁴⁸ See Lord Rodger at para. 121, restated by Sharp LJ in *Google Inc v. Judith Vidal-Hall* [2015] EWCA Civ 311, para. 89.

¹⁴⁹ *Google Inc. v. Judith Vidal-Hall* [2015] EWCA Civ 311, at para. 90.

to the court what Parliament had intended on this issue and which could give the national court some scope for interpretation.¹⁵⁰ While the national court accepted that the interpretative duty may involve disapplying a part of national law to make it compatible with EU law,¹⁵¹ it held that this would be a step too far in this case. The provision was considered to be a central feature of the legislation and it was clear that Parliament had enacted a “carefully calibrated scheme” which restricted the compensation available to victims.¹⁵² Nevertheless, an alternative method of securing Ms Vidal-Hall’s right to damages for distress was possible in this case (see below).

4.5.2. What Happens When a Consistent Interpretation is Not “Possible”?

In the absence of direct effect, if a consistent interpretation is not possible, this may leave a gap in the judicial protection that an individual can obtain where their EU right has been breached. It should be noted that unlike the HRA, there is no power imposed on national courts by EU law or national law to make a declaration of incompatibility stating that national law incompatible with EU law will trigger an amendment to national law.

4.5.2.1. Principle of State Liability

In EU law, the ECJ has long held the view that the alternative remedy is to bring an action for damages against the state for breach of EU law.¹⁵³ This approach is recognised by the UK courts as illustrated in *Google Inc v. Vidal-Hall*. The option was not explored any further as it was not necessary to secure an outcome for the case.¹⁵⁴ Yet, it is also well established that an action for damages is no panacea and subject to conditions and limitations which curtail its effectiveness as an alternative remedy.¹⁵⁵ It should be noted that the European Union (Withdrawal) Act expressly provides for the removal of the *Francovich* remedy from UK law after two years.

4.5.2.2. EU Charter of Fundamental Rights

Prior to the UK’s EU referendum result, it is argued that the UK courts had been adopting a very *communautaire* approach when interpreting and applying

¹⁵⁰ Ibid., para. 91.

¹⁵¹ Ibid., para. 90.

¹⁵² Essentially, the relevant provision only permitted compensation for distress for breach of privacy to be awarded if economic loss had also been sustained.

¹⁵³ See *Wagner Miret* and more recently *Dominguez*.

¹⁵⁴ *Google Inc v. Judith Vidal-Hall* [2015] EWCA Civ 311, para. 86.

¹⁵⁵ See T. Lock, “Is private enforcement of EU law through state liability a myth?: An assessment 20 years after *Francovich*” (2012) 49 *Common Market Law Review* 1675–1702.

the EU's Charter of Fundamental Rights. In *Google Inc*, the Court of Appeal held that the *Marleasing* principle was not applicable, and relied on Art. 47 of the EU Charter of Fundamental Rights (EUCFR) to disapply the offending primary legislation. The same approach had been utilised by the Court of Appeal in an earlier case, *Benkharbouche v. Sudan* and *Janah v. Libya*,¹⁵⁶ where Art. 47 was used to disapply the State Immunity Act 1978 which denied the claimants a right of access to a court for alleged breaches of the national law giving effect to the Working Time Directive.

There is evidence that following the EU referendum result, the Supreme Court is adopting a more cautious approach and moving away from reliance on Art. 47 EUCFR to secure individuals' rights. On appeal in *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah*,¹⁵⁷ the Supreme Court relied on customary international law and Art. 6 ECHR to grant the claimants the *procedural* right of access to a court. The Supreme Court referred to Art. 47 EUCFR very briefly, stating that it did not raise a separate issue to be addressed. It did acknowledge that where there is a conflict with national law, EU law must prevail and the former disapplied, and that, in contrast, where there is a breach of Art. 6 ECHR, a declaration of incompatibility is the only remedy (under s. 4 HRA). However, EU law was not relied upon to resolve the dispute. Similarly, in *Unison*, the Supreme Court briefly referred to Art. 47 EUCFR before relying on common law principles to reach the same result.¹⁵⁸ The European Union (Withdrawal) Act removes the EU Charter of Fundamental Rights from UK law. Yet, the role of the EU Charter of Fundamental Rights before UK courts is in decline even before the UK has withdrawn from the EU. In both cases discussed above, the Supreme Court was able to guarantee fundamental rights of individuals independently of EU law.

