

PART A INTRODUCTION

Constitutional Framework and Principles for Interpretation

Selected Bibliography: Acosta Arcarazo/Murphy (eds), *EU Security and Justice Law* (Hart, 2014); Azoulai/de Vries (eds), *EU Migration Law* (OUP, 2014); Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011); Boeles/den Heijer/Lodder/Wouters, *European Migration Law*, 2nd edn (Intersentia, 2014); Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy', in: Hofmann/Türk (eds), *EU Administrative Governance* (Elgar, 2006), p. 287 340; Craig, *EU Administrative Law*, 2nd edn (OUP, 2012); Groenendijk, 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach', *EJML* 16 (2014), p. 313 335; Guild/Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff, 2012); Hailbronner, *Asyl und Ausländerrecht*, 3rd edn (Kohlhammer, 2013); Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer, 2000); Monar, 'The Area of Freedom, Security and Justice', in: von Bogdandy/Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart, 2009), p. 551 585; Pascouau, *La politique migratoire de l'Union européenne* (Fondation Varenne, 2011); Peers, *EU Justice and Home Affairs Law*, 3rd edn (OUP, 2011); Thym, 'EU Migration Policy and its Constitutional Rationale', *CML Rev.* 50 (2013), p. 709 736; Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck, 2010); Walker (ed), *Europe's Area of Freedom, Security and Justice* (Hart, 2004); Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff, 2010).

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I. General Remarks

1. Evolution of the Treaty Regime

EU immigration and asylum legislation is nowadays adopted on the basis of 1 Articles 77 80 TFEU. These provisions have been firmly embedded into the supranational legal order of the EU Treaties since the entry into force of the Treaty of Lisbon on 1 December 2009. Prior to this date, the situation was different. To a large degree, early EU immigration and asylum law had been dominated by *ad hoc* inter governmental cooperation between some or all Member States outside of the supranational Treaty

framework. Informal cooperation existed since the early 1970s¹ and was subsequently transformed into binding **international treaties** such as the original Schengen Agreement of 1985, the **Schengen Implementing Convention** of 1990 (see Thym, *Legal Framework for Entry and Border Controls*, MN 1) and the Dublin Convention of 1990.² More detailed rules were laid down in the decisions of the Schengen Executive Committee and other bodies established under said Conventions, where national interior ministers adopted multiple implementing decisions, intergovernmental resolutions or similar arrangements (this mode of decision making was often criticised as intransparent and undemocratic³). These rules later became known as the ‘Schengen Acquis’ and formed the backbone of the EU immigration and asylum law, which will be discussed in this volume. While the UK and Ireland remained outside the Schengen framework, most other Member States joined Schengen (see below MN 42).

- 2 In 1992, the **Treaty of Maastricht** established a framework for decision making on justice and home affairs within the newly founded European Union, which maintained decidedly **intergovernmental characteristics**. At the time, the EU Treaty only allowed for the adoption of non binding joint positions or the elaboration of international treaties (not supranational directives and regulations), which would have to be ratified by national parliaments in line with established principles of public international law.⁴ These rules on intergovernmental justice and home affairs in the Maastricht Treaty proved rather inefficient and produced little legally binding output.⁵ Nevertheless, the informal arrangements provided a bedrock of common standards which the EU institutions could build on once the **Treaty of Amsterdam** established a more robust Treaty base for migration and asylum law within the supranational EC Treaty.⁶ To satisfy British, Irish and Danish demands, these states were granted an opt out (see below MN 38–45). At the same time, the Schengen Acquis was incorporated into the EU framework, thereby giving more substance to the new Treaty bases (see Thym, *Legal Framework for Entry and Border Controls*, MN 2–3).
- 3 Since the entry into force of the Treaty of Amsterdam, the EU institutions have been allowed to adopt regular Community instruments, in particular Directives and Regulations, which can be directly applicable and benefit from primacy over domestic law in cases of conflict, in line with the established principles of the supranational legal order. Nonetheless, the transfer of immigration, asylum and border controls to the supranational ‘first pillar’ remained incomplete, since the Treaties of Amsterdam and Nice continued specific institutional arrangements that diverged from the **supranational decision making method**. This was deemed necessary in order to take account of the political ‘sensitiveness’ of matters which had hitherto belonged to the core issues of

¹ See Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff, 2006), p. 3–16.

² Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 December 2000 (OJ 1997 C 254/1).

³ See Curtin/Meijers, ‘The Principle of Open Government in Schengen and the European Union’, *CML Rev.* 32 (1995), p. 391–442; and, for improvements after the integration into the EU legal order, see Thym, ‘The Schengen Law: A Challenge for Legal Accountability in the European Union’, *ELJ* 8 (2002), p. 218, 221–233.

⁴ Cf. Article K.2(2) EU Treaty as amended by the Treaty of Maastricht of 7 February 1992 (OJ 1992 C 191/1).

⁵ See Hailbronner, *Immigration and Asylum Law*, p. 35–42; and Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002), ch. 6.

⁶ Cf. Articles 61–69 EC Treaty as amended by the Treaty of Amsterdam of 2 October 1997 (OJ 1997 C 340/173); on the negotiating history, see Guild, *Guild, Immigration Law in the European Community* (Martinus Nijhoff, 2001), p. 327–333.

national sovereignty.⁷ For that reason, the Council acted unanimously on proposals from the Commission or a Member State in most subject areas and the European Parliament was only consulted. Moreover, not all domestic courts could make preliminary references to the Court of Justice.⁸ The Treaty of Nice, which entered into force in 2003, extended today's ordinary legislative procedure to some policy fields⁹ and one year later the Council activated a bridging clause in the EC Treaty rendering more areas subject to qualified majority voting in the Council and co decision powers of the European Parliament.¹⁰ However, full supranationalisation was brought about only by the entry into force of the **Treaty of Lisbon**, which aligned immigration and asylum law with the orthodoxy of supranational decision making. In the age of the Lisbon Treaty we may conclude that the former 'ghetto' has been gentrified; Articles 77–80 TFEU are part and parcel of the supranational integration method.¹¹

The Treaty of Lisbon not only streamlined decision making procedures, but also broadened the scope of Union competences through a **substantive revision of today's Articles 77–80 TFEU** in line with the proposal of the erstwhile Constitutional Treaty, which never entered into force. The European Convention, which drafted the Constitutional Treaty, was particularly active in the field of justice and home affairs and its conclusions on immigration and asylum retain full relevance, since they were later integrated in the Lisbon Treaty without major changes.¹² To understand the meaning of Treaty formulations such as 'integrated management system for external borders' (Article 77(2)(d) TFEU), it is helpful to consult the drafting documents of the European Convention.¹³ The **scope of EU competences** on immigration and asylum will be discussed in more detail in the introductions to the different chapters of this commentary dealing with border controls and visas (see Thym, Legal Framework for Entry and Border Controls, MN 7–24), immigration (see Thym, Legal Framework for EU Immigration Policy, MN 9–27) and asylum (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 8–36).

2. Objectives for Law-Making

Besides the consolidation of Union competences, the Treaty of Lisbon endorsed the **self sufficiency of EU immigration and asylum law** in line with the reform steps agreed upon in the debate leading towards the Constitutional Treaty (see above MN 4). EU activity on the basis of Articles 77–80 TFEU is no longer presented as a spillover of the single market in line with the original assumption that the abolition of border controls within the Schengen area necessitated 'flanking measures' compensating Member States for the loss of control options at domestic borders (see Thym, Legal Framework for

⁷ See Walker, 'In Search of the Area of Freedom, Security and Justice', in: *ibid.* (ed), *Europe's Area*, p. 3, 16–20; for a critical position, see Peers, *EU Justice and Home Affairs Law*, 1st edn (Longman, 2000), p. 2: 'ghetto.'

⁸ See Articles 67, 68 EC Treaty (OJ 1997 C 340/173), which also provided for some qualified majority voting in the Council after a five year period; and Hailbronner, *Immigration and Asylum Law*, p. 92–103.

⁹ Cf. Article 67(5) EC Treaty as amended by the Treaty of Nice of 26 February 2001 (OJ 2006 C 321E/37) and the Protocol (No. 35) on Article 67 (OJ 2006 C 321E/317).

¹⁰ See Decision 2004/927/EC (OJ 2004 L 396/45).

¹¹ See Peers, *EU Justice*, p. 17–24.

¹² Articles 77–80 TFEU correspond to Articles III 265–268 Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force.

¹³ For detail, see Ladenburger/Verwirlghen, 'Policies Relating to the Area of Freedom, Security and Justice', in: Amato/Bribosia/de Witte (eds), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), p. 743–772; and Thym, *The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe*, WHI Paper 12/2004, http://www.whi-berlin.eu/documents/whi_paper1204.pdf [last accessed 13 November 2015].

Entry and Border Controls, MN 3). Instead, immigration and asylum law has been reaffirmed as a self sufficient policy field in its own right within the area of freedom, security and justice,¹⁴ which Article 3(2) TEU lists among the central objectives of the European project. The concept of the ‘area of freedom, security and justice’ was first introduced first by the Treaty of Amsterdam and was later reinforced by the Treaty of Lisbon (in line with the Constitutional Treaty). It was conceived of as a grand design mirroring earlier projects to realise a single market or economic and monetary union, thereby pushing the process of European integration into new directions, although it should be acknowledged that it was not immediately clear what exactly the ‘area of freedom, security and justice’ was actually meant to mean.¹⁵

- 6 The conceptual autonomy of the area of freedom, security and justice confirms that EU immigration and asylum law does not replicate the mobility regime of Union citizens. Instead, immigration and asylum law is nowadays typified by a collection of **diverse objectives laid down in the EU Treaties**, which were introduced by the Treaty of Lisbon. The abolition of internal borders is complemented by ‘enhanced measures to combat illegal immigration’¹⁶ which command ‘compliance with the principle of *non refoulement*.’¹⁷ Generally speaking, ‘the efficient management of migration flows’¹⁸ is to be accompanied by ‘fair[ness] towards third country nationals.’¹⁹ These objectives may be summarised under the heading of ‘**migration governance**’ a choice of terminology recognising that the migration control perspective of state authorities must accommodate legitimate interests of migrants.²⁰ Two basic features define the new Treaty regime and illustrate that the area of freedom, security and justice differs from the historic template of Union citizenship: firstly, legislation concerning third country nationals is not usually based on individual rights to cross border movement at constitutional level (see Thym, Legal Framework for EU Immigration Policy, MN 28 36); secondly, the extended legislative discretion is not absolute, since EU legislation on immigration and asylum must respect human rights (see below MN 46 55).
- 7 The EU legislature benefits from principled discretion when it comes to realising the Treaty objectives for immigration and asylum law. The EU institutions are bound to promote the Treaty objectives, even if the latter do not regularly translate into judicable yardsticks for secondary legislation.²¹ In contrast to human rights (see below MN 46 55), the Treaty objectives cannot usually be relied on in situations of judicial review in order to challenge EU legislation. Academics may criticise the predominance of securitarian approaches focusing on migration control,²² but such criticism remains inherently political as long as it does not fall foul of human rights standards. This principled **discretion on the side of the legislature in realising the Treaty objectives** is a general characteristic of Union law²³ and is reaffirmed, within the context of the area

¹⁴ At a textual level, Article 67 TFEU defines the area of freedom, security and justice without reference to the concept of flanking measures (as did Article 61 lit. a EC Treaty Amsterdam/Nice).

¹⁵ See Monar, *The Area of Freedom*, p. 552 562.

¹⁶ Article 79(1) TFEU.

¹⁷ Article 78(1) TFEU.

¹⁸ Article 79(1) TFEU.

¹⁹ Article 67(2) TFEU; similarly, Article 79(1) TFEU; for the meaning of the different Treaty objectives see, again, Monar, *The Area of Freedom*, p. 552 562; and Costello, *Administrative Governance*, p. 289 293.

²⁰ See Thym, *EU Migration Policy*, p. 718 723.

²¹ Similarly, Thym, *Migrationsverwaltungsrecht*, p. 96 99; and Bast, *Aufenthaltsrecht*, p. 141 144.

²² By way of example, see Guiraudon, ‘European Integration and Migration Policy’, *JCMS* 38 (2000), p. 251 271; and Acosta Arcarazo/Martire, ‘Trapped in the Lobby: Europe’s Revolving Doors and the Other as Xenos’, *EL Rev.* 39 (2014), p. 362 379.

