The Association, Cooperation, Partnership, and Trade Agreements Before the EU Courts: Embracing Maximalist Treaty Enforcement?

1. Introduction

This chapter assesses the EU Courts’ case law in what has been the vast bulk of their activity concerning EU Agreements, namely, the Association, Cooperation, Partnership, and Trade Agreements (henceforth, for ease of reference, Trade Agreements). This body of case law, a total of 184 cases, developed at a remarkable rate following the early batch of cases that culminated with the bold Kupferberg ruling. This chapter aims to redress an existing gap in the literature whereby particular EU Trade Agreement judgments are singled out for praise or criticism without situating them within the broader framework of the case law. This accordingly also creates a key pillar for the empirically grounded overall assessment of the judicial treatment accorded EU Agreements which constitutes a core objective of this book. It is only in this fashion that one can assess whether the lofty judicial language commencing with Haegeman II, and for many the promise that the full enforcement arsenal of EU law would be unleashed for policing this additional category of EU law, has been adhered to in judicial practice.

The chapter is divided into two main sections. The first assesses preliminary rulings, where the bulk of EU Court activity has occurred (131 cases),

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1 Excluding cases pertaining to the review of the act concerning conclusion.
and the second direct actions, that is, actions commencing and terminating before the EU Courts in Luxembourg (53 cases).

2. Preliminary Rulings

The preliminary rulings jurisprudence in the EU Trade Agreement context can be divided into two core categories involving, respectively, challenges to domestic action or to EU action.

2.1 Challenges to domestic action

The Trade Agreement case law challenging domestic measures can be divided into three categories concerning, respectively, provisions pertaining, first, to trade in goods, where the EU Trade Agreement jurisprudence commenced, secondly, to movement of persons which rapidly became the dominant sources of litigation activity, and, thirdly, to a small generic category concerning neither of the aforementioned provisions.

2.1.1 Provisions pertaining to goods

The case law concerning provisions pertaining to goods has given rise to 35 rulings, 27 of which have come since *Kupferberg*. The number of rulings by decade is represented in Figure III.1, with only six having arisen since 1997.

Through to the emphatic *Kupferberg* ruling in 1982 only two specific EU Agreement provisions had been expressly found directly effective: the customs duty prohibition in the Yaound Convention (*Bresciani*), and the fiscal discrimination prohibition in both the Greek Association Agreement and the Portugal Trade Agreement (*Pabst* and *Kupferberg*). These types of provision have given rise to a further six preliminary rulings, two pertaining to the customs duty prohibition, and four for the fiscal discrimination prohibition. In none were the questions framed in terms of direct effect

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and in all six the ECJ provided interpretations without expressly conceptualizing matters in such terms.

As far as the non-fiscal discrimination provision is concerned, in the first two cases the Court’s reading preserved the national measure at issue.\(^4\) The second of the cases, Metalsa, is the more significant for current purposes. It concerned whether an interpretation accorded to Article 110 TFEU applied to its counterpart in the Austria Trade Agreement.\(^5\) The Commission and the Member State whose legislation was at stake successfully argued, invoking Polydor, against such an interpretative transposition. The ECJ concluded that the interpretation accorded the EU provision was based on the aims of the Treaty including the establishment of a common market which were not part of the Austria Agreement and was accordingly unwilling to countenance the same interpretation.\(^6\) The third case, the Texaco ruling, saw the ECJ asked effectively whether a certain charge was

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\(^4\) In Kupferberg II this concerned the Portugal and Spain Agreements. And the validity of the taxation reduction at issue would be preserved providing that the rate applied to imported products did not exceed that levied on corresponding domestic products.

\(^5\) The interpretation rendered national legislation incompatible with Art 110 TFEU where it penalized certain tax offences disproportionately more severely where they concerned imported rather than domestic goods.

\(^6\) Such reticence was unsurprising given that the alternative would have constrained Member State competence with regard to criminal penalties in the Trade Agreement sphere.
consistent with the customs duty prohibition (Art 6) and the fiscal discrimination prohibition (Art 18) in the Sweden Agreement and Agreements containing corresponding provisions. Little attention was given to the customs duty prohibition, but the ECJ invoked *Kupferberg* and the identical fiscal discrimination prohibition at issue in that case in concluding that the charge was contrary to Agreements containing provisions similar to the fiscal discrimination prohibition in the Sweden Agreement. The fourth was a recent domestic damages action in which the ECJ curiously expressly asserted that it only needed to engage with the scope of the non-fiscal discrimination provision of the first Yaoundé Convention (Art 14) and not its direct effect. A reading of that provision was proffered preserving the validity of the relevant domestic tax in this context.

In both the customs duty prohibition cases the interpretations given made it clear that domestic measures breached EU Agreements. The first, *Legros*, established that certain ‘dock dues’ constituted a charge having an equivalent effect to a customs duty in breach of the EU Treaty. France argued, invoking *Polydor*, that it did not follow that this also rendered it a prohibited charge under the Sweden Agreement. The Court underscored that the Agreement would be deprived of much of its *effet utile* if the term were interpreted as having a more limited scope than its EU law counterpart. The second case made it clear that this interpretative transposition of the term ‘charge’ applied to all EU Trade Agreements containing such a prohibition.

On several occasions prior to *Kupferberg*, the ECJ interpreted provisions in EU Trade Agreements on quantitative restrictions (QRs) and measures having equivalent effect to quantitative restrictions (MEQRs) without first asking whether they were directly effective or conferred rights. The five additional preliminary rulings continued in this vein but one is worthy of

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7 C-102/09 *Camar*.

8 The Court was unwilling to bring within its scope discriminatory taxation of unlike products which are in competition with each other.

9 C-125/94 *Aprile*.

10 Even where the referring court expressly framed its question in the language of direct effect.

11 314–16/81 & 83/82 *Waterkeyn* [1982] ECR 4337 was an unsuccessful attempt to have an infringement ruling holding French legislation to breach Art 34 TFEU interpreted as also breaching the equivalent Portugal Agreement provision. In 125/88 *HFM Nijman* [1989] ECR 3533 the ECJ reinterpreted the questions referred as also concerning the Sweden Agreement and having upheld the compatibility of the national legislation as a result of the derogation (Art 36 TFEU) to the Art 34 TFEU prohibition, the ECJ did likewise vis-à-vis the counterpart (Art 20) to the equivalent Sweden Agreement proscription (Art 13). In C-143/06 *Ludwigs-Apotheke* [2007]
additional comment. In *Bulk Oil* a UK court asked several questions concerning the Cooperation Agreement with Israel. At issue was the then UK policy precluding exports of crude oil to certain countries, a policy to which a contract between two firms had linked a sale and which led to litigation and the reference for a preliminary ruling. The relevance of the Cooperation Agreement to this sensitive dispute was easily dispensed with. The ECJ, following the UK and Commission submissions, concluded that it did not contain provisions expressly prohibiting export QRs/MEQRs. The case shares a clear parallel with the *Polydor* judgment in that a judicial interpretation preserving the national measure at issue was proffered while sidestepping the express direct effect question, including its particularly controversial horizontal manifestation.

Nine cases have concerned rules of origin provisions, in none of which did the domestic court frame its question in terms of direct effect, instead seeking only interpretations of provisions in disputes in which disgruntled traders challenged decisions of, inter alia, customs authorities. In one, the
ruling made clear that the domestic customs authority decision was invalid but without addressing the relevant Agreement. Of the remaining eight, in seven the Court interpreted the relevant provisions without, like the Advocate General before it, framing matters in terms of direct effect. The remaining case, where direct effect was explored, merits additional comment.

The 1994 Anastasiou judgment saw the ECJ and the Advocate General expressly respond to the UK and Commission submissions that the provisions invoked were not directly effective concerning, as they did, administrative cooperation between customs authorities; a rather counter-intuitive argument given that the Court had already proffered interpretations of similar provisions in Agreements with Switzerland, Yugoslavia, and Austria that effectively proscribed domestic customs authorities decisions. The explanation for such argumentation lies in the controversial nature of the dispute. It concerned a judicial challenge based on the Cyprus Association Agreement—which Greece supported before the ECJ—to the UK practice of permitting certain imports from the Turkish Republic of Northern Cyprus to benefit from the Agreement’s preferential tariffs.