4.6. LEGAL CERTAINTY

A degree of legal uncertainty is inherent in the operation of the principle of consistent interpretation.¹⁵⁹ One of the criticisms of the EU principle is its strength and breadth. To what extent can it be considered acceptable that the employers in *Webb*, *Coote*, *Attridge* and *Jessemey* were subject to legal obligations of which they would have been unaware? Is this consistent with the rule of law? There is a view that this level of legal uncertainty is an acceptable

¹⁵⁶ *Benkharbouche, Janah v. Embassy of the Republic of Sudan*: [2015] EWCA Civ 33.

¹⁵⁷ [2017] UKSC 62.

¹⁵⁸ *R (on the application of Unison) v. Lord Chancellor* [2017] UKSC 51.

¹⁵⁹ *Betlem* (n. 4), p. 417.

trade-off between, “on the one hand, the legitimate expectations of the individual seeking to have purely national law applied, and, on the other hand, the need to ensure the widest enforcement possible of Community law, along with the protection of the rights of individuals originating in Community law”.¹⁶⁰ Furthermore, the limitations on interpreting national law *contra legem* or in breach of general principles of law could be considered to be sufficient safeguards in respecting the rule of law. It could also be argued that much of the litigation would not arise if the Member States implemented EU law in their own legal orders correctly (estoppel argument).

The UK judiciary seems to have some sympathy with concerns about legal certainty for parties who may be subject to unforeseen legal obligations, but it is limited and, in general, it has not been sufficient to override their duty to apply a consistent interpretation. In *IDT Card Services*,¹⁶¹ the principle of consistent interpretation was adopted in a complex case concerning the interpretation of national law purporting to implement the Sixth EC VAT Directive¹⁶² which raised an issue of “novelty and difficulty”. Essentially, as the rules in the UK and Republic of Ireland differ, they had given rise to circumstances in which a VAT-free scenario had arisen. Arden LJ acknowledged that there was an argument against applying the *Marleasing* principle based on legal certainty and the legitimate expectations of the taxpayer. However, she was of the view that it was well known that the VAT Act 1994 had to be interpreted in conformity with the Sixth VAT Directive and that the supply of telecommunications services amounts to a taxable supply for the purposes of the Directive.¹⁶³ In *British Gas Trading v. Lock*,¹⁶⁴ Sir Colin Rimer expressed some sympathy for the fact that the “correct” interpretation of Art. 7 of the Working Time Directive had emerged several years after it had come into force through a later interpretation of the EU provision by the ECJ, but proceeded to interpret national law in line with EU law. In 2002, Betlem argued that if the legislature “voluntarily” accepted the levels of legal uncertainty created by s. 3 HRA, which had in turn been inspired by the EU interpretative principle, then the same acceptance should be accorded to legal uncertainty resulting from the application of the *Marleasing* principle. This is even more compelling given that the UK legislature considered the insertion of an interpretative obligation into the HRA preferable to permitting courts to set aside conflicting legislation as in the case of direct effect.¹⁶⁵

¹⁶⁰ K. Lackhoff and H. Nyssens, “Direct effect of directives in triangular situations” (1998) 23 *European Law Review* 397, at 411.

¹⁶¹ *R (IDT Card Services Ireland Ltd) v. Customs and Excise Commissioners* [2006] EWCA Civ 29.

¹⁶² Directive 77/338/EC.

¹⁶³ Arden LJ, at para. 110.

¹⁶⁴ *British Gas Trading v. Lock, Secretary of State for Business, Innovation and Skills* [2016] EWCA Civ 983.

¹⁶⁵ Betlem (n. 4), p. 417.

5. THE EFFECTIVENESS OF THE PRINCIPLE OF CONSISTENT INTERPRETATION IN THE UK COURTS

There are two specific policy areas where the effectiveness of the UK courts' approach in relation to the principle of consistent interpretation has been called into question. This undermines its potency as a key weapon in the armoury of individuals who are seeking to invoke or protect their EU rights before national courts which have been infringed, and particularly in the absence of direct effect.