²³ The same applies to the objectives in Article 3 TEU.

of freedom, security and justice, by the inherent contradictions between different objectives.²⁴ Moreover, EU immigration and asylum law is not only bound to promote the objectives laid down in Articles 77–80 TFEU, since it must also contribute to the realisation of general objectives, such as ‘full employment’ (Article 3(1) TEU), which arguably supports restrained rules on the access of lesser qualified migrants for as long as unemployment remains ubiquitous among Union citizens.²⁵ The same applies to the objectives of external action, which include, among other things, the eradication of poverty in developing countries.²⁶

3. Political Programming

In the initial stages of EU legislative harmonisation, the grand design of the area of freedom, security and justice established by the Treaty of Amsterdam (see above MN 6) was in need of an overarching rationale giving substance to the abstract notion of ‘freedom, security and justice’.²⁷ This function was assumed by the programmes put forward by the European Council on the occasion of its meetings in **Tampere (1999)**, **The Hague (2004)**, **Stockholm (2009)** and **Ypres (2014)**²⁸ and the intergovernmental 2008 Pact on Immigration and Asylum as an interlude.²⁹ The theoretical underpinning of these programmes was met with criticism due to their lack of conceptual coherence across policy fields,³⁰ but the various programmes served important functions from a political perspective. Throughout the years, the focus of attention shifted in response to wider political and social developments in Europe and beyond. While the initial Tampere Programme was full of youthful enthusiasm, The Hague Programme was dominated by the fight against terrorism and the Stockholm Programme made a deliberate effort to balance security and human rights concerns in light of the new provisions of the Treaty of Lisbon.³¹ By contrast, the Ypres Guidelines are noticeably shorter and comprise only a few paragraphs with little substantive guidance.³² The political programmes have therefore lost their practical impact; the earlier programmes, which have expired, can no longer be relied on.

From a legal perspective, the guidelines are political in nature in the sense that the institutions are free to deviate from their contents in the ordinary legislative proce

²⁴ It is the prerogative of the legislature to decide how to balance the ‘fair treatment’ of third country nationals (Article 67(2) TFEU) and ‘enhanced measures to combat illegal immigration’ (Article 79(1) TFEU; emphasis added) short of human rights standards, which individuals can rely on in courts.

²⁵ With regard to third countries, the objective of combating poverty (Article 21(2)(d) TEU) calls for measures to counter the ‘brain drain’ of highly qualified migrants from developing countries.

²⁶ Cf. Article 21(2) TEU, which can be used as a legal argument to prevent ‘brain drain.’

²⁷ See Walker, ‘In Search of the Area of Freedom, Security and Justice’, in: *ibid.* (ed), *Europe’s Area*, p. 3, 5–10.

²⁸ See the initial ‘Vienna Action Plan’ (OJ 1999 C 19/1); European Council, Presidency Conclusions of the Meeting on 15/16 October 1999 in Tampere; The Hague Programme Strengthening Freedom, Security and Justice in the European Union (OJ 2005 C 53/1); The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens, adopted by the European Council on 11 Dec. 2009 (OJ 2010 C 115/1); and European Council, Conclusions of the Meeting on 26/27 June 2014 in Ypres, doc. EUCO 79/14, paras 1–13.

²⁹ See Council doc. 13440/08 of 24 September 2008, which was spearheaded by France, Germany and the United Kingdom and reinvigorated the European debate. It has been criticised for its focus on the perspective of interior ministers; cf. O’Dowd, ‘Mutual Recognition in European Immigration Policy’, in: Goudappel/Raulus (eds), *The Future of Asylum in the European Union* (Springer, 2011), p. 73, 77–78.

³⁰ By way of example, see Monar, *The Area of Freedom*, p. 556–561.

³¹ For an overview, see Murphy/Acosta Arcarazo, ‘Rethinking Europe’s Freedom, Security and Justice’, in: *ibid.* (eds), *EU Security*, p. 1, 4–9.

³² See De Bruycker, *The Missed Opportunity of the ‘Ypres Guidelines’ of the European Council Regarding Immigration and Asylum*, EUI Migration Policy Centre Blog on 29 July 2014.

dure.³³ Doctrinally, the political programmes are therefore less relevant than the Treaty objectives introduced by the Treaty of Lisbon, which leave considerable discretion to the EU institutions but are nonetheless binding on them as a matter of principle (see above MN 7). The **limited legal weight of the political programmes** does not detract from their political significance; guidance from heads of state or government often supported the realisation of the area of freedom, security and justice when the European Council ‘urged’ hesitant interior ministers to ‘speed up’ legislation.³⁴ More recently, however, their impact has gone into a sharp decline. In noticeable contrast to the extensive prescriptions in earlier programmes, the Ypres Guidelines adopted in June 2014 are limited to general declarations of intent.³⁵ This demonstrates that the area of freedom, security and justice has reached a state of maturity. Change remains possible, but the various legislative instruments, which are commented upon in this volume, are now at the centre of attention. Political programming has lost its relevance.

II. Overarching Principles

1. Interpretation of EU Legislation

- 10 Immigration and asylum regulations and directives are interpreted according to the same principles that apply to secondary EU legislation in other areas. This implies that the established principles of legislative interpretation apply, in particular those derived from continental civil law jurisdictions by the ECJ.³⁶ In line with established case law, the supranational EU legal order has created its own legal system and is not subject to the interpretative principles of public international law.³⁷ Generally speaking, secondary legislation must therefore be **interpreted in the light of the wording, the systemic structure (general scheme), the drafting history, the objectives and constitutional requirements**, such as human rights or international law (see below MN 46–59) as well as the unwritten general principles of Union law (see below MN 21–27).³⁸ This commentary explores the interpretation of EU immigration and asylum law on the basis of these interpretative principles including in situations where there is currently no ECJ case law on a specific question.
- 11 It should be noted that contextual factors can complicate the straightforward **operationalisation of the interpretative standards in practice**. As a supranational and multilingual order, EU law often lacks the precision of domestic legal systems, where certain terms often have a precise doctrinal meaning that has been historically con

³³ Article 68 TFEU on ‘strategic guidelines for legislative and operational planning’ by the European Council does not detract from the political discretion of the Parliament, the Commission and the Council in the ordinary legislative procedure, which applies to the adoption of measures on the basis of Articles 77(2), 78(2) and 79(2) TFEU and during which they may decide not to follow the European Council.

³⁴ See, e.g., the Seville European Council of 21/22 June 2002, Presidency Conclusions, para 37; see also Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff, 2006), p. 215–220.

³⁵ The reason may be a dispute between the Council and the Commission on the implementation of the Stockholm Programme described by Carrera, ‘The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders’, in: Guild/Minderhoud (eds), *The First Decade*, p. 229, 239–243.

³⁶ See van Gestel/Micklitz, ‘Why Methods Matter in European Legal Scholarship’, *ELJ* 20 (2014), p. 292–316.

³⁷ Cf. ECJ, *Costa/E.N.E.L.*, 6/64, EU:C:1964:66; nevertheless, there is a certain parallelism between the interpretative principles of international treaty law and EU practice, in particular concerning the predominance of teleological interpretation prescribed in Articles 31–32 Vienna Convention on the Law of Treaties.

³⁸ Generally on the interpretation of EU law, see Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’, *GLJ* 10 (2009), p. 537–561.

structured over the years.³⁹ Moreover, debates in the Council and between the EU institutions tend to follow the tradition of diplomatic negotiations resulting in open compromise formulae instead of clear guidance.⁴⁰ Poor drafting and lack of coordination between working parties can further entail that EU immigration and asylum legislation occasionally employs similar terminology and concepts, albeit with separate meanings in different legislative acts.⁴¹ We should therefore apply the interpretative standards of EU immigration and asylum law in full awareness of the underlying supranational characteristics. In so doing, academics and judges should make an effort to build bridges between transnational debates (in English) and the enduring domestic discussions within the Member States in the respective national languages,⁴² which the contributions to this commentary aim to integrate into their analysis. Commentators should not mistake the transnational debate in English for the only or main forum for legal debates about EU immigration and asylum law.⁴³

While the Court of Justice has acquired a certain **celebrity for dynamic interpretation**, it should be noted that the most notorious examples of dynamic interpretation concerned essential Treaty concepts, such as the realisation of the single market or the promotion of Union citizenship. By contrast, immigration and asylum law does not necessarily benefit from a similar constitutional direction, since Treaty rules on the area of freedom, security and justice embrace diverse and occasionally conflicting objectives (see above MN 6-7). It is convincing, therefore, that the ECJ exhibits more **sensitivity towards the choices of the EU legislature** in areas where the EU Treaty awards the EU institutions a greater level of discretion. In the case law on immigration and asylum regulations and directives, there is a noticeable number of judgments developing their conclusion under recourse to the wording, general theme, objectives and other interpretative principles mentioned above.⁴⁴ This confirms that the Court's approach towards secondary legislation is more conservative, from a methodological perspective, than towards Treaty law. The legislature holds the primary responsibility to offset the framework for EU immigration and asylum law in the ordinary legislative procedure on the basis of Articles 77-80 TFEU.

Questions of interpretation frequently arise with regard to the **drafting history** of a directive or regulation. In its earlier case law, the Court had generally attributed limited importance to the legislative history;⁴⁵ even common interpretative declarations of the Member States on the occasion of the adoption were considered irrelevant, with the Court relying on the primary importance of the fundamental freedoms,⁴⁶ which realise the central Treaty concepts of the single market and Union citizenship (see above MN

³⁹ On the relative doctrinal weakness of EU law, see Póiaras Maduro, 'Interpreting European Law', Eur. J. Legal Stud. 2 (2007), Issue 2, p. 1, 9-10; and von Danwitz, 'Funktionsbedingungen der Rechtsprechung des Europäischen Gerichtshofs', *Europarecht* 2008, p. 769, 780-782.

⁴⁰ See Sharpston, 'Transparency and Clear Legal Language in the European Union', *The Cambridge Yearbook of European Legal Studies* 12 (2009-2010), p. 409, 411-412.

⁴¹ See Hecker, 'Zur Europäisierung des Ausländerrechts', *Zeitschrift für Ausländerrecht* 2011, p. 46, 48-49.

⁴² See Thym, 'The Solitude of European Law Made in Germany', *Verfassungsblog.de* on 29 May 2014, <http://www.verfassungsblog.de/en/die-einsamkeit-des-deutschsprachigen-europarechts> [last accessed 16 November 2015].

⁴³ Not least since the United Kingdom and Ireland do not participate in many immigration and asylum law initiatives; see below MN 42-45.

⁴⁴ For border controls and visas, see ECJ, *Koushkaki*, C-84/12, EU:C:2013:862; for immigration, see ECJ, *Tahir*, C-469/13, EU:C:2014:2094; and for asylum, see ECJ, *Bolbol*, C-31/09, EU:C:2010:351.

⁴⁵ See Wendel, 'Renaissance der historischen Auslegungsmethode?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 68 (2008), p. 803, 807-811.

⁴⁶ See, in the context of the free movement of EU citizens (not: third country nationals), ECJ, *Antonissen*, C-292/89, EU:C:1991:80, paras 17-18.

12). In the area of freedom, security and justice, this technique cannot usually be employed. The Court should take the drafting history more seriously, not least since the information on the position of the various actors is now **easily accessible through the Eur Lex portal** of the EU institutions.⁴⁷ This information is particularly useful when addressing questions that have not yet been discussed in ECJ case law – as many chapters to this commentary illustrate. The newly found prominence of historic interpretation extends to the EU Treaties *mutatis mutandi*, since the drafting documents of the rules on immigration and asylum in the Treaty of Lisbon and the European Convention preparing the Constitutional Treaty (see above MN 5) are easily accessible online.⁴⁸ Article 52(7) of the Charter expressly obliges judges at national and European level to give due regard to the official explanations.⁴⁹

- 14 In the field of asylum and immigration, human rights and international legal standards have an enduring influence on the interpretation of EU law. In so far as public international law is concerned, the ECJ maintains that EU law must be interpreted in light of the **international legal obligations of the European Union** as a matter of principle, although there are some caveats concerning the direct applicability of international law as well as the obligations of the Member States to which the EU has not signed up (see below MN 58–59). In practice, the Geneva Convention holds a special position enshrined in Article 78(1) TFEU (see Hailbronner/Thym, Legal Framework of EU Asylum Law, MN 8, 47). When it comes to human rights, Article 6 TEU leaves no doubt that they must be respected; secondary legislation can be struck down or **interpreted in conformity with human rights**,⁵⁰ as the ECJ has reaffirmed in a number of cases on immigration and asylum.⁵¹ In practice, the European Convention of Human Rights plays a central role, since it informs the interpretation of the EU Charter (see below MN 49). There have been cases, however, where judges in Luxembourg preferred to focus on the general scheme of secondary legislation (MN 12) instead of embarking on a human rights analysis, especially in situations where the human rights dimension did not directly influence the outcome of the case.⁵² Moreover, experts on immigration and asylum should recognise that the ECJ pays due regard to other constitutional principles, such as the division of competences between the European Union and the Member States,⁵³ which may entail that the assessment of national laws

⁴⁷ In the ‘procedure’ section, the Eur Lex portal offers detailed information for each legislative act, which may be identified through the search form for the ‘document reference’ (see <http://eur.lex.europa.eu/advanced-search-form.html>) or for the corresponding preparatory COM document (see <http://eur.lex.europa.eu/collection/eu-law/pre-acts.html>; both accessed last on 24 November 2015) by opening the subsection on ‘procedure’.