The judgment commenced with invocation of the direct effect test for EU Agreements which provides that a provision ‘must be regarded as having direct effect when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise

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16 C-292/91 Weis.
17 The interpretation proffered effectively proscribed the relevant customs authority decision in five instances (218/83 Les Rapides Savoyards; 156/85 Perles Eurotool; C-12/92 Huygen (the national court was given the green light to invalidate the customs decision); C-334/93 Bonapharma; C-23–5/04 Sfakianakis) and preserved the validity of the relevant customs authority decision in two instances (C-56/06 Euro Tex and more controversially in C-386/08 Brita where the Court relied on a general principle of international law (pacta tertiis nec nocent nec prosunt) which finds expression in Art 34 VCLT in holding that the Israel Association Agreement (Art 83) precluded products originating in the West Bank from falling within its territorial scope. The Court also interpreted both protocols to the Israel and Palestine Liberation Organisation Agreements in rejecting the notion that importing customs authorities can make an elective determination that leaves open the question of which of the two Agreements applies and whether proof of origin is to be issued by Israeli or Palestinian authorities. Finally, it held that an inconclusive reply from the Israeli authorities was not binding under the administrative cooperation provisions of the Israel Agreement, nor was there an obligation by the customs authorities of the importing State to refer to the Customs Cooperation Council a territorial scope dispute).
18 Respectively 218/83 Les Rapides; 156/85 Perles Eurotool; C-12/92 Huygen.
19 Not, however, where the movement certificate had been issued in the name of the Turkish Republic of Northern Cyprus.
obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.\textsuperscript{20} Applying the test, the Court pointed to the aim of the Agreement, which was the progressive elimination of obstacles to trade, and the rules of origin play an essential role in determining which products benefit from preferential treatment. The rules were asserted, without explanation, to lay down clear, precise, and unconditional obligations. Two of the earlier EU Agreement rules of origin cases were cited, with the ECJ noting that this by implication showed that similar provisions could be applied by national courts. It was accordingly concluded that the provisions had direct effect.

Anastasiou shed important light on the ECJ’s then emerging approach to EU Agreements. The judicial approach to EU law provisions has been characterized (in Chapter I) as a maximalist model in which, amongst other things, the link between individual rights \textit{stricto sensu} and direct effect was gradually discarded. Anastasiou sat comfortably within that evolving framework. The provisions concerned administrative cooperation between importing and exporting customs authorities rather than, as the UK and Commission’s logic would have it, individual rights for traders and producers of Republic of Cyprus goods enforceable before domestic courts. Expressly rejecting this argument indicated that the judicial approach to EU Agreements was developing in line with the approach to EU law proper. As Judge Pescatore once argued, direct effect is the normal state of the law and ultimately it is a question of whether a rule is capable of judicial adjudication.\textsuperscript{21} This presumption of justiciability equally appeared to be taking hold in certain dimensions of the Trade Agreement jurisprudence.

Four further cases involving the finer points of customs law have also arisen, in none of which were the questions or the responses framed in terms of direct effect.\textsuperscript{22} One, \textit{Deutsche Shell},\textsuperscript{23} was notable in that a German

\textsuperscript{20} The classic formulation stems from C-12/86 \textit{Demirel} which employed the language of direct applicability.

\textsuperscript{21} See Pescatore (1983). He was the judge-rapporteur for the first of the rules of origin cases (218/83 \textit{Les Rapides Savoyards}) which did not employ a direct effect analysis.

\textsuperscript{22} In 170/82 \textit{Ramel} [1983] ECR 1319 the ECJ interpreted the interim Algeria Trade Agreement which was not expressly referred to in the national court questions. In 266/81 \textit{SIOT} [1983] ECR 731 the ECJ responded to an Italian court question on the compatibility of an Italian charge with a Transit Agreement with Austria by holding that it did not contain a specific commitment in relation to tax treatment of goods in transit. In 99/83 \textit{Fioravanti} [1984] ECR 3939 the judicial response to an Italian court’s requested interpretation of a Transit Agreement with Switzerland left little doubt as to the invalidity of the domestic duties.

\textsuperscript{23} C-188/91 \textit{Deutsche Shell AG} [1993] ECR I-363.
court asked several questions pertaining, inter alia, to a Transit Agreement with EFTA States and a recommendation of the Joint Committee established to administer it. The Court first asserted its interpretative jurisdiction over non-mandatory measures of bodies established by EU Agreements, considering them to be directly linked to the Agreement itself and thus forming part of the EU legal order.²⁴ The ECJ ruled that it was not precluded from ruling on the interpretation of a non-binding measure in Article 267 proceedings,²⁵ and whilst acknowledging that Joint Committee recommendations do not confer domestically enforceable individual rights, national courts were obliged to take them into consideration.²⁶

An Italian consumption tax on bananas from non-member countries generated litigation in Italian courts which sought preliminary rulings on the compatibility of the legislation mainly with the common commercial policy.²⁷ The Italian magistrates had not put forth any question as to the compatibility with EU Trade Agreements, but both the Commission and traders invoked EU Agreements. The ECJ gave a strong signal that the legislation breached the Lomé Convention (Art 139(2)), and that domestic courts should disregard national law incompatible with EU provisions contained in Agreements conferring rights on individuals. The manner in which the ruling was framed would inevitably invite further rulings and a different Italian court asked whether the Lomé Conventions confer domestically enforceable rights and whether the consumption tax was incompatible therewith.²⁸ Italy argued that the Lomé Conventions did not contain provisions conferring domestically enforceable individual rights.²⁹ But the other intervening Member State, the Commission, and the Advocate General, all appropriately pointed to the Bresciani judgment on a predecessor Agreement. The ECJ predictably reiterated Bresciani in holding that the Lomé Convention at issue may contain provisions conferring domestically enforceable individual rights. The relevant standstill clause was then held to

²⁴ In line with the earlier ruling in C-192/89 Sevince [1990] ECR I-3461, considered below, as to decisions adopted by such bodies.
²⁵ The Commission argued that there was no jurisdiction over non-binding measures.
²⁶ The substantive interpretations of the recommendation and the Transit Convention clearly left the domestic customs decision, which was based on the recommendation, intact.
²⁹ Italy pointed to the dispute settlement provisions of the Fourth ACP–EEC Convention as a factor negating the direct effect of any of its provisions.
be worded in clear, precise, and unconditional terms upon which individ-
uals could rely and which precluded tax increases on banana imports from
ACP States.30

Finally, in Katsivardas a Greek court asked whether an individual trader
could plead the incompatibility of a national law with the most-favoured-
nation clause in a Cooperation Agreement with several Latin American
countries.31 The ECJ predictably reiterated an earlier ruling rejecting the
direct effect of the equivalent provision in the successor Agreement;32 a
decision considered equally valid for the most-favoured-nation clause of the
predecessor Agreement.

2.1.2 Provisions pertaining to the movement of persons

Provisions pertaining to the movement of third country nationals in EU
Trade Agreements have given rise to 77 rulings with only one prior to 1987

Figure III.2 Preliminary rulings challenging domestic action and concerning per-
sons-related provisions in EU Trade Agreements (76 cases, 1987–2011 (03/10/11))

30 Article 1 of Protocol No 5. Italy argued that the tax predated the entry into force of the first
Lomé Convention. C-102/09 Camar involved the same provision, however the domestic court
did not frame its question in the language of direct effect and the Court simply put forth its
interpretation of the provision.

31 C-160/09 Katsivardas [2010] ECR I-4591. The Court rejected the Italian argument that
individuals could not rely on Cooperation Agreements, an argument which flew in the face of
long-standing jurisprudence, most obviously C-18/90 Kziber considered below.

32 C-377/02 Van Parys, considered below.
(Razanatsimba). The activity since the second of these rulings in 1987—a trickle of cases in the early 1990s and growing substantially since then—is represented in Figure III.2:

This case law can be broken down into four core categories that will each be taken in turn.

2.1.2.1 Provisions specific to the Turkey Agreement

Revisiting Demirel and Sevince Provisions pertaining to the movement of Turkish nationals first arose in the Demirel judgment. A Turkish woman who entered Germany on a short visitation visa and lived with her husband, a lawfully employed Turkish worker, challenged an expulsion order. The German court asked whether certain Turkey Agreement provisions prohibited these new restrictions affecting resident Turkish workers. The UK and Germany argued that the free movement of workers provisions of this mixed agreement were commitments entered into by the Member States exercising their own powers and which the ECJ was not competent to interpret. The ECJ responded by holding that Article 217 TFEU empowered the EU to guarantee commitments in all fields, of which free movement of workers was one, covered by the Treaty of Rome. It in effect viewed the EU as having exercised that competence in concluding this Agreement via Article 217 TFEU.