5.1. MOTOR INSURANCE DIRECTIVES

The *nature* of the implementation of the EU Motor Insurance Directives¹⁶⁶ into UK law is unconventional and includes relying on existing statutes such as the Road Traffic Act 1988, and the continued use of historic *private law* agreements between the Department of Transport and the Motor Insurance Bureau.¹⁶⁷ This hotchpotch legal framework has given rise to many of the deficiencies in the transposition of EU law into national law and resulted in extensive litigation before the UK and the emergence of specialist lawyers in the field.¹⁶⁸ The application of the principle of consistent interpretation has had mixed results. In this policy area, there seems to be a more cautious approach on the part of the judiciary to using the *Marleasing* principle. Compared to the field of employment law, the UK courts seem much more reluctant to insert new provisions into national law to ensure compliance with EU law even where this would seem to be demanded by interpretations of the law delivered in the judgments of the ECJ. In contrast, where there has been a referral by a UK court, the referring court has been more willing to adopt a conform interpretation of national law in line with EU law.¹⁶⁹

One restriction on the use of the principle of consistent interpretation arose in the House of Lords 2001 decision in *White v. White*. The case involved

¹⁶⁶ The five Motor Insurance Directives enacted between 1972 and 2005 have now all been consolidated into a single instrument: Directive 2009/103/EC.

¹⁶⁷ The first agreement of this nature dates back to 1945. See further J. Davey and C. Richards, "Direct but ineffective? The Second Motor Insurance Directive" (1999) *Journal of Business Law* 157.

¹⁶⁸ See e.g. specialist UK solicitor firms like Nicholas Bevan and Leigh Day solicitors.

¹⁶⁹ See e.g. in *Churchill Insurance Company Ltd v. Fitzgerald Wilkinson; Evans v. Cockayne & Equity Claims Ltd v. Secretary of State for Transport* [2012] EWCA Civ 1166 where following a referral to the ECJ in Case C-442/10, *Churchill*, the court (and all the parties including the intervening Secretary of State for Transport) accepted that an interpretation conforming to EU law was possible, but the disagreement centred on the form of the words to be inserted into the Road Traffic Act 1988.

a number of disputes (joined on appeal) concerning the enforcement of the EU's Second Motor Insurance Directive¹⁷⁰ which requires Member States to establish a compensation fund for the victims of uninsured drivers and "hit and run" accidents. In the UK, these obligations were given effect through private law contractual arrangements between the Department for Transport and the Motor Insurance Bureau, the body responsible for paying compensation claims. The litigation reflects the general approach to the enforcement of EU rights before national courts with direct effect being considered first, followed by the principle of consistent interpretation, and finally the principle of state liability.¹⁷¹ At first instance, the trial judge resolved the issue through recourse to the doctrine of direct effect.¹⁷² The Court of Appeal¹⁷³ held that the trial judge had erred in law in relying on direct effect. Further, it refused to adopt the principle of consistent interpretation on the grounds that the private law contractual arrangements purporting to give effect to the Directive could not be categorised as "national law" for the purpose of the *Marleasing* principle. Similarly, the House of Lords declared that the relevant provisions of the Directive were insufficiently precise to have direct effect, and then considered that the *Marleasing* principle could not be used as an alternative method of giving effect to the Directive. Lord Nicholls held that the principle of indirect effect "cannot be stretched to the length of requiring contracts to be interpreted in a manner that would impose on one or other of the parties obligations which, the *Marleasing* case apart, the contract did not impose".¹⁷⁴ Fortunately for the claimant, Lord Nicholls resolved the dispute by drawing on a domestic variant of statutory interpretation. He held that, even though the *Marleasing* principle could not apply in this context, "I consider that the application of the conventional [contract law] principles of interpretation of documents arrives at the same result".¹⁷⁵ Lord Cooke argued that the EU version could have been used.

Although the practical result for the claimant was the same, the UK's unconventional transposition of the Directive through non-legislative means

¹⁷⁰ Directive 84/5/EEC of 30 December [1984] OJ L8/17.

¹⁷¹ For further discussion and a comparison of how a similar dispute was resolved before the Irish courts by recognising that the Motor Insurance Bureau of Ireland was jointly liable for damages with the State for mal-implementation of the Directive in accordance with the *Francovich* principle: C. Costello and S. Drake "Enforcing EC Motor Insurance Directives: Navigating the Maze" (2003) 9(3) *European Public Law* 371–98.

¹⁷² Judgments of 13 March 1997 and 12 March 1998 unreported.