⁴⁸ For the European Convention, see <http://european-convention.europa.eu>; and for the IGC for the Lisbon Treaty, see <http://www.consilium.europa.eu/en/documents-publications/intergovernmental-conferences> [both accessed last on 24 November 2015]; for further reflection, see Craig, ‘The Detailed Mandate and the Future Methods of Interpretation of the Treaties’, in: Pernice/Tanchev (eds), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?* (Nomos, 2008), p. 86–98.

⁴⁹ See the Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303/17).

⁵⁰ Similarly, Groenendijk, *Recent Developments*, p. 330; and Groß, ‘Europäische Grundrechte als Vorgaben für das Einwanderungs- und Asylrecht’, *Kritische Justiz* 2001, p. 100–111.

⁵¹ Cf., by way of example, ECJ, *O & S*, C 356/11 & C 357/11, EU:C:2012:776, paras 76–78; ECJ, *Kamberaj*, C 571/10, EU:C:2012:233, para 34; and ECJ, *X, Y & Z*, C 199/12 & C 200/12, EU:C:2013:720, para 40.

⁵² Cf., by way of example, the silence on Article 8 ECHR in ECJ, *Noorzia*, C 338/13, EU:C:2014:2092; or the lack of comments on human dignity or Article 34 of the Charter in ECJ, *Saciri et al.*, C 79/13, EU:C:2014:103; see also Azoulai/de Vries, ‘Introduction’, in: *ibid.* (eds), *EU Migration Law*, p. 1, 6–7.

⁵³ See Horsley, ‘Reflections on the Role of the Court of Justice as the “Motor” of European Integration’, *CML Rev.* 50 (2013), p. 931, 941–953; and Thym, ‘Towards “Real” Citizenship?’, in: Adams et al. (eds), *Judging Europe’s Judges* (Hart, 2013), p. 155–174.

beyond the scope of EU obligations are left to national constitutions and the ECHR (see below MN 47–48). The ECJ is not a specialised immigration and asylum tribunal, but rather a supreme court with broader constitutional responsibilities.

For historic reasons, the concept of direct effect and the related category of individual rights play a prominent role in the interpretation of Union law by the ECJ.⁵⁴ Judges recognise that **migrants may have individual rights** emanating from EU legislation⁵⁵ and that, in addition, exceptions to individual rights should be narrowly construed.⁵⁶ On this basis, the position of migrants can be advanced through a methodology of rights based interpretation,⁵⁷ whose outcome should reflect the broader constitutional context. In contrast to the single market and EU citizenship (see below MN 20), the individual rights of third country nationals in immigration and asylum legislation do not usually flow directly from rights to cross border movement with constitutional status.⁵⁸ Human rights, in particular, do not typically comprise a guarantee for migrants to be granted access to the European territory in the field of legal migration (see Thym, Legal Framework for EU Immigration Law, MN 51). This implies that individual rights granted by the EU legislature can go beyond the level of protection prescribed by human rights, as the ECJ explicitly recognised in the case of family reunification.⁵⁹ When deciding on the scope of the **statutory rights of migrants beyond the human rights requirement**, the EU legislature determines the conditions and limits set forth in legislative instruments. Judges should generally respect these legislative choices, especially if secondary legislation provides for discretion on the side of national authorities in the application of statutory requirements for individual rights.⁶⁰ The contours of individual rights in EU legislation have to be determined under recourse to the interpretative principles, such as the wording, the telos or the general scheme (see above MN 10–12).

EU law experts are well aware of the fact that the ECJ frequently activates the principle of *effet utile*, which aims at the effective application of EU law in domestic legal orders and which is usually applied in conjunction with teleological interpretation promoting the objectives of supranational rules (see below MN 17). Unsurprisingly, the Court also activated the **principle of *effet utile*** in immigration and asylum law, for instance by preventing Member States from charging prohibitive fees that might render the realisation of statutory rights of migrants practically ineffective.⁶¹ While the *effet utile* can work to the benefit of migrants, it is not intrinsically linked to this scenario, since it aims to promote the effectiveness of Union law as an end in itself. The advancement of individual rights on the basis of the *effet utile* concept by judges in Luxembourg has been essentially functional in order to promote the broader integration process;⁶² if EU law pursues different objectives, the *effet utile* may direct interpretation

⁵⁴ See Bast, *Aufenthaltsrecht*, p. 101–111.

⁵⁵ By way of example, see ECJ, *Chakroun*, C 578/08, EU:C:2010:117, para 41.

⁵⁶ *Ibid.*, para 43.

⁵⁷ See Groenendijk, *Recent Developments*, p. 329–330; and Boeles, ‘What Rights Have Migrating Third Country Nationals?’, in: de Zwaan/Goudappel (eds), *Freedom, Security and Justice in the European Union* (T.M.C. Asser, 2006), p. 151, 152–162.

⁵⁸ For further reading, see Thym, *Constitutional Rationale*, p. 718–721.

⁵⁹ See ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, paras 59–60.

⁶⁰ See, by way of example, in the field of visas ECJ, *Koushkaki*, C 84/12, EU:C:2013:862, paras 56–62; and for students ECJ, *Ben Alaya*, C 491/13, EU:C:2014:2187, paras 23–27, 33; in the German language version, the Court refers to a ‘Beurteilungsspielraum’ (not: ‘Ermessen’), thereby emphasising that the discretion concerns the conditions under which individual rights come about.

⁶¹ See ECJ, *Chakroun*, C 578/08, EU:C:2010:117, para 43; and ECJ, *Commission vs. Netherlands*, C 508/10, EU:C:2012:243, para 65.

⁶² For a prominent critique, see Weiler, ‘*Van Gend en Loos*: The Individual as Subject and Object and the Dilemma of European Legitimacy’, *International Journal of Constitutional Law* 12 (2014), p. 94–103.

in other directions. Thus, the ECJ emphasised that the Return Directive 2008/115/EC aims to establish an effective policy of removal and repatriation of illegally staying foreigners⁶³ and that asylum seekers cannot benefit from individual rights under the former Dublin II Regulation (EC) No 343/2003 in situations that are not prescribed by human rights in light of, among other things, the general scheme and objective of said Regulation.⁶⁴ Essentially, the objectives to be promoted by the *effet utile* principle should be determined by means of statutory interpretation; they are dependent on the content and context.

17 Unfortunately, the ECJ can be superfluous when **identifying the aims pursued by the EU legislature** in the adoption of immigration and asylum rules. It has fluctuated, for instance, when identifying the main objective behind the Dublin Regulations between the identification of the Member States responsible for examining an asylum application⁶⁵ and effective access by individuals to the asylum procedure⁶⁶ (both objectives should probably be considered to underlie the Regulation in parallel). Similarly, the Family Reunification Directive 2003/86/EC has been generally deemed to promote family reunification,⁶⁷ while Article 4(5) establishing a minimum age of 21 years was considered to prevent forced marriages (an objective that may conflict with the promotion of family reunification).⁶⁸ To say, moreover, that the Long Term Residents Directive 2003/109/EC pursues the objective of promoting the integration of long term residents may conceal the complexity that is inherent to interpreting of the concept of ‘integration’ lurking behind the seemingly well defined objective identified by the Court (see Thym, *Legal Framework for EU Immigration Policy*, MN 43–47). Likewise, it can be treacherous to rely solely upon abstract formulations of a particular recital, since closer inspection of the recitals in the light of the drafting history (see above MN 13) will often expose that specific legislative acts pursue **diverse and potentially conflicting objectives** which reflect the diversity of opinions among the various participants in the legislative process in a democratic and pluralistic society.⁶⁹ In such scenarios, courts should discuss the plurality of objectives openly and address them, where appropriate, in the balancing exercise that underlies proportionality *sensu stricto*, whose outcome is determined by the relative weight of the objectives and interests at stake (see below MN 26).

18 It is not surprising that the ECJ supports the coherence of the supranational legal order by interpreting similar terms in an identical fashion whenever appropriate. This may entail that doctrinal concepts developed for other segments of Union law are applied to immigration and asylum instruments,⁷⁰ such as the concept of ‘abuse’, which was first developed for the field of economic market regulation (see Thym, *Legal Framework for EU Immigration Policy*, MN 48–49). However, such **parallel interpretation of similar terminology** is no foregone conclusion and depends on the context of the statutory rule under consideration. Occasionally, the legislature may expressly define certain concepts for the purpose of the specific legislative instruments.⁷¹ In other

⁶³ See ECJ, *El Dridi*, C 61/11 PPU, EU:C:2011:268, para 59.

⁶⁴ See ECJ, *Abdullahi*, C 394/12, EU:C:2013:813, paras 51–59; the reasoning applies to the Dublin III Regulation (EU) No 604/2013 *mutatis mutandi*.

⁶⁵ Cf. ECJ, *Kastrati*, C 620/10, EU:C:2012:265, para 52.

⁶⁶ Cf. ECJ, *MA et al.*, C 648/11, EU:C:2013:367, para 54.

⁶⁷ ECJ, *Chakroun*, C 578/08, EU:C:2010:117, para 43.

⁶⁸ ECJ, *Noorzia*, C 338/13, EU:C:2014:2092, para 16.

⁶⁹ To pursue diverse and potentially conflicting aims is a hallmark of open democratic discourse, not a pathology.

⁷⁰ See Groenendijk, *Recent Developments*, p. 329; and Jesse, ‘The Value of “Integration” in European Law’, *ELJ* 27 (2011), p. 172–189.

⁷¹ Such official definitions can usually be found in the introductory operative articles of the directive or regulation and may be specific to it, i. e. other instruments may prescribe a different meaning.

scenarios, consideration of the general theme and the objectives of the legislative acts in question may result in the conclusion that identical terms have a different meaning in different instruments.⁷² It therefore has to be ascertained, in line with general interpretative criteria (see above MN 10-12), whether and, if so, to what extent, different legislative acts may be interpreted in parallel.

The example of the ECJ case law on the Association Agreement between the EEC and Turkey and related Decisions of the Association Council which are often relied on as a harbinger of dynamic interpretation of similar terminology,⁷³ demonstrates both the potential and the limits of parallel interpretation. The ‘so far as is possible’⁷⁴ formula employed by the ECJ reflects the wording of the **Association Agreement with Turkey** which stipulates explicitly that rules on Turkish citizens should be approximated to the economic freedoms in the single market.⁷⁵ This implies, in turn, that parallel interpretation ends where the objectives and the general scheme of Union law and the Association Agreement diverge; the ‘so far as is possible’ formula is inherently open ended and ultimately depends on the context⁷⁶ in a similar vein as the comparability of secondary legislation on immigration and asylum with other policy area has to be determined on a case by case basis (see above MN 18). In practice, this dependence on the context of the EEC Turkey Agreement entailed that even identically formulated provisions, such as the concept of public policy as a limit to free movement guarantees,⁷⁷ have to be interpreted differently if the objectives and the general scheme do not support interpretative convergence.⁷⁸

The considerations above demonstrate that it is a general feature of EU immigration and asylum law that the interpretation of specific rules depends on the broader statutory and constitutional context. It is therefore not convincing to maintain the generic argument that the interpretation of secondary legislation on immigration and asylum by the ECJ will support a sort of domino effect that confers equal rights as Union citizens upon third country nationals.⁷⁹ **There is no legal expectation enshrined at Treaty level that third country nationals and Union citizens should have similar rights.** EU citizens benefit from individual rights emanating from the Treaty concept of Union citizenship, while third country nationals cannot rely upon legal guarantees of cross border movement with constitutional status in regular circumstances (see above

⁷² See, by way of example, the divergent interpretation of the term ‘worker’ and ‘social assistance’ in the context of Union citizenship with regard to the Citizenship Directive 2004/38/EC and the Social Security Coordination Regulation (EU) No. 883/2004 reaffirmed by ECJ, *Brey*, C 140/12, EU:C:2013:565.