The now classic two-part direct effect test was articulated and its application commenced with the ECJ pointing to the various stages of the Agreement. Looking to its structure and content, it was found to be characterized by setting out the Association’s aims and guidelines for their attainment without establishing the detailed rules for doing so and with decision-making powers for their attainment being conferred on the Association Council. Turning to the specific provisions invoked, the first (Art 12) provided that the Contracting Parties agreed to be guided by the EU Treaty provisions on free movement of workers for the purposes of progressively securing freedom of movement of workers, while the second, in a Protocol to the Agreement (Art 36), provided that this was to be secured in progressive stages and that the Association Council was to decide on the necessary rules. The conclusion that followed was that these provisions set out a programme and were not sufficiently precise and unconditional.

35 The Court added that this constituted an exclusive rule-making power and that no Decision in the family reunification sphere had been adopted.
Four Member States and the Commission had intervened against direct effect, and the Advocate General reached the same conclusion, in a textually irreproachable argument. Implementing decisions for the said rules had simply not been forthcoming. And a Reyners-type conclusion where, in the internal EU law context, the Court was unwilling to let the absence of explicitly textually envisaged implementation measures impede ‘one of the [EU’s] fundamental legal provisions’ was never a likely eventuality. Implementation of the free movement of workers objectives of the Agreement had been thrown wildly off track as a result of the global economic shocks of the 1970s and their consequences for the labour requirements of West European industry, combined with the 1980 coup in Turkey and Greece’s EU accession.

Nevertheless, the Association Council adopted Decision 2/76 pertaining mainly to the access to employment of Turkish workers and their family members which was superseded in 1980 by Decision 1/80 which expressly sought to revitalize the Association. These two Decisions were the subject of litigation shortly after Demirel. The Sevinc ruling concerned a Turkish national challenging a residence permit refusal, invoking the two Association Council Decisions, in a Dutch court which referred questions as to their interpretation. The two intervening Member States, the Netherlands and Germany, were split on jurisdiction; the former siding with the Commission in arguing that Association Council Decisions were acts of the institutions for which there was preliminary ruling jurisdiction, and the latter contesting this by arguing that the Association Council is an autonomous institution with a different identity to that of the EU institutions. This was a powerful textual objection to jurisdiction, however, less than a year earlier in a direct action in which Germany had not intervened, it was held that a particular Turkey Association Council Decision, being directly connected with the Agreement, formed from its entry into force an integral part of the EU legal system. The ECJ invoked that ruling and further held, citing Haegeman II, that since it has jurisdiction to give preliminary rulings insofar as Agreements are acts adopted by the institutions it likewise has jurisdiction over the interpretation of decisions adopted by authorities established by Agreements and with responsibility for their implementation. That the latter proposition does not in itself follow from the former,

obviously did not trouble the Court. And Germany would take little consolation that the textually indefensible argument that such Decisions are indeed acts of the EU institutions was not adopted,\(^{39}\) given that the practical consequences are indistinguishable.\(^{40}\)

The Court then turned to the specific provisions which both Germany and the Netherlands, in contrast to the Commission, argued were not directly effective. The provisions at stake provided Turkish workers with certain rights depending on the length of their employment in the relevant Member State (Art 2(1)(b) of Decision 2/76 and Art 6(1) of Decision 1/80) and prohibited the introduction of new employment access restrictions (Art 7 of Decision 2/76 and Art 13 of Decision 1/80). It was held that Association Council Decision provisions would have to satisfy the same direct effect conditions as those applicable to the Agreement itself. The ECJ merely paraphrased the first batch while referring to them as upholding ‘in clear, precise and unconditional terms, the right of a Turkish worker….’, whilst the second batch were referred to as ‘contain[ing] an unequivocal standstill clause’. Direct application was held to be confirmed by the purpose and nature of the Association Council Decisions and the Turkey Agreement. The fact that the Decisions were intended to implement the Turkey Agreement provisions recognized as programmatic in Demirel was also noted, the logic seemingly being that they serve to concretize the programmatic norms. Following the Advocate General, several arguments against direct effect were then rejected: first, provisions in the Decisions providing that the procedure for applying the relevant provisions are to be established under national law did not empower Member States to restrict the application of precise and unconditional rights granted to Turkish workers by the Decisions; secondly, provisions in the Decisions providing that the Contracting Parties are to take any measures required for implementation merely emphasizes the obligation to implement in good faith; thirdly, the non-publication of the Decisions may prevent their application to a private individual but not their enforcement by a private individual vis-à-vis a public authority; fourthly, the safeguard


\(^{40}\) It added in support of jurisdiction the functional argument that Art 267 TFEU serves to ensure uniform application of all EU provisions. The argumentation employed for jurisdiction in Sevinç was one of the cases employed to illustrate judicial activism at the Court in a much-cited critique: Neill (1995: 29–31).
provisions only apply to specific situations. Direct effect of the relevant provisions was then confirmed.\footnote{Mr Sevince was left no better for it. The interpretation of legal employment was such that the period for which he worked did not count for Association Council Decision purposes: O’Leary (1998: 739) referred to the definition as not generous. This might be viewed as sweetening the pill of a bold and far-reaching judgment on jurisdiction and direct effect.}

The self-interest of the two States putting forward the direct effect objections is not difficult to discern: of the Turkish citizens residing in the EU some 90 or so per cent did so in Germany (in the mid-1980s),\footnote{Gilsdorf (1992: 332) asserted that non-publication served exactly this objective. In contrast, the practice was for EU Agreements, despite no EU Treaty requirement, to be published. And as noted in Chapter I, in the domestic legal orders of the founding Member States and many other automatic incorporation States, non-publication will impede direct judicial application of a Treaty. Decision 1/80 was never published in the Official Journal, however shortly after Sevince it did appear in a Council Publication (1992).} with the largest percentage of the remainder residing in the Netherlands. But such self-interest should not detract from the cogency of some of the arguments advanced. Provisions clearly calling for both EU and domestic implementing measures had not been pursued; the safeguards clause was of a unilateral nature and did not require any authorization from the Association Council; and the EU institutions had not published the two Decisions at issue which could be seen as indicative of the non-judicially applicable status intended.\footnote{Indeed, Commission counsel in Sevince noted that the Council and the Commission clearly considered the applicability of Association Council Decisions to require adoption of a legal act to produce their effects: Gilsdorf (1992: 331). See also Hailbronner and Polakiewicz (1992: 57).} Given these factors, it would be difficult to conclude that the Contracting Parties (in reality the Member States) intended Association Council Decisions to be directly effective.\footnote{Hailbronner and Polakiewicz (1992: 56–9).}

The judgment evoked a similar dynamic to the maximalist enforcement model characterizing internal EU law, a model which, as in Sevince and Kupferberg, has frequently developed in the face of powerful contrary submissions from Member States. For precisely this reason, it has been criticized as a manifestation of judicial activism employing dubious reasoning.\footnote{Hailbronner and Polakiewicz (1992: 56–9).}

**Post-Sevince case law on Articles 6 and 7 of Decision 1/80** The Court has addressed direct questions from national courts pertaining to the Association Council Decision provision (Art 6(1)) first held directly effective in...
Sevince on 21 occasions,\textsuperscript{46} and in addition offered a detailed interpretation of that provision in responding to a question on a different provision.\textsuperscript{47} Of these 22 cases, six included national court questions regarding Article 7 of Decision 1/80.\textsuperscript{48} The first paragraph of Article 7 concerns certain employment entitlements for family members of Turkish workers conditional on the length of their legal residence, and the second concerns employment entitlements for Turkish workers’ children conditional on their completion of vocational training in the Member State and one of their parents having completed a three-year period of legal employment there. It is useful at this point to digress momentarily with respect to the conceptually and substantively similar Article 7 line of case law. Aside from the aforementioned six judgments that also saw questions raised regarding Article 7, there have been an additional 11 cases in which national courts have raised Article 7.\textsuperscript{49} Thus, together this Article 6 and Article 7 jurisprudence has yielded a further 33 post-Sevince judgments. Both paragraphs of Article 7 were held directly effective in two cases in which the national courts did not frame their questions in such terms but appeared to assume they were directly effective; the Court’s reasoned justification amounted to an assertion that, like Article 6(1), the relevant provisions clearly, precisely, and unconditionally embodied the rights of Turkish workers’ children and conferred rights on their family members and were directly effective like Article 6(1).\textsuperscript{50} This was perhaps a foregone conclusion given the previous direct effect finding in Sevince on the related Article 6 question, but it


\textsuperscript{47} C-4/05 Gützeli [2006] ECR I-10279.