¹⁷³ *Mighell v. Reading; Evans v. MIB; White v. White* [1999] 1 CMLR 1251. It should be noted in Case C-413/15, *Farrell*, ECLI:EU:C:2017:745, the Motors Insurers' Bureau of Ireland was deemed to be an emanation of the state. It is argued that the same interpretation should be applied to the MIB in the UK which would mean that the judgment of the Court of Appeal is no longer good law.

¹⁷⁴ *White* [2001] 2 All ER 43, para. 22.

¹⁷⁵ *Ibid.*, para. 23.

combined with the refusal by the House of Lords to apply the *Marleasing* principle to private law agreements created unacceptable levels of legal uncertainty and a lacuna in the effective protection of individuals' rights before the national courts. It was hoped that the ECJ would chastise the UK's method for transposing the Directive into national law in *Evans*.¹⁷⁶ The Advocate General had been highly critical of the UK's implementing approach and considered it to be "fraught with so many imponderables that it fails to satisfy the requirements of legal certainty ...".¹⁷⁷ He called on the national courts to use the *Marleasing* principle to rectify this legal uncertainty.¹⁷⁸ In his view, failing to do so because of the constraints of national law meant that the Directive had not been implemented correctly into UK law.¹⁷⁹ Unfortunately, the ECJ adopted a more deferential and pluralist approach and made no direct reference to the *Marleasing* principle. The Court clearly did not want to be drawn on the UK's implementation of the Directive by a private law agreement, or on the reliance of the national courts on domestic principles of interpretation. It is argued by this author that the ECJ would prefer the UK courts to resolve the issues themselves. Indeed, in *White*, the end result for the claimant was the same. Nevertheless, in the interests of legal certainty, the effective judicial protection of the individual's Union rights, and to avoid unnecessary litigation, there have been calls for the ECJ to be more explicit to avoid any confusion on the part of the national court in the future.¹⁸⁰

Further legal uncertainty has arisen in this area of law in more recent litigation. For example, in *Bristol Alliance Partnership v. Williams, EUI Ltd*,¹⁸¹ the *Marleasing* principle was adopted by the High Court to interpret the Road Traffic Act 1988 and the 1999 MIB Agreement to bring national law in line with the EU Motor Insurance Directives as interpreted by the ECJ in *Bernaldez*.¹⁸² However, this ruling was overturned by the Court of Appeal which held that the ECJ ruling was not of "general application."¹⁸³ A subsequent successful *Francovich* damages claim in *Delaney II*¹⁸⁴ casts doubt on this view and lawyers

¹⁷⁶ Case C-63/01, *Evans v. Secretary of State for the Environment, Transport and the Regions and Motor Insurers' Bureau* [2004] 1 CMLR 47.

¹⁷⁷ Opinion of Advocate General Alber, C-63/01 *Evans v. Secretary of State for the Environment, Transport and the Regions and Motor Insurers' Bureau* [2004] 1 CMLR 47 at para. 131.

¹⁷⁸ *Ibid.*, para. 132.

¹⁷⁹ *Ibid.*, para. 133.

¹⁸⁰ *Betlem* (n. 4).

¹⁸¹ [2011] EWHC 1657 (QB).

¹⁸² Case C-129/94, *Ruiz Bernaldez* [1996] ECR I-1929. The ECJ held that the EU Motor Insurance Directives could not be interpreted to allow an insurance contract to exclude liability to pay compensation for damage to property caused by an intoxicated driver. The exceptions listed in the relevant directive are exhaustive.

¹⁸³ *EUI Ltd v. Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267. For criticism of this decision, see N. Bevan, "Marking the Boundary" (2013) 3 *Journal of Personal Injury Law* 151.

¹⁸⁴ See *Delaney v. Secretary of State for Transport* [2014] EWHC 1785 (QB).

have called for the Department of Transport's systemic failure to fully implement the Motor Insurance Directives to be addressed.¹⁸⁵ An investigation for non-compliance by the European Commission under Art. 258 TFEU is not yet complete.