⁷³ See Barbou des Places, ‘Droit communautaire de la liberté de circulation et droit des migrations’, in: *L’Union européenne: Union de droit, Union des droits. Mélanges en l’honneur de Philippe Manin* (Pedone, 2010), p. 341, 344-350; Carrera/Wiesbrock, ‘Whose European Citizenship in the Stockholm Programme?’, *EJML* 12 (2010), p. 337, 347-349; and Groenendijk, *Recent Developments*, p. 321-324.

⁷⁴ ECJ, *Bozkurt*, C 434/93, EU:C:1995:168, para 20.

⁷⁵ See the Preamble and Article 12 Agreement Establishing an Association between the European Economic Community and Turkey of 12 September 1963 (OJ 1977 L 361/1).

⁷⁶ See Hailbronner, ‘Einreise und Aufenthalt türkischer Staatsangehöriger im Assoziationsrecht EWG Türkei’, *Zeitschrift für Ausländerrecht* 2011, p. 322, 324.

⁷⁷ For a distinction between EU rules and the Association Agreement with regard to the public policy exception, see ECJ, *Ziebell*, C 371/08, EU:C:2011:809; similarly, for the standstill provision in the Additional Protocol to the said Agreement, see ECJ, *Demirkan*, C 221/11, EU:C:2013:583.

⁷⁸ For further reading, see Thym, ‘Constitutional Foundations of the Judgments on the EEC Turkey Association Agreement’, in: *ibid./Zoetewij Turhan* (eds), *Rights of Third Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship* (Martinus Nijhoff, 2015), p. 13-38.

⁷⁹ Such predictions usually rely on the abstract recognition that proportionality applies in both scenarios without considering the constitutional context; see, by way of example, Groenendijk, *Recent Developments*, p. 330-332; Wiesbrock, ‘Granting Citizenship related Rights to Third Country Nationals’, *EJML* 14 (2012), p. 63, 76-79; and Carrera, *In Search of the Perfect Citizen?* (Martinus Nijhoff, 2009), ch. 3.

MN 15). Judges in Luxembourg have repeatedly recognised that ‘a particularly restrictive interpretation’⁸⁰ of derogations of the rights of Union citizens was required in the light of EU primary law.⁸¹ This cannot be extended to the rules on immigration and asylum, which are an integral part of the area of freedom, security and justice in line with the diverse policy objectives laid down in the EU Treaty (see above MN 6 7), which distinguish the new policy field from the historic template of the single market and Union citizenship (see Thym, *Legal Framework for EU Immigration Policy*, MN 28 36). This different constitutional context for immigration and asylum law supports the search for autonomous solutions for third country nationals.

2. General Principles (Proportionality)

- 21 The supranational legal order comprises a number of unwritten general principles, which were developed by the Court of Justice on the basis of the legal traditions common to the domestic legal orders of the Member States.⁸² These general principles were **developed by the ECJ over the past few decades** and are now applied to immigration and asylum law as an integral part of the EU legal order. As unwritten rules, general principles apply without the need for references to them in secondary legislation. They can be relied upon in order to interpret the measures adopted by the EU institutions and, in exceptional circumstances, serve as grounds for judicial review.⁸³ Moreover, the general principles bind **Member States when implementing Union law**, i. e. state authorities and domestic courts must respect the general principles when they adopt decisions or render judgments whose outcome is determined by EU law, thereby influencing the interpretation of domestic law. As we shall go on to discuss, the extent to which Member States must respect the general principles when they have implementing discretion remains unclear (see below MN 47 48). Whenever Member States are not bound by general principles, they apply only national standards, including domestic constitutional guarantees. A narrow reading of the scope of the general principles does not leave migrants without legal protection.
- 22 From a conceptual perspective, the general principles underline that EU immigration and asylum law is firmly embedded into the rule of law. Traditional notions of migration law and alienation as an exclave of legal protection, which prevailed in some Member States until recently, cannot be maintained.⁸⁴ The significance of the general principles comes to the fore after the end of the legislative procedure, once domestic courts and the ECJ begin to interpret EU directives and regulations. **Unexpected legal effects** flowing from the interpretation of secondary law in light of general principles are a common phenomenon.⁸⁵ Judges in Luxembourg have developed a certain celebrity for dynamic interpretation, in particular with regard to Primary law although there are indications that judges take the wording, the structure and the drafting history of immigration and asylum law instruments seriously (see above MN 12).

⁸⁰ By way of example, see ECJ, *Orfanopoulos & Olivieri*, C 482/01 & C 493/01, EU:C:2004:262, para 65.

⁸¹ See also, Thym, *Constitutional Rationale*, p. 718 721.

⁸² For further reading, see Tridimas, *The General Principles of EC Law*, 2nd edn (OUP, 2007).

⁸³ On the hierarchical superiority of the general principles in situations of judicial review, see ECJ, *Audiolux*, C 101/08, EU:C:2009:626, para 63.

⁸⁴ Cf. Thym, *Migrationsverwaltungsrecht*, p. 198 211; and Groenendijk, ‘Citizens and Third Country Nationals’, in: Carlier/Guild (eds), *L’avenir de la libre circulation des personnes dans l’U.E.* (Bruylant, 2006), p. 79, 98 100.

⁸⁵ Similarly, De Bruycker, ‘Legislative Harmonization in European Immigration Policy’, in: Cholewinski et al. (eds), *International Migration Law* (T.M.C. Asser Press, 2007), p. 329, 343; and Kluth, ‘Reichweite und Folgen der Europäisierung des Ausländer und Asylrechts’, *Zeitschrift für Ausländer recht* 2006, p. 1, 6 7.

Acknowledging the significance of the general principles for the dynamic interpretation of EU migration law by the Court of Justice does not imply that they will always vindicate the position of those that criticise national legal practices. Rather, the precise meaning of the unwritten general principles has to be **ascertained on a case by case basis**. This exercise usually requires a thorough analysis of ECJ case law by consulting, for instance, general treatises on EU administrative law.⁸⁶ On this basis, one may determine what the general principles require for each case. In terms of substance, human rights have traditionally been the most relevant general principles, although the legally binding **Charter of Fundamental Rights** means that they are now often discussed separately, as in this chapter (see below MN 47–50). General principles include the primacy and direct effect of Union law in national legal orders when individuals rely upon EU rules that are clear, precise and unconditional in national courts and when the supranational rules prevail over domestic laws in cases of conflict.⁸⁷ Other principles include legitimate expectations and legal certainty⁸⁸ or damages Member States may have to pay to individuals for manifestly and gravely disrespecting their obligations under EU law.⁸⁹ General principles relating to the right to defence and judicial protection will be discussed below (see below MN 37).

Besides human rights, primacy and direct effect, the principle of proportionality is the most relevant general principle for asylum and immigration law. In EU law, the principle of proportionality has a dual relevance: it both serves as a yardstick for the delimitation of EU competences⁹⁰ and defines the limits of state action affecting individuals.⁹¹ It is the second scenario that is especially relevant in the field of immigration and asylum. Generally speaking, an application of the **principle of proportionality** requires a four pronged test: firstly, the state measure affecting individuals must pursue a legitimate aim; secondly, the measure must be suitable for achieving its objective; thirdly, the state action must be necessary to achieve the aim, since there are no less onerous ways available; finally, proportionality *sensu stricto* is assessed on the basis of a balancing exercise that takes the competing interests into account (although the ECJ sometimes merges the third and fourth criteria).⁹² This four step test rationalises the application of the principle of proportionality and allows courts and academics to evaluate individual scenarios more easily.

It is important to understand that any assessment of proportionality is based on objective standards but nevertheless **depends on the circumstances of each individual case**. The abstract criteria of the four pronged test described above require an assessment focusing on the measure in question and its effect in a specific societal context. This dependence on context implies that the degree of judicial scrutiny may depend on the subject area under consideration. There may be good reasons to grant the legislature and/or administrative authorities a **margin of appreciation** when assessing the suit

⁸⁶ See, in particular, Craig, *Administrative Law*, chs 15–21; and Tridimas, *The General Principles of EC Law*, 2nd edn (OUP, 2007).

⁸⁷ Cf. any textbook on EU law.

⁸⁸ See Craig, *Administrative Law*, ch. 18; and Wiesbrock, *Legal Migration*, p. 189–192.

⁸⁹ Cf. ECJ, *Brasserie du pêcheur & Factortame*, C 46/93 & C 48/93, EU:C:1996:79 and any textbook on EU law.

⁹⁰ I.e. the definition of the scope of EU powers in line with Article 5(4) TEU.

⁹¹ In contrast to the German legal order, from which the ECJ derived the principle of proportionality, its application is not limited to situations of state interference with individual rights; the ECJ tends to apply proportionality as a limit to state power also in situations that do not involve interference with individual rights.

⁹² For details, see Tridimas, *The General Principles of EC Law*, 2nd edn (OUP, 2007), ch. 3.

ability, necessity or proportionality *sensu stricto* of the measure in question,⁹³ in particular in areas where courts lack information or expertise and where broader value judgments have to be made.⁹⁴ The argument in favour of discretion is particularly strong in areas without strict legal standards, such as the promotion of social integration (see Thym, *Legal Framework for EU Immigration Policy*, MN 43–47).

- 26 In the evaluation of specific scenarios, it is necessary to clearly identify both the objective(s) pursued by the state measures and the individual interest(s) at stake. Without careful identification of the objectives and interests, the eventual balancing exercise in the final proportionality assessment *sensu stricto* runs the risk of being unpersuasive, since the outcome depends on the **relative weight of public policy objectives and private interests**. Unfortunately, the ECJ can be superfluous in the identification of the aim pursued by the EU legislature – a problem that also affects the operationalisation of the principle of *effet utile*, for instance with regard to the Dublin Regulations, the Long Term Residents Directive 2003/109/EC and the Family Reunification Directive 2003/86/EC (see above MN 17). With regard to the Visa Code Regulation (EC) No 810/2009, judges similarly highlighted the dual objective of facilitating legitimate travel and of preventing ‘visa shopping’.⁹⁵ In such scenarios, judges should discuss the **plurality of objectives** openly and address them in the balancing exercise that underlies proportionality *sensu stricto* by adjusting the relative weight of the public policy objective(s) and private interest(s) involved. The test’s dependence on context is one explanation as to why proportionality and related interpretative standards will not necessarily confer equal rights as Union citizens on third country nationals, since the former benefit from a special position under EU primary law that cannot be extended to immigration and asylum (see above MN 20).
- 27 The ECJ has regularly taken recourse to general principles of Union law in order to promote their application even **before the expiry of the period of transposition of a directive**. Where national rules fall within the scope of EU law, the Court should indeed provide the necessary interpretative guidance required by domestic courts to determine whether national rules are compatible with Union law. Therefore, the observance of general principles of Union law cannot be made conditional, in the eyes of the Court, upon the expiry of the period allowed for the transposition of a directive.⁹⁶ In cases within their jurisdiction, national courts have to interpret domestic law in line with Union law and its general principles. While this obligation is most relevant after the expiry of the transposition period, national courts are obliged, nonetheless, to refrain as far as possible from interpreting domestic law in a manner which might seriously compromise the attainment of an objective pursued by a directive from the date when it enters into force.⁹⁷

3. More Favourable National Provisions

- 28 Most directives on immigration and asylum contain an express provision stating that the directive shall not affect the possibilities of the Member States to introduce or retain more favourable provisions – a discretion which most instruments adopted in recent

⁹³ For the ECJ practice in the light of constitutional theory, see Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, *ELJ* 17 (2011), p. 80, 85–100.

⁹⁴ For the differentiated ECJ approach to the principle of equality, see Croon, ‘Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non Discrimination or Alternative Tales on Equality’, *ELJ* 19 (2013), 153–173.

⁹⁵ See ECJ, *Koushkaki*, C 84/12, EU:C:2013:862, paras 52–53.

⁹⁶ Cf. ECJ, *Mangold*, C 144/04, EU:C:2005:709.