\textsuperscript{48} C-355/93 Eroglu; C-65/98 Eyup; C-188/00 Kurz; C-467/02 Cetinkaya; C-373/03 Aydınli; C-136/03 Dövr.


\textsuperscript{50} C-355/93 Eroglu (on Art 7(2)); C-351/95 Kadiman (where Eroglu was invoked in support of the same finding for Art 7(1)).
remains noteworthy that direct effect was so casually established (and via Chamber rulings).

Certain key traits emerge from this batch of 33 judgments on Articles 6 and 7. First, in none were the questions expressly framed in terms of direct effect and yet in 26 rulings the ECJ has either asserted or expressly reiterated its direct effect holding, and in the remaining seven, whilst the language of direct effect was not expressly employed, reference to the conferral of rights by the relevant provisions was. Secondly, in 26 cases the domestic action challenged came from Germany. Germany has intervened in all bar two of the cases, usually seeking, mostly unsuccessfully, a restrictive reading. Thus, in the first post-Sevince case, the Kus case concerning Article 6(1), as well as seeking unsuccessfully to reiterate the argument against jurisdiction over Association Council Decisions employed in Sevince, Germany contested any inherent correlation between a right of access to employment and a residence permit. The ECJ, however, relied on the 1964 Free Movement of Workers Directive (64/221/EEC), and a judgment on the EU free movement provisions, in holding that a right of residence is indispensable to access to paid employment and concluded that a Turkish worker who fulfilled the Article 6(1) requirements could rely on it to obtain both a work permit and residence permit renewal. The judgment was equally notable for finding that the reason a Turkish worker is legally resident is irrelevant to the renewal of a work permit.

Sharpston appropriately underscored the significance of this ruling:

Traditionally Member States retain the right to determine, not only access to their territory, but also the right to stay and reside there. That right has already

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51 The seven being C-434/93 Bozkurt; C-285/95 Kok; C-294/06 Payir; C-275/02 Ayaz; C-349/06 Polar; C-14/09 Gene; C-187/10 Unal.
52 Of the data-set rulings, only courts in three other countries have sought rulings on these provisions: the Netherlands three times since C-192/89 Sevince (C-434/93 Bozkurt; C-484/07 Pehlivan; C-187/10 Unal); Austria (C-136/03 Dörr; C-383/03 Dogan; C-65/98 Eyup); the UK (C-294/06 Payir).
53 C-187/10 Unal and surprisingly C-462/08 Bekleyen which emanated from Germany.
54 To use a recent example, Germany, joined by Denmark and the Land Baden-Württemberg, argued unsuccessfully that, unless the status of family member is retained, those rights are lost: C-303/08 Bozkurt.
57 In Kus a worker who obtained a residence permit to marry a German national was entitled to a work permit renewal even though the marriage had been dissolved.
disappeared in relation to [EU] nationals exercising rights of free movement. Now . . . third country nationals claiming rights under an association agreement may also acquire entrenched rights, which defeat the ordinary immigration policy of the Member State concerned.58

The Kus reading expressly linking the work permit and residence permit was transposed in the very next judgment to Article 7(2) concerning the rights of the children of Turkish workers, as was the finding, contrary to German submissions, that the right to respond to employment offers was not conditioned upon the grounds on which entry was originally granted.59

Of the remaining Article 6 and Article 7 cases, many involved transposing internal EU law principles and/or the Court responding with bold interpretations frequently in the face of contrary Member State submissions. The 1995 Bozkurt ruling was particularly significant, for here the ECJ first emphasized that it was essential to transpose as far as possible the principles enshrined in the Treaty provisions on free movement of workers to Turkish workers enjoying rights conferred by Decision 1/80. It is true that Article 12 of the Agreement expressly refers to the Contracting Parties agreeing to be guided by the EU Treaty free movement of workers provisions for progressively securing freedom of movement for workers,60 but it is contestable whether this provides a sufficient anchor for the extent of judicially created interpretative borrowing.61 In Bozkurt itself, in line with the Commission and contrary to the four intervening Member States, the internal EU law meaning of legal employment was transposed to Article 6(1) of Decision 1/80,62 later followed by the EU meaning of a ‘worker’ and a ‘family member’ being transposed, respectively, to Article 6(1) and Article 7 of Decision 1/80.63 In Tetik it was concluded, in line with Commission

\[58 (2003: 239). \text{Footnote omitted.}
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\[59 \text{C-355/93 Eroğlu. The residence permit logic was duly transposed to Art 7(1) in C-351/95 Kadiman.}
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\[60 \text{Articles 13 and 14 of the Agreement make the same point with respect to establishment and services.}
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\[61 \text{Even when read alongside the expressly articulated accession dimension to the Agreement (Art 28).}
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\[62 \text{C-434/93 Bozkurt. It has been considered restrictively to interpret the right to remain as the}
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\[\text{Court held, in line with the intervening Member States and the Advocate General but contrary to}
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\[\text{the Commission view, that it is lost as a result of permanent incapacity to work; O’Leary (1998:}
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\[\text{747–50) offers an alternative reading situating it within the context of the free movement of EU}
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\[\text{nationals jurisprudence, whilst Peers (1996b: 109–10) provided a brief textual defence.}
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\[63 \text{In respectively C-188/00 Kurz (a case notable for rejecting the submissions of Germany,}
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\[\text{and the Commission to the effect that a trainee is not duly registered as belonging to the labour}
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submissions but in opposition to the Advocate General and the submissions from the three intervening Member States (Germany, the UK, and France) and the Land Berlin, that a Turkish worker who fulfilled the four-year legal employment period in Article 6(1) did not forfeit rights by leaving employment on personal grounds and searching for new employment for a reasonable period; 64 strikingly, the analogy with internal EU law concerned a case outlining that EU nationals should be given a reasonable time to apprise themselves of offers of employment but without acknowledging or explicating how this was relevant when dealing with someone entering the host State for the first time as opposed to someone already employed in the relevant State. 65 Nor are these rights forfeited through temporary interruptions resulting from both suspended and non-suspended prison sentences, the Court having sought to interpret the public policy, public security, or public health exception in Decision 1/80 (Art 14(1)) analogously with the almost identically phrased Article 45(3) TFEU exception. 66

In addition, important judgments have established that the rights for family members and children are not forfeited because of the attainment of adulthood and independent living. This conclusion was initially reached contrary to German submissions. 67 Crucially, it was reiterated against strong opposition from several Member States and a national court contesting such reasoning as incompatible with Article 59 of the Additional Protocol providing for Turkey not to receive more favourable treatment than that granted under EU law between Member States. 68 That ruling arguably deprived Article 59 of its natural meaning and was further consolidated when it later held that the child of Turkish workers who had returned with her parents to Turkey and returned alone to Germany ten years later, when over 21, to continue with and duly complete a vocational higher force for Art 6(1) purposes), and C-275/02 Ayaz (which resulted in a step-child being included). C-14/09 Genc, offered a more generous interpretation of ‘worker’ than has hitherto been employed for EU workers, by accepting that it could include someone working 5.5 hours a week (see further, Martin (2012: 90)).