A great deal of legal uncertainty has arisen following the ECJ's judgment in *Vnuk*¹⁸⁶ in which the Court held that the concept of "use of vehicles" as set out in the First Motor Insurance Directive¹⁸⁷ which covers "the use of a vehicle that is consistent with the normal function of that vehicle" includes the use of a tractor with a trailer attached, in a farmyard, in order to reverse into a barn. Furthermore, it is *implicit* in *Vnuk* that the liability extends to private land such as the farmyard in the main proceedings. This means that UK motor insurance law as it currently stands is incompatible with EU law. In a UK case, *UK Insurance Ltd v. Holden*,¹⁸⁸ a claim was brought in which a car had caught fire while being repaired on private land and had spread to an adjacent building causing extensive damage. The insurer of the property paid out over £2million and then sought an indemnity from the car owner, Mr Holden, and his motor insurer, UK Insurance Ltd. The motor insurer claimed that the policy did not cover the claim as the incident took place on private land and did not entail the "use" of the car. In accordance with national law, third party liability only arises in relation to accidents when the car is being driven or used on a public road or other public place. Before the High Court, the judge denied the claim on the basis that the repair of the car did not amount to use. However, the judge considered obiter that the Road Traffic Act 1988 (s. 145(3)) which refers to the use of vehicle "on a road or other public place" did not comply with EU law following *Vnuk*. He did not consider it appropriate to apply the principle of consistent interpretation in this case since to even insert the word "including" before "on a road" into the Act to bring it in line with EU law would "go against the grain" of the Act of Parliament and amount to an amendment rather than an interpretation of the law. He held obiter that

The addition of that single word belies ... the scale of the change. It may be that extending the ambit of the Act in this way does not in practice lead to many more claims especially given the need to have requisite use of the vehicle but nonetheless, this is potentially a significant additions to the scope of the Act and it is in a different league to importing the ECJ's definition of "use".¹⁸⁹

¹⁸⁵ See e.g. N. Bevan, in his article, "A world turned upside down" (2014) 3 *Journal of Personal Injury Law* 136.

¹⁸⁶ Case C-162/13, *Vnuk v. Zavarovalnica d.d.*, ECLI:EU:C:2014:2146.

¹⁸⁷ Art. 3(1) "covers any use of a vehicle that is consistent with the normal function of that vehicle".

¹⁸⁸ [2016] EWHC 264.

¹⁸⁹ *Ibid.*, para. 38.

The issue was addressed directly by the High Court in an action for judicial review brought by Roadpeace, a charity which promotes road safety and provides support for crash victims. In *Roadpeace v. Secretary of State for Transport, Motor Insurer's Bureau*,¹⁹⁰ the claimant argued that various provisions of national law are inconsistent with EU law. The High Court accepted that national law is not compliant with the ECJ's ruling in *Vnuk*, but also refused to adopt the *Marleasing* principle on the grounds that it would run counter to the principles set out in *Vodafone No. 2*. The court was cognisant of its duty to provide effective remedies in line with Case C-432/05, *Unibet*, but considered that the only remedy available was to issue a Declaration. It was willing to accept submissions by the parties on whether more was required once the judgment has been handed down, e.g. a timetable for legislative amendment.¹⁹¹

This author argues that the recognition by the judiciary of the potentially wide-reaching implications of interpreting national law in compliance with *Vnuk* for the insurance industry and its business model explains their more cautious approach in this field compared to employment policy. For Davey, this resistance to "Europeanisation" in the field of motor insurance by some of the judiciary, demonstrates a commitment to the model of insurance (and tort) law as separate in nature and subject to the market.¹⁹²

Nevertheless, the inconsistency between EU law and national law exposes the UK to a *Francovich* damages claim.¹⁹³ Given that the full implications of the *Vnuk* ruling are far-ranging and unforeseen by the Court of Justice, the European Commission¹⁹⁴ and the UK Government¹⁹⁵ have launched consultations to consider the appropriate (legislative?) response.

¹⁹⁰ [2017] EWHC 2725. Roadpeace is a national charity which promotes road safety and provides support for road crash victims.

¹⁹¹ In *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28, the Supreme Court issued a mandatory order requiring the Secretary of State to prepare new air quality plans which should be delivered to the European Commission in accordance with a defined timetable.

¹⁹² J. Davey, "A compulsory diet of chickens and eggs: The EU Motor Insurance Directives as a shadow tort regime" in P. Giliker, *Research Handbook on EU Tort Law* (Edward Elgar, 2017).

¹⁹³ In December 2016, a claim brought by a motor trade dealer who traded from his farm in Wales and was injured by a customer test-driving a 4X4 quad bike was settled. The barrister for the claimant indicated that if the claim had gone to trial and the national court not construed UK law to comply with EU law, the claimant would have instigated a *Francovich* claim: "Andrew Ward obtains settlement in a *Vnuk* type personal injury claim" 3 January 2017. Accessed at <www.exchangechambers.co.uk> on 9 January 2017.