⁹⁷ See ECJ, *Adeneler*, C 212/04, EU:C:2006:443, paras 113–123, in part. 123.

years qualify to be limited ‘insofar as these [national rules] are compatible with this Directive.’⁹⁸ These **provisions in secondary legislation** are generally understood to allow Member States to adopt rules in favour of third country nationals whose rights and duties are regulated by the directive in question,⁹⁹ although the precise scope of national discretion remains unclear. Both the new primary law framework of the Treaty of Lisbon and the aforementioned proviso concerning compatibility with the directive in question argue in favour of a **cautious approach towards national deviations**. It will be demonstrated in this section that, notwithstanding more specific prescription in individual directives, Member States cannot deviate from common rules on the basis of generic clauses on more favourable rules whenever the relevant provision of the instrument in question opts for full harmonisation.

Before the entry into force of the **Treaty of Lisbon**, the Treaty base for most asylum instruments allowed for the adoption of ‘minimum standards’ only, while rules on immigration, border controls and visas had not been subject to a similar restriction.¹⁰⁰ It was often argued at the time that the limitation to ‘minimum standards’ in EU primary law and corresponding provisions in secondary legislation should be understood, in a similar way to international human rights law, as a minimum requirement for domestic legislation, while generally allowing for more generous rules for the benefit of migrants, especially in the field of asylum legislation.¹⁰¹ It is no longer relevant whether this position was correct, since the Treaty of Lisbon abandoned the restrictive Treaty base, thereby permitting a higher degree of harmonisation (see above MN 3 4). On this basis, **new legislation on asylum** has been adopted in the meantime allowing for more favourable national rules only insofar as they are compatible with the relevant directive.¹⁰² The interpretation of these rules should acknowledge the broader objective laid down in the EU Treaty to move towards a ‘**Common European Asylum System**’ as an integral part of the area of freedom, security and justice, which generally aims for more uniformity.¹⁰³ This constitutional context supports extensive legislative activities (see above MN 5) and argues for a restrictive reading of the clauses on national deviations that compromise uniformity.

In order to understand the relevance of the EU law provisions on more favourable national treatment, it is important to point out that the **concept of harmonisation** is central to the European project, since it entails the approximation of national rules in line with the overarching objective of establishing an ‘ever closer union,’¹⁰⁴ in which differences between Member States are replaced by common standards in line with the more specific objective of a common immigration and asylum policy in Articles 78 79 TFEU. Tellingly, regulations on immigration and asylum, such as the Schengen Borders Code, the Dublin III Regulation or the Visa Regulation, contain no provision

⁹⁸ By way of example, see Article 5 Asylum Procedure Directive 2013/32/EU.

⁹⁹ See Peers, *EU Justice*, p. 509.

¹⁰⁰ Contrast the Treaty bases for asylum in Article 63(1)(a) (c) and 63(2) EC Treaty as amended by the Treaty of Nice (OJ 2006 C 321E/5) with rules for immigration in Article 63(3) and for border controls and visas in Article 62 EC Treaty.

¹⁰¹ Cf. Storey, Hugo: *EU Refugee Qualification Directive: A Brave New World?*, *IJRL* 20 (2008), p. 1, 16 22; and Lambert, ‘The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law’, *ICLQ* 55 (2006), p. 161 191.

¹⁰² See, Article 3 Asylum Qualification Directive 2011/95/EU, Article 5 Asylum Procedure Directive 2013/32/EU and Article 4 Asylum Reception Conditions Directive 2013/33/EU, while the Dublin III Regulation (EU) No 604/2013 contains, like all regulations on immigration and asylum (see below MN 30), no provision on more favourable national treatment.

¹⁰³ See also Peers, *EU Justice*, p. 308.

¹⁰⁴ Recital 1 of the Treaty on the Functioning of the European Union.

authorising Member States to adopt more favourable provisions.¹⁰⁵ Unlike international human rights law,¹⁰⁶ EU harmonisation measures do not establish minimum requirements, but lay down **pan European standards that command primacy over domestic rules in cases of conflict**. It is well known that the Court of Justice cautiously defends the uniform and effective application of EU law and generally regards national deviations with suspicion.¹⁰⁷ For that reason, one should ascertain on a case by case basis whether and if so to what extent Member States may deviate from secondary legislation. In cases of doubt, it should be assumed that legislation supports a pan European standard from which Member States cannot deviate.

31 The example of consumer protection illustrates how national deviations are addressed by the ECJ.¹⁰⁸ The Court of Justice establishes on a case by case basis **whether individual articles in secondary legislation result in complete (full) harmonisation**, which pre-empt national deviations as a uniform standard, while rules that are more favourable are allowed in other scenarios as long as they do not compromise the effective and uniform application of the EU rules in question.¹⁰⁹ Whether an article grants Member States **discretion depends on an interpretation of the provision** taking into account the wording, the general scheme, the drafting history, the aims and the constitutional context (see above MN 10 18), including the Treaty objective to move towards a common immigration and asylum policy (see above MN 29). In some instances the interpretation of individual articles will be straightforward. The term ‘shall’ designates mandatory rules and, by contrast, the word ‘may’ indicates a certain level of flexibility awarded to Member States, which are not free, however, to do as they please, since national deviations are only permitted in so far as the article in question allows for differences. One may conclude by means of interpretation, for example, that Member States ‘may’ choose between solution A and B, while solution C would violate the directive, since it would involve going beyond state discretion.¹¹⁰ With regard to the Schengen Borders Code and the Visa Code, the Court found explicitly that the objective of common standards within the Schengen area argues against Member States’ discretion.¹¹¹ In short, the definite scope for possible deviations must be ascertained on a case by case basis when interpreting EU legislation.

32 As mentioned at the outset, the formulation of EU immigration and asylum directives follows different patterns. **Three clauses on more favourable national provisions can be distinguished:** (1) Most directives permit for national deviations only ‘insofar as [they]

¹⁰⁵ In line with Article 288 TFEU, regulations are unlike directives meant to be applied directly, thereby establishing a higher degree of harmonisation.

¹⁰⁶ Cf. Article 53 ECHR; many immigration and asylum experts have a background in human rights law (not EU law) and therefore tend to underestimate the preference for uniformity in EU law.

¹⁰⁷ Cf. de Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’, in: Craig/de Búrca (eds), *The Evolution of EU Law*, 2nd edn (OUP, 2011), p. 323–362.

¹⁰⁸ Like migration law, consumer protection is a policy field in which more protection to the benefit of the allegedly weaker party (migrant, consumer) is often considered to be an end in itself but which nevertheless does not necessarily permit more favourable national provisions.

¹⁰⁹ See Loos, Full harmonisation as a regulatory concept and its consequences for the national legal orders, Centre for the Study of European Contract Law Working Paper Series No. 2010/03; the contributions to Stürner (ed), *Vollharmonisierung im Europäischen Verbraucherrecht?* (Sellier, 2010); and Whittaker, ‘Unfair Terms and Consumer Guarantees’, *European Review of Contract Law* 5 (2009), p. 223–247.

¹¹⁰ Interpretation in the light of the broader context can even indicate that ‘may’ means ‘shall’ or that Member States have only a binary choice (not) to do a certain thing; cf. the opinion of the Council legal service on the Draft Asylum Qualification Directive in Council doc. 14348/02 of 15 November 2002.

¹¹¹ For visas, see ECJ, *Koushkaki*, C 84/12, EU:C:2013:862, paras 48–50; and for border controls, see ECJ, *Air Baltic Corporation*, C 575/12, EU:C:2014:2155, paras 65–68.

are compatible with this Directive;¹¹² these provisions require an assessment on a case by case basis as to whether specific articles allow for flexibility in line with the interpretative principles above. (2) Other directives explicitly lay down that Member States may deviate from specific provisions, which allow for the adoption of more favourable rules as a result.¹¹³ (3) Some directives stipulate in more general terms that Member States remain free ‘to adopt or maintain provisions that are more favourable to the persons to whom it applies’ without indicating, like in the first scenario, that domestic rules must comply with the directive.¹¹⁴ The Family Reunion Directive and the Long Term Residents Directive, neither of which contain the caveat that more favourable domestic rules concern only those ‘to whom [the Directive] applies’, are the most far reaching instruments.

An interpretation of the **Family Reunion Directive** and the **Long Term Residents Directive** shows that the third scenario above does not allow Member States to deviate from mandatory provisions when they adopt implementing legislation. Member States remain free, however, to retain or adopt more favourable domestic rules outside the scope of the directive. They can establish, for instance, a hardship clause for family reunion, which, as a result, does not bring about rights under the Directive (see Hailbronner/Arévalo, Directive 2003/86/EC Article 3 MN 20–24) or retain more generous domestic rules on long term residence status if the latter can be distinguished from the status prescribed by EU law (see Thym, Directive 2003/109/EC, Article 13 MN 2, 4). Similarly, the ECJ recognised that Member States can grant complementary status under domestic law to people whose application for international protection has been rejected as long as states do not call into question the effective implementation of the EU legislation, which in practice requires them to draw ‘a clear distinction ... between national protection and protection under the directive.’¹¹⁵ **More favourable national protection statuses do not bring about rights under the EU asylum acquis**, since Member States act within the scope of their retained powers.¹¹⁶ In short, the precise space for national deviations depends upon EU law; if new directives are adopted, Member States may lose room for manoeuvre they had held previously.

4. Application in Domestic Law

Regulations such as the Dublin III Regulation or the Schengen Borders Code are by their very nature directly applicable in domestic legal systems and are therefore binding on all national authorities and courts applying EU immigration and asylum law, whereas directives must be transposed into national law before they may be invoked before national courts as a matter of principle.¹¹⁷ In contrast to regulations, directives often leave some discretion to Member States as to how to regulate certain questions, although the precise scope of flexibility depends on the interpretation of the instrument in question (see above MN 31).¹¹⁸ It is well established in ECJ case law that **directives**

¹¹² See, the new asylum directives mentioned above MN 29; Article 4(3) Return Directive 2008/115/EC; and Art. 15 Employer Sanctions Directive 2009/52/EC.

¹¹³ Cf. Article 4(2) Blue Card Directive 2009/50/EC; Article 4(2) Seasonal Workers Directive 2014/36/EU; and Article 4(2) ICT Directive 2014/66/EU.

¹¹⁴ See Article 4(2) Researcher Directive 2005/71/EC; Article 4(2) Student Directive 2004/114/EC; and Article 13(2) Procedures Directive 2011/98/EU.

¹¹⁵ See ECJ, *B.*, C 57/09 & 101/09, EU:C:2010:661, para 120.

¹¹⁶ Cf. ECJ, *M’Bodj*, C 542/13, EU:C:2014:2452, paras 42–46.

¹¹⁷ Cf. Article 288 TFEU.

¹¹⁸ In practice, the distinction between regulations and directives is not always clear cut, if some regulations call upon Member States to adopt implementing rules (see Article 2(n) Dublin III Regulation (EU) No 604/2013), whereas some directives are almost as specific and detailed as regulations.

can also be directly applicable if they have not been implemented correctly by the Member States during the transposition period, if the provision in question is clear, precise and unconditional and it seeks to confer rights upon individuals against the state.¹¹⁹ Moreover, domestic courts are bound to interpret national law, so far as possible, in light of the directive in order to achieve the result sought by the EU legislature, including in situations when the conditions for direct effect have not been met.¹²⁰ In these cases, a directive may be indirectly relied upon.

35 EU law concentrates on the legislative harmonisation of substantive rules and corresponding procedural guarantees, while the actual **application of supranational rules to individuals is left to the Member States** as a matter of principle. This entails that the day to day decision making in immigration and asylum cases is done by national authorities, whose decisions can be challenged in domestic courts which may ask the ECJ to interpret EU rules under the preliminary reference procedure of Article 267 TFEU. Given that immigration and asylum have a tangible practical and operational dimension,¹²¹ the EU institutions support the **convergence of administrative practices** through guidelines on the interpretation of EU law, networks among practitioners and financial support for transnational cooperation.¹²² There are also examples of enhanced transnational cooperation, in particular through the FRONTEX border agency and the European Asylum Support Office (EASO). These prototypes for transnational cooperation focus on convergence rather than the direct application of the EU asylum and immigration *acquis* towards individuals following a quasi federal model. While EU primary law permits and supports closer transnational cooperation, it does not at present sanction the move towards a quasi federal bureaucracy replacing national authorities in the day to day decision making on migration issues (see Thym, Legal Framework for Entry and Border Controls, MN 7).