64 C-171/95 Tetik.
66 Case law commencing with C-340/97 Nazli and including C-467/02 Cetinkaya; C-136/03 Dürr; C-383/03 Dogan; C-373/03 Aydinli; C-502/04 Torun; C-325/05 Derin; C-349/06 Polat; in which Germany was usually unsuccessfully arguing for a restrictive interpretation and the Commission the contrary.
67 C-329/97 Ergat.
68 C-325/05 Derin; reiterated in C-349/06 Polat. EU nationals only have the right to install themselves with family members where they are under 21 years of age or dependants.
education course, was entitled to rely on the right of access to the employment market and a residence permit.\footnote{C-462/08 Bekleyen. A reading contrary to the arguments advanced by two Member States. See for criticism of both rulings: Martin (2012: 86–90).}

A final case worthy of particular mention saw the Court faced with four Member States arguing that Turkish nationals who had not entered the host State as workers could not rely on Article 6(1).\footnote{C-294/06 Payir. At issue was the status of Turkish citizens permitted entry to the UK for studying, albeit with permission to work for a limited period during term-time and full time outside term-time, and as au pairs.} The strenuous Member State objections, including that an adverse judgment would lead them to restrict their policy of admitting Turkish students and au pairs, were to no avail for in Payir the ECJ held, in line with the Commission submissions but contrary to the Advocate General as concerned students, that being granted leave to enter as an au pair or student cannot deprive them of the status of worker and being duly registered as belonging to the labour force under Article 6(1).

**Cases on the standstill clauses in Decision 1/80 and the Additional Protocol** The employment restrictions standstill clause (Art 13) held directly effective in Sevinc\footnote{C-317/01 & 369/01 Abatay & Sabin [2003] ECR I-12301. Although the German court’s questions were not framed in terms of direct effect, the ruling commenced with reiterating the direct effect of both standstill clauses.} has led to three further preliminary rulings. The first was in Abatay & Sabin where the Court engaged with both that provision and the services and establishment standstill clause in the Additional Protocol (Art 41(1)).\footnote{The international haulage workers were not, nor did they have the intention of becoming, integrated in the German employment market.} It held that the former standstill clause was not applicable to the facts,\footnote{The argument advanced by Germany, two additional intervening Member States, and the Commission, and accepted by the Advocate General. The Court also rejected a Dutch argument, followed by the Advocate General, that the services and establishment standstill clause did not apply to the transport sector and proffered an interpretation drawing expressly on internal EU law principles pertaining to the right of establishment and freedom to provide services. Little doubt was left that if the German work permit requirement for international road haulage workers was new, it would breach the standstill clause.} while rejecting a textually viable argument that it only operated with respect to those already in lawful employment.\footnote{The argument advanced by Germany, two additional intervening Member States, and the Commission, and accepted by the Advocate General. The Court also rejected a Dutch argument, followed by the Advocate General, that the services and establishment standstill clause did not apply to the transport sector and proffered an interpretation drawing expressly on internal EU law principles pertaining to the right of establishment and freedom to provide services. Little doubt was left that if the German work permit requirement for international road haulage workers was new, it would breach the standstill clause.} The services and establishment clause had been held directly effective in the earlier Savas\footnote{The argument advanced by Germany, two additional intervening Member States, and the Commission, and accepted by the Advocate General. The Court also rejected a Dutch argument, followed by the Advocate General, that the services and establishment standstill clause did not apply to the transport sector and proffered an interpretation drawing expressly on internal EU law principles pertaining to the right of establishment and freedom to provide services. Little doubt was left that if the German work permit requirement for international road haulage workers was new, it would breach the standstill clause.} judgment where a UK court put forth questions as to its direct effect and that of Article 13 of the Agreement (the freedom of establishment
counterpart to Art 12 which had been held not directly effective in *Demirel*.

The five intervening Member States, the Commission, and the Advocate General were against direct effect for the latter provision and the ECJ followed suit invoking the same reasoning as in *Demirel*.

The two remaining post-*Sevince* rulings on the employment restrictions standstill clause stemmed from questions from the Dutch Council of State framed in terms of the interpretation of that provision. In the first, the Court did not employ express direct effect language but did underscore that the standstill clause could be relied on before Member State courts, and concluded that it precluded the introduction of national legislation making the granting of residence permits or their extension conditional on disproportionate charges compared to those for EU nationals. The second paid no customary lip-service to direct effect. The basic issue in *Toprak & Oguz* was whether national provisions on the acquisition of residence permits introduced after the entry into force of Decision 1/80 and relaxing the provisions applicable on its entry into force could be tightened without being any more restrictive than the rules applicable when Decision 1/80 entered into force. Unsurprisingly, the Member State defending its new regime did so precisely on the ground that the relevant date was when the Decision entered into force (1 December 1980), a position supported by Germany and Denmark. Creative judicial interpretation followed with the Court finding that the relevant date to assess whether new rules gave rise to ‘new restrictions’ was when the new rules were adopted. In effect, any liberalization post-1 December 1980, sets a new benchmark from which a Member State can no longer retreat. To reach this conclusion, the Court relied on the objectives pursued by Article 13 as it articulated them, reiterating earlier judgments, creating conditions conducive to the gradual establishment of freedom of movement of workers, the right to establishment, and the freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms. The critic might

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74 C-37/98 *Savas* [2000] ECR I-2927. Uncharacteristically this came with a detailed justification including by analogizing with an almost identically worded but since repealed standstill clause (Art 53 TEC) and the direct effect holding on the employment restrictions standstill clause in *Sevince*. Commentators had expressed reservations as to its direct effect (Martin and Guild (1996: 262–3)).


76 C-300/09 and 301/09 *Toprak and Oguz* [2010] ECR I-12845.

77 An approach called for by Hoogenboom (2010: 713–15) albeit articulating some of its shortcomings.
well emphasize that none of these objectives are actually directly apparent on a reading of Decision 1/80. That the Court bolstered its conclusion by relying on equally generous interpretations of internal EU law standstill clauses, will be disconcerting for Member States seeking to defend their measures insofar as it further attests to the cross-fertilization from internal to external EU law.\textsuperscript{78}

The services and establishment standstill clause first held directly effective in \textit{Savas} has led to three further preliminary rulings reiterating its direct effect.\textsuperscript{79} The first (\textit{Tum}) and second (\textit{Soysal}) were of considerable consequence. The significance of \textit{Soysal}, where the standstill clause was held to preclude a German visa requirement for Turkish nationals which did not exist when the Additional Protocol entered into force, is touched on in Section 2.2. In \textit{Tum} Turkish nationals challenged decisions refusing their entry into UK territory to establish themselves in business and ordering them to leave. This refusal resulted from the application of new immigration rules. Only three Member States intervened, two of which argued, relying on \textit{Savas}, which convinced the Advocate General, that Member States were exclusively competent to determine who is permitted lawful first entry and that the standstill clause could only be invoked by those lawfully present. The ECJ held that whilst the standstill clause does not confer a right of entry and does not render inapplicable the relevant substantive law it replaces, it operates as a quasi-procedural rule stipulating \textit{ratione temporis} which Member State legislative provisions apply in this context. Or in plainer English, the standstill clause required the new immigration rules to give way and that those in force in 1973 be applied instead. The Court insisted that this did not call into question Member State competence to conduct their national immigration policy and that the mere fact that the clause imposed a duty not to act which limits their room for manoeuvre did not mean that the very substance of their sovereign competence in respect of aliens was undermined. To many Member States


\textsuperscript{79} C-16/05 \textit{Tum} [2007] ECR I-7415. A preliminary ruling concerning Art 41(1) was sought in C-296/05 \textit{Günes}, but once the \textit{Tum} ruling was sent to the Dutch Council of State it decided it was no longer needed: see Order of 21 November 2007 ([2008] OJ C64/46); C-228/06 \textit{Soysal} [2009] ECR I-1031. In C-186/10 \textit{Tural Oguz}, Judgment of 21 July 2011 the ECJ responded to a UK court reference that the clause could be relied upon by a Turkish national who breached a condition of his leave to remain by setting up a business.
this distinction will ring hollow, for it further intrudes in the applicability of their immigration policy, as far as Turkish nationals are concerned.  

**Article 9 of Decision 1/80: Turkish children and access to education and educational benefits** The final judgment to consider is the Gürol ruling.  