¹⁹⁴ See Inception Impact Assessment, "Adaptation of the scope of Directive 2009/103/EC on motor insurance: Roadmap" (8 June 2016).

¹⁹⁵ Department for Transport, Technical consultation on motor insurance: Consideration of the European Court of Justice ruling in the case of *Damijan Vnuk v. Zavarovalnica Triglav d. d.* (C-162/13), published 20 December 2016. Consultation ends on 31 March 2017.

5.2. WORKING TIME DIRECTIVE

Another area of legal uncertainty has revolved around the correct interpretation of the national law purporting to implement the Working Time Directive,¹⁹⁶ particularly the provisions on annual leave.¹⁹⁷ A preliminary reference was sent to the ECJ by an ET to ascertain the correct interpretation of Art. 7(1) with regard to holiday pay. The case concerned a salesman, whose remuneration package included a basic salary plus results-based commission depending on the number and type of contracts he persuaded customers to enter into. However, his holiday pay consisted only of his basic salary and any commission which had been earned at an earlier date but had not been paid at that time. Since he was not working he could not earn any commission while he was on holiday. He claimed that his rights under EU law had been infringed and that the relevant national law¹⁹⁸ should be interpreted in light of the Directive. The ECJ held in *Lock v. British Gas Trading Ltd*¹⁹⁹ that the right to paid annual leave is an important principle of EU social law and further, is set out in Art. 31(2) of the Charter of Fundamental Rights.²⁰⁰ Accordingly, Art. 7(1) requires that results-based commission paid to an employee which is not dependent on the amount of work done by that employee must be taken into account in the calculation of pay for annual leave (otherwise employees may be deterred from taking leave). On referral back to the ET, it was held that it was possible to interpret the relevant national law to comply with EU law by “reading words” into the applicable statute.²⁰¹ This approach was confirmed on appeal to the EAT²⁰² (following the earlier EAT decision in *Bear Scotland and Others v. Fulton and Others*).²⁰³

¹⁹⁶ Council Directive 93/104/EC and amended by Council Directive 2000/34/EC. These two directives have since been consolidated into Council Directive 2003/88/EC which came in force on 2 August 2004.

¹⁹⁷ Art. 7: “(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. (2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”

¹⁹⁸ Section 221 of the Employment Rights Act 1996 and Regulation 16 of the Working Time Regulations 1998, as amended. The current version came into force on 1 October 2013.

¹⁹⁹ Case C-539/12 *Lock v. British Gas Trading Ltd* [2014] ICR 813.

²⁰⁰ Art. 31(2) EUCFR states that every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

²⁰¹ The employment tribunal considered four alternatives and opted for the national law being construed as if an additional paragraph had been added to the implementing law.

²⁰² *British Gas Trading Ltd v. Lock, Secretary of State for Business, Innovation and Skills*, EAT, 22 February 2016. It should be noted that this claim had been selected as the lead claim for over 900 claims against British Gas and for thousands of other similar claims that have been stayed pending the outcome of this claim.

²⁰³ *Bear Scotland and Others v. Fulton and Others* [2015] ICR 221. Although not bound to follow its own decisions, the EAT will find them of persuasive authority and generally will follow

On appeal before the Court of Appeal,²⁰⁴ the leading judge, Sir Colin Rimer was also prepared to interpret national law to comply with EU law. He dismissed the argument that such an interpretation would be *contra legem* as held in case-law pre-dating the jurisprudence of the ECJ on Art. 7. He added that in light of the recent judgment in Case C-441/14, *Dansk Industri*,²⁰⁵ the existence of conflicting domestic case-law does not prevent a conform interpretation being adopted by a national court. In his view, the case fell within a set of circumstances referred to by Arden LJ in *IDT Card Services Ltd*²⁰⁶ whereby the correct interpretation of the law could not have been envisaged by Parliament when adopting the domestic implementing legislation, but that there was no conflict with the “grain or thrust” of the national legislation.²⁰⁷ In an interesting development, the judge confined *Lock* to its facts. He also held that a narrower interpretation of national law should be adopted which referred to results-based commission only. The conforming interpretation originally adopted by the ET had referred to all forms of commission. Deep concerns about the implications of such a broad interpretation were raised during the proceedings as this could include, *inter alia*, bankers’ bonuses!²⁰⁸ Permission to appeal against the Court of Appeal ruling to the Supreme Court was refused, paving the way for payment of compensation for Mr Lock and thousands of employees in a similar position.