36 When adjudicating on individual cases, **Member States apply their own domestic rules on administrative and judicial procedure** unless there are more specific procedural rules in secondary legislation.¹²³ EU immigration and asylum legislation contains numerous provisions on procedural aspects, although many of these clauses remain abstract when stipulating, for instance, that Member States ‘shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy.’¹²⁴ These provisos require the continued existence of national administrative rules, which must be interpreted in the light of EU law in cases of conflict; national laws fill the gaps of EU immigration and asylum law. This application of domestic procedural guarantees is often referred to as the **principle of procedural autonomy**.¹²⁵ The ECJ has repeatedly reaffirmed this principle, while also establishing two limits: when applying national rules Member States must ensure, firstly, that the rules for EU related claims are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render the exercise of rights conferred by Community law practically impossible or excessively difficult (principle of effectiveness).¹²⁶ The principle of effectiveness, in particular, is

¹¹⁹ See Craig/de Búrca, *EU Law*, 5th edn (OUP, 2011), ch. 4.

¹²⁰ Cf. ECJ, *Pfeiffer*, C 397/01 C 403/01, EU:C:2004:584, paras 110–119.

¹²¹ See Costello, *Administrative Governance*, p. 322; and Walker, ‘In Search of the Area of Freedom, Security and Justice’, in: *ibid.* (ed), *Europe’s Area*, p. 3, 20–23.

¹²² See Thym, *Migrationsverwaltungsrecht*, p. 347–352.

¹²³ See von Danwitz, *Europäisches Verwaltungsrecht* (Springer, 2008), p. 302–312.

¹²⁴ Article 46(4) Asylum Procedure Directive 2013/32/EU concerning judicial action against the rejection of an asylum application.

¹²⁵ See Craig, *Administrative Law*, ch. 23.

¹²⁶ See ECJ, *Rewe vs. Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188, para 5.

often used by the ECJ to limit the discretion of Member States, although its operationalisation in practice remains inherently difficult to predict.¹²⁷

National rules on administrative and judicial procedure must comply not only with specific rules in EU legislation and the limits to the principle of procedural autonomy (see above MN 35–36) but also with the **Charter of Fundamental Rights**, which binds Member States whenever they are implementing Union law (see below MN 47–48). In this respect, the right to **effective judicial protection** in Article 47 of the Charter plays a central role, since it is often relied upon to challenge restrictive national provisos.¹²⁸ ECJ judges have made clear that Article 47 of the Charter applies in these instances, although the case law also emphasises that the special circumstances of asylum procedures can be taken into account, for instance through short time limits;¹²⁹ similarly, the Charter does not require either automatic suspensive effect or the guarantee to remain in the territory pending proceedings.¹³⁰ In short, the precise contents of procedural human rights must be analysed carefully taking into account supranational and international case law.¹³¹ The same applies to the **human rights guarantees for administrative procedure** in Articles 41–42 of the Charter, which can be applied within domestic legal orders as general principles of Union law.¹³² The relevance of these supranational guarantees will also be dependent upon the state of affairs in domestic legal orders: Member States with sophisticated procedural guarantees will be less affected than countries with limited options for judicial review.

III. Territorial Scope (Member State Participation)

Mirroring the asymmetrical composition of the intergovernmental Schengen Agreement, EU immigration and asylum law contains country specific opt outs to this date. More specifically, we need to distinguish **different opt out arrangements for the United Kingdom, Denmark and Ireland**, which were fortified by some procedural twists and a novel degree of selectivity in the Treaty of Lisbon. Unfortunately, the country specific opt outs do not follow a uniform rationale. There are differences between the rules governing Denmark on the one hand and the United Kingdom and Ireland on the other. Moreover, we are faced with two sets of rules for these countries: firstly, measures building upon the Schengen acquis laid down in the Schengen Protocol and,¹³³ secondly, measures in the area of freedom, security and justice that do not form part of the Schengen acquis, are governed by separate protocols¹³⁴ with

¹²⁷ See, again, Craig, *Administrative Law*, ch. 23.

¹²⁸ See Bast, 'Of General Principles and Trojan Horses', *GLJ* 11 (2010), p. 1006, 1020–1023; and Acosta Arcarazo/Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy', *JCMSt* 51 (2013), p. 179–193.

¹²⁹ See ECJ, *Samba Diouf*, C 69/10, EU:C:2011:524, paras 49–69.

¹³⁰ See ECJ, *Abdida*, C 562/13, EU:C:2014:2453, paras 44–53.

¹³¹ For a recent study, see Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart, 2014).

¹³² See ECJ, *HN*, C 604/12, EU:C:2014:302, paras 49–51; and ECJ, *Mukarubega*, C 166/13, EU:C:2014:2336, paras 42–45; for further comments, see Hofman/Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', *EuConst* 9 (2013), p. 73–101.

¹³³ See today's Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union (OJ 2008 C 115/290) and its predecessor (OJ 1997 C 340/93); for how to define which measures build upon the Schengen acquis, see ECJ, *United Kingdom vs. Council*, C 77/05, EU:C:2007:803, paras 54–68.

¹³⁴ See today's Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice (OJ 2008 C 115/295), which builds upon previous versions (OJ

special procedures.¹³⁵ Altogether, we therefore need to distinguish four distinct opt out arrangements for the United Kingdom/Ireland and Denmark and for measures (not) building upon the Schengen acquis.¹³⁶

- 39 In practice, the recitals of all legislative acts indicate whether the United Kingdom, Ireland and/or Denmark are bound by the relevant instrument and whether it is considered to build upon the Schengen acquis.¹³⁷ The overall picture emanating from these diverse arrangements is complex and can be difficult to monitor. In order to facilitate orientation, the introductions to the different parts of this volume include a **list of the measures** commented upon with an indication of whether the measure in question applies to the United Kingdom, Ireland and/or Denmark. Corresponding overviews can be found in the sections on border controls and visas (see Thym, Legal Framework for Entry and Border Controls, MN 5), immigration (see Thym, Legal Framework for EU Immigration Policy, MN 5) and asylum (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 7).

1. Denmark

- 40 Denmark did not object to the abolition of internal border controls and had subscribed to the intergovernmental Schengen Conventions prior to the Treaty of Amsterdam. It nonetheless asked for an opt out, since the supranationalisation of justice and home affairs called into question caveats on these matters that had served as justifications for the Danish government in its campaign for a ‘yes’ vote in the second referendum on the Treaty of Maastricht.¹³⁸ However, the Danish government did not want to leave the Schengen zone and therefore negotiated a ‘political opt in’ and ‘legal opt out’¹³⁹, which maintained its status as a member of the Schengen group while guaranteeing that the supranational integration method would not apply; the opt out is **based on ‘methodology rather than ideology’**.¹⁴⁰ As a result, Denmark cannot at present – unlike the United Kingdom and Ireland – opt into supranational decision making on a case by case basis. However, it is allowed to terminate or modify the opt out by means of a simple declaration the activation of which has been made politically conditional upon another referendum which the government has so far hesitated to call despite occasional calls to the contrary.¹⁴¹ At the time of writing, it seemed that a referendum might be called in

1997 C 340/295; and OJ 2006 C 321 E/198); and today’s Protocol (No. 22) on the Position of Denmark (OJ 2008 C 115/299), which replaces the original Protocol (OJ 1997 C 340/299).

¹³⁵ Allegedly, two different working groups preparing the Amsterdam Treaty designed the rules and forgot to align their substance; later IGCs drafting the Treaty of Nice and the Constitutional Treaty retained their distinct outline; cf. Kuijper, ‘Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration’, CML Rev. 37 (2000), p. 345, 352.

¹³⁶ The presentation in this section builds on Thym, ‘Supranational Differentiation and Enhanced Cooperation’, in: Tridimas/Schütze (eds), *The Oxford Principles of European Union Law. Vol. I: The European Union Legal Order* (OUP, 2015), forthcoming.

¹³⁷ In most instruments, the information is contained in the last recitals.

¹³⁸ The Protocol on the Position of Denmark enshrined in firm Treaty rules the compromise at the 1992 European Council in Edinburgh, the legal status of which had remained precarious; cf. Howarth, ‘The Compromise on Denmark and the Treaty on European Union’, CML Rev. 31 (1994), p. 765–805.

¹³⁹ den Boer, ‘Justice and Home Affairs Cooperation in the Treaty on European Union’, Maastricht Journal of European and Comparative Law 4 (1997), p. 310, 311.

¹⁴⁰ Hedemann Robinson, ‘The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark’, in: O’Keefe/Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law, 1994), p. 189, 297.

¹⁴¹ Article 7 of the Protocol No. 16 on Denmark allows for its renunciation at any time, also in part. Moreover, Article 8 allows for the substitution of the strict opt out by a flexible British style solution, which permits case specific opt ins described below.

2016 to **switch to the more flexible British/Irish position** as a result of which Denmark could possibly decide to opt in various immigration and asylum measures.

In line with its original compromise to oppose supranationalisation as a member of the Schengen area, Denmark retains, with regard to measures building upon the Schengen acquis,¹⁴² the right to ‘decide within a period of 6 months ... whether it will implement this decision in its national law.’ If it decides to do so, this decision will create an obligation under international law between Denmark and other Member States.¹⁴³ As a result, Denmark is **bound by measures building upon the Schengen acquis on the basis of public international law**.¹⁴⁴ The experience in recent years does not indicate any major legal issues directly related to the opt out.¹⁴⁵ One reason for this comparatively trouble free functioning of the opt out may be the similarity between the Danish position and the situation of the neighbouring countries Norway and Iceland, which are both associated with the Schengen acquis on the basis of an international association agreement (see Thym, Legal Framework for Entry and Border Controls, MN 29). Mirroring its status under the Schengen Protocol, Denmark has associated itself with the Dublin II Regulation (EC) No 343/2003 on asylum jurisdiction through the conclusion of international agreements between Denmark and the Community/Union through the conclusion of an international agreement.¹⁴⁶ This peculiarity confirms that the Danish opt out is not as such directed against European cooperation on immigration and asylum law.

2. United Kingdom and Ireland

In contrast to Denmark, the United Kingdom objects to the political project of border free travel. Consecutive British governments have maintained that the geographical position of the British Isles, the traditional absence of domestic identification requirements (such as ID cards) and the symbolism of Schengen cooperation as a means for closer European integration warned against British participation.¹⁴⁷ Nonetheless, the Labour government under Tony Blair’s leadership was willing to consent, at the final stages of the intergovernmental conference for the Amsterdam Treaty, to the integration of the Schengen acquis into the EU framework under the condition that Britain retained a special status on the basis of a **flexible opt out with an option to sign up to individual projects**. Ireland was factually obliged to follow its neighbour, since it wanted to maintain the *Common Travel Area* providing for passport free travel in the British Isles, including Northern Ireland.¹⁴⁸ As in the case of monetary

¹⁴² By contrast, initiatives which are not part of the Schengen acquis are subject to a strict opt out.

¹⁴³ Article 4(1) Protocol No. 16 on Denmark; if Denmark decides against participation, the other Member States may, under Article 4(2), ‘consider appropriate measures to be taken’, which may justify the reintroduction of border controls in extreme scenarios; see Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos, 2004), p. 110–114, available online at <http://www.ungleichzeitigkeit.de> [last accessed 13 November 2015].

¹⁴⁴ The Protocol refrains from a definition of international law; in essence, general principles of Union law, such as direct and supreme effect, and the ECJ’s jurisdiction do not apply.

¹⁴⁵ In 2011, the Danish government announced plans to reintroduce limited border controls at the insistence of the populist peoples’ party. The project was abandoned when the general elections in 2012 brought a centre left government into power.

¹⁴⁶ See the Council Decision 2006/188/EC (OJ 2006 L 66/37) approving the agreement; a similar agreement has not been concluded so far for the Dublin III Regulation (EU) No 604/2013.

¹⁴⁷ See Wiener, ‘Forging Flexibility – The British ‘No’ to Schengen’, EJML 1 (1999), p. 441, 456–9 and the evidence in House of Lords Select Committee on the European Communities, Schengen and the United Kingdom’s Border Controls, 7th Report, Session 1998/99.

¹⁴⁸ See Fahey, ‘Swimming in a Sea of Law’, CML Rev. 47 (2010), p. 673, 679–82 and the Declaration (No. 56) of Ireland (OJ 2008 C 306/268). Ireland has later occasionally pursued a more restrictive approach and opted out of some initiatives despite of British participation.

union, the asymmetry of the Schengen law was characterised by an inherent pragmatism: granting an opt out to three Member States was a compromise to secure the unanimity necessary for Treaty change. Britain would not have consented to supra-nationalisation in Amsterdam without an opt out.