A German court asked a direct question as to the direct effect and interpretation of the first sentence of Article 9 of Decision 1/80. This provides that Turkish children resident with parents who are or have been legally employed in the Member State are to be admitted to general education, apprenticeship, and vocational training courses under the same educational entry qualifications as children of Member State nationals. Germany and Austria, alongside the Commission and the Advocate General, accepted that the first sentence was directly effective and the Court unsurprisingly followed suit. But, strikingly, it went on to hold the second sentence to be directly effective which provides that ‘They [the children] may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area.’ This was drafted in terms that, as academic commentary had suggested, granted such wide latitude to Member States as to rule out direct effect. The choice of the verb ‘may’ over an imperative form such as ‘shall’ or ‘will’ should not be overlooked, for it was surely the result of careful consideration at the drafting stage. Not surprisingly, Germany and Austria argued that this wording imposed no obligation, but the Commission asserted otherwise and crucially so held the Court. Non-discriminatory access to courses including those provided abroad, as in Gürol itself, would, it was held, be purely illusory if Turkish children were not assured of an equal right to the relevant grant. This was considered the only interpretation making it possible to attain in full the objective pursued by Article 9 of guaranteeing equal opportunities for Turkish children and those of host State nationals in education and vocational training. But asserting that this is the objective of the provision does not make it so. If that were, indeed, the objective, as contrasted with ensuring equal treatment with respect to entry qualifications, then the expressed intention of the parties could have reflected this

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80 The Court also substantiated its reading by drawing on a fundamental freedoms judgment: C-372/04 Watts [2006] ECR I-4325.
82 Emphasis added.
directly rather than, as they did, expressly opting not to use imperative language.\textsuperscript{84} It is no solution for the Court to assert that, like the first sentence, it lays down an obligation of equal treatment when the language chosen is not unconditional. The general rule of treaty interpretation, codified in the Vienna Convention on the Law of Treaties (Art 31) is that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. A term should be given its ordinary meaning since it is reasonable to assume that until the contrary is established this is most likely to reflect what the parties intended.\textsuperscript{85} And it would be unpersuasive to suggest that in Gürol the contrary was convincingly established. Austria and Germany were not alone in their ordinary meaning interpretation, for at least one other Member State has changed its law in the wake of the ruling.\textsuperscript{86} 

2.1.2.2 Social security provisions

The seminal Kziber judgment is the fountain from which nearly all later jurisprudential developments pertaining to social security provisions in EU Trade Agreements have stemmed.\textsuperscript{87} Here, a Belgian court had asked whether Belgium could refuse on nationality grounds to grant a Moroccan national’s child a particular unemployment benefit given the social security equal treatment clause in the Morocco Cooperation Agreement (Art 41(1)). France and Germany argued that it did not have direct effect. They were joined by the Commission in arguing that this was precluded in the main because Article 41(2) expressly provided for the Cooperation Council to take measures to ensure the application of the principles in Article 41 and no such measures had emerged. The Court held that Article 41(1) provided

\textsuperscript{84} The Commission argued that if the second sentence were held not directly effective, then the first could be read to include study grants. The drafting of the first sentence (‘same educational entry qualifications’) was clearly intended to preclude the 9/74 Casagrande [1974] ECR 773 conclusion pertaining to Art 12 of Regulation 1612/68 which referred to ‘under the same conditions’ (see also Peers (1996a: 26–7)). Sympathy for the proposed interpretative creativity is understandable given that the Turkish national involved was born and brought up in Germany. However, in an era of growing anti-EU sentiment fuelled at least in some part by judicial creativity then it behoves the Commission to avoid such transparent infidelity to legislative intent.

\textsuperscript{85} Aust (2007: 235).

\textsuperscript{86} In England this took place via the Education (Student Fees, Awards and Support) (Amendment) Regulations 2007 (SI 2007/1336); in Wales via the Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2007 (SI 2007/1045 (W. 104)).

\textsuperscript{87} C-18/90 Kziber [1991] ECR I-199.
in clear, precise, and unconditional terms for a prohibition on nationality
discrimination for Moroccan workers and their family members in social
security.\footnote{That it provided that the prohibition was subject to the following paragraphs of Art 41(1) which contained certain limitations was not considered to remove the unconditional character of the discrimination prohibition with respect to all other social security questions.} That Article 41(2) foresaw Cooperation Council implementing
measures did not call into question the direct applicability of a text that was
not subordinated in its execution or effects to any further implementing
measures, nor did it condition the immediate applicability of the non-
discrimination principle. And direct effect was held not to be contradicted
by the purpose and nature of the agreement.\footnote{Broadly, to promote Moroccan economic development.} The direct effect finding
bore a stark resemblance, unmentioned by the Court in contrast to its
Advocate General, to the approach to internal EU law as famously evinced
in \textit{Reyners} where the absence of implementation measures was not permitted to stand in the way of the direct effect holding.

A textually contentious substantive scope interpretation was also given,
for the Member States had argued that unemployment benefits did not come within social security under Article 41.\footnote{A broad interpretation of ‘worker’, contrary to the arguments of the Member States, encapsulating both active members of the workforce and in certain contexts those who have left it, was also proffered.} The curt response was that ‘social security’ needed to be understood by analogy with the EU Social Security Regulation; a conclusion reached absent any supporting reasoning and subject to powerful criticism given that the Agreement makes no provision for free movement of workers.\footnote{Hailbronner and Polakiewicz (1992: 58); Peers (1996a: 36–7).} For the ECJ, unemployment benefits did fall within Article 41 absent a clear manifested intent towards their exclusion, and the benefit at issue was simply a particular form of unemployment benefit. This finding, however, was in stark tension with its own earlier finding that the benefit at issue was a ‘social advantage’ within Article 7(2) of the basic Free Movement of Workers Regulation (1612/68), a provision not replicated in the Agreement at issue.\footnote{94/84 \textit{Deak} [1985] ECR 1873 which the Advocate General had relied on in rejecting the interpretation that found favour with the Court.} Unsurprisingly, the judgment generated accusations of judicial activism.\footnote{Hailbronner and Polakiewicz (1992: 58–9); Peers (1996a: 36–8).}

The financial ramifications of the bold \textit{Kziber} judgment would be significant for not only would this put the Member States on notice for all existing social security practices that may be of a discriminatory nature, but indeed
all future social security developments would need to accommodate Moroccan workers and their family members. Furthermore, Member States were well aware that the particular clause at issue had a direct counterpart in the Agreements with two other Maghreb States (Algeria and Tunisia) and in Turkey Association law. Germany responded to Kziber as it had to Secvice, by seeking to have the judgment reconsidered (Kus). In Yousfi a Belgian court had asked a question on the direct applicability and interpretation of Article 41(1). The ECJ reiterated Kziber and rejected Germany’s reconsideration request on the ground that no new fact had been submitted. In the third of the social security judgments, the ECJ predictably responded to a French court’s question on the interpretation of the equivalent Algeria Cooperation Agreement provision (Art 39(1)) by holding that it too had direct effect.

The fourth judgment, Taflan-Met, concerned Decision 3/80 of the EU–Turkey Association Council. Questions were put forward by a Dutch court as to the applicability and interpretation of provisions pertaining to social security aggregation for workers. The significance of the dispute was attested to by six Member State interventions. They argued that Decision 3/80 was not binding in the absence of implementing measures and was not

94 C-58/93 Yousfi [1994] ECR I-1353. Like treatment was accorded to the three intervening Member States’ submission that the term ‘social security’ in Art 41(1) could not include the disability benefits at issue because they were only expressly added to the EU Social Security Regulation in 1992. The Court underscored that it had already brought such benefits within the Regulation and, as Kziber had held, social security was to be given the same definition as in the EU Social Security Regulation.

95 C-103/94 Krid [1995] ECR I-719. The dispute concerned an Algerian national but the question also pertained to the Tunisia Agreement on which the ECJ remained silent. A French argument seeking to draw a distinction, based on internal EU law and the EU Social Security Regulation, between personal rights and derived rights was also rejected (a distinction stemming from 40/76 Kermasbek [1976] ECR 1669, which was later overturned: C-308/93 Cabanis-Issarte [1996] ECR I-2097); that rejection was emphatically reiterated in the fifth and sixth cases: first in a Morocco Agreement case in response to views expressed by the Netherlands, the referring Dutch court and the Dutch Social Security Board (C-126/95 Hallouzi Choho [1996] ECR I-4807), then in response to a Belgian court reference which generated Belgian submissions seeking to have the personal/acquired social security rights dichotomy accepted for the Algeria Agreement: C-113/97 Bababenini [1998] ECR I-183.