6. CONCLUDING REMARKS

This contribution explores the application and the effectiveness of the principle of consistent interpretation by the UK courts since its inception by the ECJ in *Von Colson* in 1984. Three phases are identified in the application of this

them. There are four exceptions to this general principle: (1) where the earlier decision was *per incuriam*, in other words, where a relevant legislative provision or binding decision of the courts was not considered; (2) where there are two or more inconsistent decisions of the Appeal Tribunal; (3) where there are inconsistent decisions of the Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court; (4) where the earlier decision is manifestly wrong; (5) where there are other exceptional circumstances.

²⁰⁴ *British Gas Trading v. Lock, Secretary of State for Business, Innovation and Skills* [2016] EWCA Civ 983.

²⁰⁵ Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278, judgment of 19 April 2016 (Grand Chamber). This judgment and the response of the Danish courts is discussed elsewhere in this volume.

²⁰⁶ Sir Colin Rimer refers to Arden LJ at para. 113.

²⁰⁷ *Ibid.*, paras. 109–12.

²⁰⁸ *Ibid.*, paras. 114–16.

EU method of statutory interpretation by the UK courts. They broadly reflect a shift from a traditionalist view of parliamentary sovereignty, where Parliament is deemed to be the supreme law-maker, to the New View, where it is accepted that parliamentary sovereignty has to be reconciled with the UK's international law obligations stemming from its membership of the European Union and as a signatory to the European Convention of Human Rights. The first phase immediately follows the establishment of the duty in *Von Colson* and demonstrates a cautious approach: where national legislation had been enacted to give effect to EU law, the national courts were prepared to apply the principle of consistent interpretation to read words into a statute where a literal reading was not ambiguous, but would not be sufficient to comply with EU law; yet where national legislation pre-dated an EU directive, the UK courts refused to interpret it in light of a later EU directive. This initial reluctance and arguably deference to parliamentary sovereignty and its legislative intentions changed following the *Marleasing* ruling in 1990 (and the ruling of the then House of Lords in *Factortame*), where the ECJ was unequivocal in stating that the duty of consistent interpretation imposed on national courts required them to consider all national law, even if it pre-dated the conflicting EU law. At this point, the UK courts entered into a second phase in which they broadly accepted the full nature of the duty imposed on them by EU law. Indeed, from this point onwards, the principle of consistent interpretation was more commonly referred to by legal counsel and the judiciary as the “*Marleasing* principle”. This phase continued until the House of Lords delivered its decision in *Ghaidan*. This was a judgment on the interpretation of a statute in light of the HRA and it explored in depth the duty of interpretation incumbent on national courts to interpret national law in compliance with the ECHR. It was later claimed by the Court of Appeal that it was at this point that the UK judiciary “assimilated” their duty under s. 3 of the HRA with their duty under EU law under the *Marleasing* principle (or vice versa). There is now no discernible difference in the application of the principle of consistent interpretation when determining its scope, namely whether a consistent interpretation is “possible”. The UK courts are confident in complying with the interpretative obligation derived from EU law and are clear as to the boundaries between interpretation and amendment of the law. The courts have consistently refused to “go against the grain” of national legislation enacted by Parliament and venture into the field of policy-making. The contribution draws attention to the areas of motor insurance law and annual leave where the use of the principle of consistent interpretation has been more cautious and contested before the UK courts. This uncertainty in the law has arguably led to unnecessary and costly litigation for individuals seeking to assert their EU rights where national implementing legislation is deemed out of line with EU law, sometimes as a result of later ECJ rulings. There remains a great deal of

legal uncertainty surrounding the UK's departure from the EU. Nevertheless, on the basis of this contribution, it can be predicted that the UK judiciary will interpret in accordance with Parliament's intentions. For this reason, it is essential that the EU (Withdrawal) Act 2018 (and any other Acts of Parliament related to Brexit) clearly stipulate the obligations of the judiciary to interpret national law to comply with EU law as it evolves post-Brexit either through legislation or judgments of the ECJ.