- 43 Upon closer inspection, the British/Irish opt out is the most prolific expression of the *à la carte* logic of principled freedom for Member States.¹⁴⁹ Firstly, Britain and Ireland retain the right, during the legislative process, to ‘notify ... that they wish to take part’ in the adoption of a proposal.¹⁵⁰ On this basis, the United Kingdom and/or Ireland took the route of **ex ante participation in the legislative procedure**; they decided to participate in many (not all) measures on immigration and asylum (the precise scope of participation will be confirmed in the sections with introductions to the chapters on border controls, immigration and asylum; see above MN 39). Originally, the arrangement did not provide for subsequent withdrawal after a decision to participate had been made; any decision to opt in was a one way street towards closer integration. The Lisbon Treaty reversed this situation by granting Britain and Ireland the option of unilateral withdrawal (see below MN 45). Secondly, both states retain the **option of ex post accession** at a later stage. Britain and Ireland ‘may at any time request to take part in some or all of the provisions’ that define the original Schengen *acquis* or which have been adopted in other segments in the area of freedom, security and justice.¹⁵¹ Indeed, both countries decided to join in important areas of the original Schengen cooperation, albeit without subscribing to the abolition of internal border controls.¹⁵² The combined effect of *ex ante* and *ex post* participation was quite constructive.
- 44 The United Kingdom’s and Ireland’s freedom of choice is not absolute. The **Schengen Protocol limits participation** to proposals and initiatives to those ‘which are capable of autonomous application.’¹⁵³ This meant, in the eyes of the Council, that two British requests for participation in the borders agency **Frontex** and a regulation on security features in travel documents had to be rejected, since both were intractably linked to aspects of the Schengen *acquis*, in particular to border controls, which the United Kingdom had refused to endorse.¹⁵⁴ The ECJ confirmed this standpoint in two judgments which demonstrated a certain willingness on the side of the Court to ensure that the opt out arrangements do not undermine the uniform and coherent application of Schengen law.¹⁵⁵ Since the Lisbon Treaty leaves the relevant provisions intact, this case law remains relevant: Britain may not sign up to measures building on the Schengen *acquis* if they require the application of the broader legislative context.¹⁵⁶

¹⁴⁹ See Thym, ‘Supranational Differentiation and Enhanced Cooperation’, in: Tridimas/Schütze (eds), *The Oxford Principles of European Union Law. Vol. I: The European Union Legal Order* (OUP, 2015), sect. II.A.3 (forthcoming).

¹⁵⁰ Article 3(1) Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice (OJ 2008 C 115/295); similarly for Schengen related instruments, see Article 5(1) Protocol (No. 19) on the Schengen *acquis* (OJ 2008 C 115/290).

¹⁵¹ See Article 4 Schengen Protocol and Article 4 Protocol No. 21.

¹⁵² See, on the UK, Decision 2000/365 (OJ 2000 L 131/43) and, on Ireland, Decision 2002/192 (OJ 2002 L 64/20); for non Schengen measures see Decision 2009/26/EC (OJ 2009 L 10/22), Decision 2009/350/EC (OJ 2009 L 108/53) and Decision 2009/451/EC (OJ 2009 L 149/73).

¹⁵³ Advocate General Verica Trstenjak, *United Kingdom vs. Council*, C 77/05, EU:C:2007:419, para 107.

¹⁵⁴ Legally, both disputes concerned the delimitation of Articles 4 5 Schengen Protocol and the (more flexible) rules of Protocol No. 21 (n 134); for detail see ECJ, *United Kingdom vs. Council*, C 77/05, EU:C:2007:803; and ECJ, *United Kingdom vs. Council*, C 137/05, EU:C:2007:805.

¹⁵⁵ See Fletcher, ‘Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty’, *EuConst* 5 (2009), p. 71, 83 88.

¹⁵⁶ See Piris, *The Lisbon Treaty* (CUP, 2010), p. 199.

During the intergovernmental conference drafting the Lisbon Treaty, the British government demanded and obtained further flexibility.¹⁵⁷ London insisted upon the right to **opt out of any amendment of instruments in whose adoption it had earlier decided to participate** (for example, the Asylum Qualification Directive¹⁵⁸). By means of a simple declaration, the UK and/or Ireland may withdraw itself from an ongoing legislative process, although it is bound by the instrument the other Member States want to modify.¹⁵⁹ To be sure, this can only be done when amendments are made: without a proposal for legislative change, Britain cannot opt out. In cases of amendments, however, London retains the ability to pick and choose as it wishes. From the perspective of legal certainty, it is regrettable that Britain (and Ireland) will continue to be bound by previous rules, even if these rules are repealed with regard to all other Member States because of an amendment.¹⁶⁰ Whenever the British or the Irish exclude themselves from amendments, the Council may vote against British participation in related instruments, from which the UK and/or Ireland do not wish to retract, if such ‘rump’ legislation cannot be applied effectively.¹⁶¹ The example of Frontex demonstrates that the ECJ may support the Council in cases of conflict (see above MN 44).

IV. Human Rights and International Law

EU legislation is based on the general commitment in Article 6 TEU to recognise the rights, liberties and principles laid down in the Charter of Fundamental Rights (see below MN 47–50), the European Convention of Human Rights (see below MN 51–52) and the unwritten general principles of Union law, which may include international human rights (see below MN 53–55). It is beyond doubt that legislation in the field of immigration and asylum must comply with the human rights standards put forward in the Charter and related documents. By contrast, the weight of international treaties concluded with third states requires careful analysis, since the ECJ traditionally attaches great importance to the autonomy of the EU legal order vis à vis the international legal environment (see below MN 56–60).

1. EU Charter

The entry into force of the Treaty of Lisbon rendered the Charter of Fundamental Rights legally binding: the rights and principles in the Charter shall have the same legal value as the Treaties.¹⁶² The Charter is **binding on the EU legislature** and can constitute grounds to challenge the validity of legislative acts before the Court of Justice (irrespective of whether the recitals of EU legislation invoke the Charter expressly).¹⁶³ Moreover,

¹⁵⁷ See No. 19 lit. I of the IGC Mandate, Council doc. 11177/07 of 26 June 2007; on the allegedly tough negotiations see Ladenburger, ‘Police and Criminal Law in the Treaty of Lisbon,’ *EuConst* 4 (2008), p. 20, 28.

¹⁵⁸ Cf. recital 50 of Asylum Qualification Directive 2011/95/EU in contrast to recital 38 of the former Asylum Qualification Directive 2004/83/EC.

¹⁵⁹ See Article 5(2) (5) Schengen Protocol and Article 4a Protocol No. 21.

¹⁶⁰ Legally, the repeal of the earlier measure through new legislation does not extend to the United Kingdom, since the latter is not bound by the amendment; cf. by way of example, Article 40(1) of the Asylum Qualification Directive 2011/95/EU; see also House of Lords Select Committee on European Union, 7th Report of the Session 2008–09, paras 15–20 and Peers, *EU Justice*, p. 78–84.

¹⁶¹ See Article 5(3) Schengen Protocol and Article 4a(2) Protocol No. 21.

¹⁶² Cf. Article 6(1) TEU.

¹⁶³ Procedurally, this can be done by means of an action for annulment under Article 258 TFEU or by means of preliminary reference under Article 267 TFEU, which is mandatory also for courts of first instance when they consider EU secondary law to be invalid; cf. ECJ, *Foto Frost*, 314/85, EU:C:1987:452.

directives and regulations have to be interpreted in accordance with the Charter as far as possible in cases of potential conflict (see above MN 14). Aside from the EU institutions, Member States are also bound by the Charter but ‘only when they are implementing Union law.’¹⁶⁴ The precise meaning of that provision has been (and still is) subject to intense debate in judicial and academic circles that culminated in an exchange of blows between the European Court of Justice and the German Federal Constitutional Court.¹⁶⁵ In its *Åkerberg Fransson* judgment, the ECJ maintained that **Member States are bound ‘within the scope of European Union law.’**¹⁶⁶ Closer inspection demonstrates that the precise scope of this formulation remains ambiguous and has been subject to a number of restrictive follow up judgments.¹⁶⁷

48 Any decision on whether national measures fall within the scope of the Charter therefore requires **careful analysis of whether the factual circumstances of the dispute and the domestic provision in question are covered by EU legislation** on immigration and asylum *ratione materiae*, *personae*, *temporis* and *loci*.¹⁶⁸ Whenever EU legislation does not apply to specific subject areas or categories of persons, the Charter doesn’t apply either. One may activate national constitutions and/or the ECHR instead, but the ECJ does not hold jurisdiction on these instruments.¹⁶⁹ This means, by way of example, that the Charter applies to the living conditions of those with subsidiary protection status (as far as EU legislation regulates their status in Articles 20–35 Asylum Qualification Directive 2011/95/EU), while the same subject areas cannot be analysed in light of the Charter for those awarded complementary humanitarian protection under domestic law.¹⁷⁰ Similarly, not all border control activities can be assessed in the light of the Charter: the latter applies only in so far as the Schengen Borders Code or related instruments prescribe obligations that the national border police has to respect.¹⁷¹ Notwithstanding these caveats, it is well established that the exercise of **national implementing discretion** can be judged in the light of the EU Charter in cases where EU legislation leaves the Member States different options how to achieve the objective prescribed in a Directive or Regulation.¹⁷²

49 When interpreting the Charter, the meaning of specific guarantees can often be identified under **recourse to the European Convention of Human Rights** and corresponding case law of the ECtHR, since the Charter calls for a parallel interpretation of both instruments whenever it contains rights which are corresponding to guarantees in the ECHR.¹⁷³ To refer to the case law of the human rights court in Strasbourg is standard practice for EU judges in Luxembourg, even though the EU has not yet acceded formally to the ECHR (see below MN 51). Moreover, the official explanations attached to the Charter are to be given due regard (see above MN 13). As is the case with most human rights, guarantees in the Charter are not absolute: **interferences can**

¹⁶⁴ Article 51(1) TFEU.

¹⁶⁵ For further comments, see Thym, ‘Separation versus Fusion’, *EuConst* 9 (2013), p. 391–419.

¹⁶⁶ ECJ, *Åkerberg Fransson*, C 617/10, EU:C:2013:280, para 19.

¹⁶⁷ See Thym, ‘Blaupausenfallen bei der Abgrenzung von Grundgesetz und Grundrechtecharta’, *Die Öffentliche Verwaltung* 2014, p. 941–951; and Fontanelli, ‘Implementation of EU Law through Domestic Measures after *Fransson*’, *EL Rev.* 39 (2014), p. 682, 689–697.

¹⁶⁸ For a typology, see Thym, *ibid.*, p. 948–950.

¹⁶⁹ ECJ, *Åkerberg Fransson*, C 617/10, EU:C:2013:280, para 44 rejects an autonomous interpretation of the ECHR in areas not covered by Union law and the EU Charter.

¹⁷⁰ See ECJ, *M’Bodj*, C 542/13, EU:C:2014:2452, paras 42–46.

¹⁷¹ See ECJ, *Zakaria*, C 23/12, EU:C:2013:24, paras 39–42.

¹⁷² For the former Dublin II Regulation (EC) No 343/2003, see ECJ, *N.S. et al.*, C 411/10 & C 493/10, EU:C:2011:865, paras 65–68; and for the Family Reunification Directive 2003/86/EC, see ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, paras 22–23, 104–105.

¹⁷³ See Article 52(3) of the Charter.

be justified if they pursue a legitimate aim in a proportionate manner.¹⁷⁴ When it comes to the contents, the Charter contains both individual rights and more abstract ‘principles’, in particular in Title IV on solidarity.¹⁷⁵ Principles require implementation by means of either Union or domestic legislation, which can be applied by courts only in conjunction with implementing measures (although the precise degree of legal obligations remains uncertain).¹⁷⁶ In practice, this concerns primarily the social rights in Articles 27 to 38 of the Charter.

The relevance of individual guarantees will be discussed in the thematic introductions to the different chapters of this commentary. Relevant provisions include **procedural guarantees** for administrative proceedings and judicial review (see above MN 37). With regard to border controls and visas, the extraterritorial application and the relative liberty of public authorities in regulating **access by migrants to EU territory** are pertinent (see Thym, Legal Framework for Entry and Border Controls, MN 32–34). In the context of legal migration, the guarantee of private and family life in **Article 7** of the Charter (see Thym, Legal Framework for EU Immigration Policy, MN 52–56), the provisions on **equal treatment** (see *ibid.*, MN 37–42) as well as limited guarantees on the **labour market and intra European mobility** deserve closer attention (see *ibid.*, MN 34–35), whereas **Articles 4 and 18** of the Charter are crucial for asylum law, since they reaffirm guarantees under the ECHR (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 56–63).