97 Until this point, only one EU Agreement case had seen as many interventions (C-280/93 Germany v Council considered in Chapter IV) and, that aside, only the trilogy of Europe Agreement cases (C-63/99 Gloszczuk; C-235/99 Kondova; C-257/99 Barkoci and Malik) and C-72/09 Rimbaud, considered below, C-308/06 Intertanko, considered in Chapter V, and C-366/10 Air Transport Association of America (noted in Chapter VI) have generated more interventions.
directly effective. The Court held that despite the Decision not providing for a date for its entry into force, an argument sufficient to resolve the dispute for the Advocate General, it followed from the binding character attached to the Decisions by the Agreement that in the absence of any provision on entry into force it did so on the day it was adopted. The relevant provisions were, however, held not directly effective, essentially because like the initial EU Social Security Regulation it required further implementing measures.\textsuperscript{98} It was thus concluded that Decision 3/80 could not be applied.

Nearly three years later in \textit{Sürül}, the seemingly clear implications of \textit{Taflan-Met}, that any direct effect of Decision 3/80 was ruled out, were disavowed.\textsuperscript{99} In responding to questions from a German court whether rights could be derived directly from the social security equal treatment provision of Decision 3/80 (Art 3), the Court concluded it was directly effective in the face of staunch opposition from five intervening Member States, but in line with the Commission and the Advocate General. \textit{Taflan-Met} was distinguished as being concerned with the social security coordinating rules of Decision 3/80 which required further implementing measures, as contrasted with the non-discrimination provision which did not.\textsuperscript{100} That provision was held to lay down in clear, precise, and unconditional terms a nationality discrimination prohibition.\textsuperscript{101}

In the wake of \textit{Kziber}—and \textit{Sevinc} asserting jurisdiction over Association Council Decisions and their capacity for direct effect in the first place—it would appear counter-intuitive, once the entry into force hurdle was surmounted, for the equivalent Turkey Agreement-related provision, with its

\textsuperscript{98} Indeed, it was noted that a Council Regulation was proposed by the Commission in 1983 containing supplementary rules for implementing Decision 3/80. This failure to adopt is usually attributed to Greek resistance: see Conant (2002: 184), Sharpston (2003: 244).


\textsuperscript{100} The ECJ reiterated a point astutely made by the Advocate General, namely, that the proposed Council Regulation, like the implementing Regulation for the basic EU Social Security Regulation, contained no provisions for giving effect to the equal treatment provision.

\textsuperscript{101} The Court added that Art 3 constituted the implementation and concrete expression in the social security field of the general nationality discrimination prohibition in Art 9 of the Agreement which refers to its general counterpart currently in Art 18 TFEU. In terms of its scope \textit{ratione personae}, the Court drew on the EU Social Security Regulation (1408/71), predictably given that Decision 3/80 expressly draws on and cross-refers to it, and related jurisprudence on the definition of ‘worker’. As for material scope, the German law residence document requirement for ‘aliens’ was caught by the non-discrimination prohibition. The Court, acknowledging the uncertainty \textit{Taflan-Met} may have created, did limit the judgment’s temporal effects. For criticism see Peers (1999a: 632–3).
more integrationist agenda, to be deprived of direct effect. In this sense Sürül was the inevitable by-product of the bold Kziber judgment. Clearly, when dealing with EU Agreements where their provisions are frequently framed in similar, if not identical, terms a bold ruling regarding one Agreement will often be capable of direct transposition to other Agreements.102 This also explains why the ECJ was unlikely to bow to pressure in Sürül: the jurisprudence on the Morocco and Algeria Agreements was by then firmly established and had been built initially in the face of opposition from only two Member States, alongside the Commission. The fact that it had increased to five Member States for the Turkey Agreement, with the Commission having changed sides since Kziber, would not be reason enough to inject a large dose of inconsistency into its case law on the equal treatment social security provisions of EU Agreements.

The additional nine social security judgments also concerned individuals challenging either the refusal to award a specific benefit, the level of the award, or the withdrawal of a benefit.103 These nine cases have dealt with the Agreements with Turkey and Morocco in three of which the questions referred were expressly framed in terms of direct effect,104 and in the three where the ruling amounted to preserving the domestic measure at issue, its response was not framed in terms of direct effect.105 Of the six cases where matters were conceptualized in terms of direct effect,106 three were Turkey Agreement cases and three concerned the Morocco Cooperation Agreement. Of the

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102 Peers suggested, when commenting on Taflan-Met and Sürül, it would have been ‘illogical’ to do otherwise: (1999a: 629).

103 The first seven cases came from Belgium, France, Germany, and the Netherlands, the remaining nine were divided between references from courts in these Member States and in addition Austria: C-179/98 Mesbah (Belgian); C-33/99 Fabmi (Dutch); C-23/02 Alami (Belgian); C-358/02 Haddad (Belgian); C-336/05 Ebouikkb (French); C-276/06 El Yousfi (Belgian); C-102/98 Kocak (German); C-373/02 Öztürk (Austrian); C-485/07 Akdas (Dutch).

104 C-102/98 Kocak; C-336/05 Ebouikkb; and C-485/07 Akdas.

105 Two cases involved far-fetched attempts to be brought within the scope of the Morocco Agreement: C-33/99 Fabmi [2001] ECR 2415; C-358/02 Haddad [2004] ECR I-1563. In C-179/98 Mesbah [1999] ECR I-7955 the Commission unsuccessfully sought an analogous reading to internal EU law (C-369/90 Micheletti [1992] ECR I-4239) such that the Moroccan nationality of a dual EU/Moroccan national could be invoked to obtain equal treatment in social security. The ECJ underscored that that jurisprudence concerned a fundamental freedom not at issue in the Morocco Agreement and that it was for Belgian law to determine the nationality of a Moroccan worker for the purposes of applying Art 41.

106 In C-373/02 Öztürk the terminology employed was that of a precise and unconditional principle capable of being applied by a national court.
latter three, the most recent two also involved its replacement where the Court transposed its extant jurisprudence on the direct effect and scope of the equal treatment social security provision of the Morocco and Algeria Agreements to its identical counterpart in the newly created Euro-Mediterranean Association Agreement with Morocco. Of the three Turkey Agreement cases, the first was significant because while giving a clean bill of health to German legislation, the ECJ accepted, drawing on internal EU law, that the social security provision also prohibits all forms of covert discrimination. The third concerned a Turkey Association Council Decision 3/80 provision (Art 6(1)) which provides that certain identified benefits ‘shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated.’ The ECJ predictably concluded, in line with the Commission submissions, that it was directly effective as it laid down a precise obligation of result. More controversially, the interpretation proffered meant that legislation withdrawing the award of a supplementary invalidity benefit for those not living in the Netherlands had to be disapplied vis-à-vis Turkish nationals falling within the scope ratione personae of that provision, even though the exportability of such benefits could be denied to EU nationals and which accordingly may have appeared in tension with

107 In the first, Art 41(1) was held to preclude legislation only permitting periods of work completed on Belgian territory to count for the purposes of a supplementary benefit for non-Belgian nationals: C-23/02 Alami [2003] ECR I-1399.
108 C-336/05 Echouikh [2006] ECR I-5223; C-276/06 El Youssfi [2007] ECR I-2851. Neither left any doubt as to the incompatibility of the national legislation with the social security non-discrimination provision (Art 65(1)).
109 C-102/98 Kocak [2000] ECR I-1287. The outcome was contrary to Commission submissions that there was indirect discrimination. The German legislation imposed certain non-discriminatory requirements as to the amendment of a date of birth for social security and pension purposes. In C-373/02 Öztürk [2004] ECR I-3605 the Grand Chamber found that the non-discrimination provision precluded the application of Austrian legislation making a certain old-age pension conditional upon having received Austrian unemployment benefits for a set period. Austria and Germany both contested the proposition that the provisions were discriminatory.
110 It corresponds directly to Art 10 of Regulation 1408/71.
111 485/07 Akdas. A Commission official had predicted this as exportability of benefits, unlike social security coordination rules, was not the subject of further implementing measures in the unadopted Commission Regulation (Verschueren 1999: 381–2).
the Additional Protocol provision precluding Turkey from receiving more favourable treatment than that granted under EU law between Member States.\textsuperscript{112}

2.1.2.3 Provisions on non-discrimination as regards working conditions, remuneration, and dismissal

Numerous EU Trade Agreements contain provisions that essentially provide that workers from the respective third States shall be free from any nationality discrimination with regard to working conditions, remuneration, and dismissal as compared to the relevant EU Member States’ own nationals.\textsuperscript{113} The Court first interpreted such a provision in the \textit{El-Yassini} case where a UK court sought an interpretation of Article 40 of the Morocco Cooperation Agreement.\textsuperscript{114} The Full Court response commenced by finding Article 40(1) directly effective. It was held to prohibit in clear, precise, and unconditional terms, nationality discrimination against employed Moroccan workers as regards working conditions or remuneration and this finding was held not to be contradicted by the purpose and nature of the Agreement.\textsuperscript{115}

In rejecting any notion of the social security non-discrimination provision in the Morocco Agreement being programmatic in \textit{Kziber}, the Court had referred to this also being so for Article 40. It had thus been clear for some eight years that the ECJ considered this provision directly effective.\textsuperscript{116} The three intervening Member States (and the Commission) sought to preclude the transposition of the Turkey Agreement jurisprudence linking

\textsuperscript{112} See for a cogent defence: Eisele and van der Mei (2012). This led to the Commission proposing a new Association Council Decision: COM(2012) 152 final.