2. European Convention

In its human rights case law, the ECJ has traditionally afforded special significance to the European Convention of Human Rights, although it does not formally have the rank of primary Union law. Article 6(2) TEU allows for the formal **accession of the EU to the ECHR** and a draft accession agreement had been negotiated but was blocked by the ECJ due to concerns about the autonomy of the supranational order.¹⁷⁷ Remarkably, asylum law was one of the issues of concern for judges in Luxembourg,¹⁷⁸ since the human rights court in Strasbourg had challenged the principle of mutual respect, which, in the eyes of the ECJ, underlies cooperation in the area of freedom, security and justice, including the Dublin III Regulation (see Hruschka/Maiani, Regulation (EU) No 604/2013 Article 3 MN 7–16). It should be noted in this respect that the future formal accession of the EU to the ECHR would primarily have procedural consequences and would not change the **constitutional status of the ECHR under EU law**,¹⁷⁹ which, even after accession, would retain a formal rank below primary law, like other international treaties concluded by the EU (see below MN 55). This implies that the **position of the ECJ prevails** in a rare case of conflict with the ECtHR, while the principled orientation of the Charter at the ECHR guarantees widespread convergence in regular circumstances (see above MN 49).

¹⁷⁴ A generic provision on the justification of restrictions can be found in Article 52(1) of the Charter.

¹⁷⁵ See Article 52(5) of the Charter, which leaves open which provisions guarantee individual rights or contain only ‘principles’.

¹⁷⁶ Cf. Article 52(5) of the Charter, which excludes, as a result, that individual rights can be deduced directly from principles; for further comments, see Jääskinen, ‘Fundamental Social Rights in the Charter’, in: Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (C.H. Beck/Hart, 2014), p. 1703–1714.

¹⁷⁷ See ECJ, *Accession to the ECHR*, Opinion 2/13, EU:C:2014:2454.

¹⁷⁸ See ECJ, *ibid.*, paras 192–195.

¹⁷⁹ See ECJ, *ibid.*, paras 189–190.

- 52 Although the ECHR contains no right to asylum, the case law of the European Court of Human Rights in Strasbourg has become increasingly relevant to immigration and asylum law in recent years. This will be discussed in this commentary for private and family life under **Article 8 ECHR** (see Thym, Legal Framework for EU Immigration Policy, MN 52–56) and the prohibition of inhuman and degrading treatment as well as the guarantee of an effective remedy in line with **Articles 3 and 13 ECHR** (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 56–60). Moreover, the question of a **right to entry and extraterritorial applicability** will be discussed (see Thym, Legal Framework for Entry and Border Controls, MN 32–39).

3. Geneva Convention and International Human Rights

- 53 Article 78(1) TFEU mandates that the EU asylum *acquis* complies with the Geneva Convention, the 1967 Protocol relating to the status of refugees and other relevant treaties. This obligation has been put into effect by the ECJ, which reaffirmed, in a number of judgments, that the EU asylum *acquis* must be interpreted taking into account the Geneva Convention (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 47–54). From a legal perspective, this **obligation to respect the Geneva Convention and the 1967 Protocol** flows from EU primary law, since the EU has not formally acceded to the Geneva Convention or assumed the functions of Member States by means of functional succession (as it had previously done with regard to the GATT Agreement).¹⁸⁰ As a result, the ECJ holds no autonomous jurisdiction to interpret the Geneva Convention: it only does so in conjunction with secondary Union law, in particular the Asylum Qualification Directive 2011/95/EU. Recital 23 of the Directive states explicitly that its provisions should ‘guide the competent national bodies of Member States in the application of the Geneva Convention.’ It also reaffirms that the Geneva Convention and the Protocol constitute the cornerstone of the international legal regime for the protection of refugees.¹⁸¹
- 54 **International human rights treaties** are not directly binding upon the European Union, since it has not acceded to them under international law. They can however be relied upon indirectly as a source of inspiration for the interpretation of the unwritten general principles of Union law that complement the human rights in the Charter.¹⁸² On this basis, the ECJ recognised explicitly that the **International Covenant on Civil and Political Rights (ICCPR)**¹⁸³ can be relied upon in order to identify the contents of EU human rights – although judicial practice has remained sketchy, not least since the international guarantees on migration usually fall short of the ECtHR jurisprudence.¹⁸⁴ Moreover, the ECJ emphasised that the views of international treaty bodies, such as the Human Rights Committee, are not legally binding.¹⁸⁵ Other international agreements cannot be considered legally binding *ipso jure*, since the ECJ insists that they must be binding for *all* Member States. As a result, the **UN Convention on the Rights of the Child**¹⁸⁶ and the

¹⁸⁰ See ECJ, *Qurbani*, C 481/13, EU:C:2014:2101, paras 22–29.

¹⁸¹ Recital 4 Asylum Qualification Directive 2011/95/EU.

¹⁸² Cf. Article 6(3) TEU, although the provisions does not list international human rights treaties explicitly; for further reflection, see Rosas, ‘The Charter and Universal Human Rights Instruments’, in: Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (C.H. Beck/Hart, 2014), p. 1685–1702.

¹⁸³ See ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, para 37.

¹⁸⁴ See Fitzpatrick, ‘The Human Rights of Migrants’, in: Aleinikoff/Chetail (eds), *Migration and International Legal Norms* (T.M.C. Asser, 2003), p. 169, 171–178.

¹⁸⁵ See ECJ, *Grant*, C 249/96, EU:C:1998:63, para 46.

¹⁸⁶ See ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, para 37.

settled case law that international agreements concluded by the EU institutions ‘form an **integral part of [Union] law**¹⁹⁶ and benefit, as a result, from the same effects as regular EU law within the domestic legal orders of the Member States, including primacy over national law in cases of conflict.¹⁹⁷ The ECJ assumes, moreover, that international agreements can be relied upon to challenge the validity of EU legislation.¹⁹⁸ Provisions of international agreements concluded by the EU have a **hierarchical status above secondary legislation but below the EU Treaties**; not even resolutions of the UN Security Council may claim a higher normative rank than EU primary law,¹⁹⁹ nor can the European Convention on Human Rights and corresponding ECtHR case law after the EU’s accession (see above MN 51).

57 It should be highlighted that the practical relevance of international agreements concluded by the EU is compromised significantly by settled ECJ case law rendering the effects mentioned above subject to the direct applicability of the relevant international agreements. **Provisions in international treaties that are not directly applicable cannot be relied upon** by individuals or courts in order to challenge the validity of secondary Union law or domestic rules.²⁰⁰ In assessing whether international treaties can be directly applied, the ECJ correctly highlights their international legal character and the corresponding applicability of the **Vienna Convention on the Law of Treaties** in the context of interpretation of agreements concluded by the EU,²⁰¹ which may deviate from the interpretative standards for supranational EU law (see above MN 10–20). This implies, in accordance with settled case law, that even provisions with an **identical wording may have a different meaning** to the equivalent rules in EU legal instruments.²⁰² While the ECJ has traditionally been rather strict towards international agreements with a global reach, such as world trade law or the Convention on the Law of the Sea, it is more generous when it comes to association agreements.²⁰³ Among the **association agreements**, the Ankara Agreement between the EEC and Turkey has become particularly relevant to immigration law in recent years (see above MN 19; and Thym, Legal Framework for EU Immigration Policy, MN 58).

58 International agreements concluded by Member States (not the European Union) are not binding on the EU institutions under public international law. While international human rights instruments ratified by all Member States can be invoked indirectly in the context of the unwritten general principles of Union law (see above MN 54), other **agreements concluded by Member States** cannot be relied upon in the EU legal order, even if they have been ratified by all Member States: the ECJ maintains that such agreements can only be invoked if they reflect customary international law and are directly applicable²⁰⁴ a double condition that is rarely met. In so far as these agreements were concluded prior to EU accession (or the conferral of corresponding competences to the EU level), they may benefit, however, from the safeguard clause in

¹⁹⁶ ECJ, *Haegemann II*, 181/73, EU:C:1974:41, para 5.

¹⁹⁷ On the conditions for direct applicability and primacy, see below MN 57.

¹⁹⁸ See, generally, ECJ, *IATA & ELFAA*, C 344/04, EU:C:2006:10, para 34; and, for visa policy, ECJ, *Soysal & Savatli*, C 228/06, EU:C:2009:101, paras 58–61.

¹⁹⁹ Cf. ECJ, *Kadi & Al Baraak/Rat & Kommission*, C 402/05 & C 415/05 P, EU:C:2008:461, in part. paras 305–309.

²⁰⁰ In the absence of direct applicability, the ECJ also excludes indirect effects, such as consistent interpretation; for further comments, see Thym, ‘Foreign Affairs’, in: von Bogdandy/Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart, 2009), p. 309, 320–323.

²⁰¹ See ECJ, *Walz*, C 63/09, EU:C:2010:251, para 23.

²⁰² This was established first by ECJ, *Polydor*, 270/80, EU:C:1982:43, paras 14–21; and has been reaffirmed for immigration related agreements by ECJ, *Demirkan*, C 221/11, EU:C:2013:583, paras 44–61.

²⁰³ See Thym, *ibid.*, p. 322–323.

²⁰⁴ Cf. ECJ, *Intertanko*, C 308/06, EU:C:2008:312, paras 48–52.

Article 351 TFEU which provides that the EU Treaties and secondary legislation do not prevent Member States from fulfilling their obligations under pre existing agreements with third states.²⁰⁵ This safeguard for earlier agreements is static, i.e. Member States have lost the capacity to amend them.²⁰⁶ Furthermore, the conclusion of new agreements in areas covered by secondary EU legislation is an exclusive competence of the European Union.²⁰⁷ In practice, respect for existing obligations is often guaranteed through **explicit safeguard clauses in EU secondary legislation** stating that Member States remain free to retain more favourable national provisions in line with international agreements (see Hailbronner/Arévalo, Directive 2003/86/EC Article 3 MN 16 19). From a legal point of view, these provisions are declaratory in nature in so far as they relate to pre existing agreements concluded prior to accession to the European Union that are covered by Article 351 TFEU.

In line with the objective of protecting existing legal obligations, explicit safeguard clauses in secondary legislation affect only Member States that had ratified the agreement(s) in question before the adoption of secondary EU legislation. They can concern **bilateral treaties on commerce and navigation**, which never gained much influence in most domestic legal orders.²⁰⁸ More important are multilateral **agreements within the framework of the Council of Europe**, which like the bilateral treaties on commerce and navigation confer reciprocal rights only upon the nationals of state parties and did not gain much practical influence either.²⁰⁹ It is therefore necessary to assess on a case by case basis which Member States ratified an agreement: the European Convention on the Legal Status of Migrant Workers of 1977 has been ratified by eleven state parties, including six EU Member States and five third states,²¹⁰ the European Convention on Social and Medical Assistance of 1953 applies to several Member States, as well as Norway, Iceland and Turkey,²¹¹ and the **European Convention on Establishment of 1955** has been ratified by ten EU Member States, as well as Norway, Iceland and Turkey.²¹² Given that the nationals of Norway and Iceland hold extensive rights under the EEA Agreement, the **practical relevance of these conventions is extremely limited** at present: they relate in particular to Turkish nationals residing legally in Member States to which the conventions apply.

²⁰⁵ For more comments, see Koutrakos, *EU International Relations Law*, 2nd edn (Hart, 2015), ch. 9.

²⁰⁶ See *ibid.* and ECJ, *Commission vs. Austria*, C 205/06, EU:C:2009:118.

²⁰⁷ See Article 3(2) TFEU.

²⁰⁸ See Bast, *Aufenthaltsrecht*, p. 81 87; and Randelzhofer, *Der Einfluss des Völker und Europarechts auf das deutsche Ausländerrecht* (de Gruyter, 1980), p. 32 40.

²⁰⁹ See Groenendijk, 'Long Term Immigrants and the Council of Europe', EJML 1 (1999), p. 275, 286 288.

²¹⁰ Convention of 24 November 1977, CETS No. 93, entry into force on 1 May 1983; it has been ratified by France, Italy, the Netherlands, Portugal, Spain and Sweden as well as the third states Albania, Moldova, Norway, Turkey and Ukraine; see <http://conventions.coe.int/> [last accessed on 24 November 2015].

²¹¹ Convention of 11 December 1953, CETS No. 14, entry into force on 1 July 1954, which has been ratified by the third states mentioned above as well as Belgian, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom; see *ibid.*

²¹² Convention of 13 December 1955, CETS No. 19, entry into force on 23 February 1965, which has been ratified by the third states mentioned above as well as Belgium, Denmark, Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Austria, Sweden and the United Kingdom; see *ibid.*