\textsuperscript{113} All bar two of the Europe Agreements contained such a provision (Cyprus and Malta). The earlier versions of this clause did not expressly include dismissal (eg Morocco and Turkey Agreements) but more recent formulations do (eg the Euro-Med Agreements with Algeria, Tunisia, and Morocco, the Europe Agreements (EAs), the Partnership and Cooperation Agreements (PCAs), the Stabilisation and Association Agreements, the Cotonou Agreement, the Swiss Free Movement of Persons Agreement).

\textsuperscript{114} C-416/96 \textit{El-Yassini} [1999] I-1209. Mr El-Yassini was refused a residence permit extension as the initial reason for its grant no longer existed given the breakdown of his marriage to a UK national.

\textsuperscript{115} The object of which is to promote cooperation and contribute to Moroccan economic and social development and strengthen relations between the Contracting Parties.

\textsuperscript{116} In C-18/90 \textit{Kziber} the Member States, and the Commission, had essentially conceded this point because their submissions against the direct effect of the social security non-discrimination provision were partially premised on it being unlike Art 40 for it foresaw further Cooperation Council implementation measures.
lawful employment to a residence right. The Court responded by invoking Article 31 of the VCLT 1969 and considered it necessary to assess the Morocco and Turkey Agreements in light of their object and context. It held that, unlike the Turkey Agreement, the Morocco Agreement did not anticipate the possibility of accession or provide for the progressive attainment of freedom of movement for workers guided by the relevant EU Treaty provisions nor had the Cooperation Council adopted a Decision analogous to Decision 1/80. These ‘substantial differences’ precluded analogous application of the Turkey Agreement rules to the Morocco Agreement. It was held that Member States could refuse a residence permit extension for a Moroccan national where the initial reason for granting leave to stay no longer existed, subject to the caveat that a residence permit extension refusal where a work permit had been granted for a longer period would need justification on the ground of a legitimate national interest such as public policy, public security, or public health. In taking up this caveat, the Advocate General’s Opinion was being followed but the latter reached this conclusion by expressly drawing an analogy with a fundamental freedoms judgment,117 as well as the Turkey Agreement Kus ruling. The ECJ, however, remained conspicuously silent as to the source of its conclusion. A factor illuminating this unwillingness to read into Article 40(1) a right to remain, subject to the aforementioned caveat, is that the counterpart provision in the Morocco Euro-Med Agreement, not yet in force at the time of El-Yassini, came with an explanatory joint declaration to the effect that it could not be invoked to obtain renewal of a residence permit, the granting, renewal, and refusal of which was to be governed by each Member State’s legislation.118 The Court was thus warned by the Contracting Parties (in reality the Member States) against transposing its Turkey Agreement jurisprudence on the right to remain to the Euro-Med Agreements.

Nine more rulings have arisen on the equivalent provision in seven Agreements stemming from litigation in three different Member States.119 National courts framed their questions expressly in terms of direct effect

117 C-292/89 Ex parte Antonissen.
118 The joint declaration was referred to by the Advocate General but not by the ECJ.
119 C-162/00 Pokrzeptowicz-Meyer (Germany–Poland EA); C-171/01 Wählergruppe (Austria–Turkey Agreement); C-438/00 Kolpak (Germany–Slovakia EA); C-265/03 Simutenkov (Spain–Russia PCA); C-97/05 Gattoussi (Germany–Tunisia Euro-Med); C-4/05 Güzeli (Germany–Turkey Agreement); C-152/08 Kabveci (Spain–Turkey Agreement); C-351/08 Grimme (Germany–Swiss FMP Agreement, Art 9(1) of Annex I); C-101/10 Pavlov (Austria–Bulgaria EA).
twice. Nonetheless, three cases aside one of which employed a direct effect conceptualization, the ECJ responded with a preliminary direct effect entitled subsection asserting the direct effect of the relevant provision. In two cases the issue was essentially whether El-Yassini, and its caveat, applied. The first was the Güzeli case on Article 10(1) of Decision 1/80 of the Turkey Agreement. Here, the Commission and Slovakia had argued that El-Yassini was applicable by analogy, whilst Germany contested its ratio as well as its applicability to the Turkey context. The ECJ left it to the national court to determine whether the situation was similar to the caveat articulated in El-Yassini. The Gattoussi case which followed gave rise to a German frontal assault on the El-Yassini residence permit extension caveat in a case on the Euro-Med Agreement with Tunisia (Art 64(1)). Germany emphasized the differences between it and the provision in the Morocco Cooperation Agreement, especially the joint declaration which reflected the Contracting Parties intention to preclude reliance on the non-discrimination prohibition to claim a right to remain. That this was the provision to which the joint declaration expressly applied, did not alter the conclusion reached on its predecessor in the Morocco Cooperation Agreement to which the equivalent joint declaration did not apply: the El Yassini caveat still applied.

Five rulings are notable for transposing internal EU law interpretations to EU Agreements (as well as in some cases for the direct effect holding). The 2002 Pokrzeptowicz-Meyer judgment concerned the relevant provision of the Europe Agreement with Poland (Art 37(1)). The direct effect finding by the Full Court saw it conclude that Article 37(1) laid down a clear, precise, and unconditional discrimination prohibition. A German

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120 Both cases coming from Austria where the express question of direct applicability was raised: C-171/01 Wählergruppe; C-101/10 Pavlov.
121 C-152/08 Kabveci [2008] ECR I-6291. And a case where the referring court expressly framed its first question as one of direct applicability, a question directly answered by the Advocate General, but where the response was that the relevant provision did not preclude the national legislation at issue: C-101/10 Pavlov (Austria–Bulgaria EA). Direct effect was never in doubt as equivalent provisions in the Europe Agreements with Poland and Slovakia had been held directly effective: C-162/00 Pokrzeptowicz-Meyer [2002] ECR I-1049; C-438/00 Kalpak.
122 First held directly effective in C-171/01 Wählergruppe considered below.
123 The Advocate General’s approach was in line with the German submissions, namely, that using Art 10 would undermine Art 6 where a Turkish worker does not satisfy the conditions for a residence permit extension via the latter.
Land argument that direct effect was negated by an indent providing that it was ‘Subject to the conditions and modalities applicable in each Member State’ was to no avail, as the Court held that this would render the provision meaningless and deprive it of any practical effect. Crucially, the ECJ concluded that a free movement of workers judgment holding the German legislation in breach of Article 45(2) TFEU could be transposed to Article 37(1) of the Polish Europe Agreement such that the indirectly discriminatory legislation breached the latter.

The Währlergruppe ruling concerned a challenge to Austrian legislation on eligibility for the general assembly of a workers chamber on the grounds of its incompatibility with Article 10(1) of Decision 1/80. Earlier judgments had established that, under an EU Regulation, migrant EU workers were eligible for election to occupational guilds. Austria underscored that unlike the EU Regulation, which expressly referred to trade union and related rights, no such terms were used in the Turkey Agreement and a narrower scope was also justified because of its less ambitious aims. The ECJ employed the interpretative parallelism logic in holding that Article 10(1) was to be interpreted in line with EU free movement of workers law thus resulting in the national legislation being in breach.

In Kolpak a Slovakian handball player challenged a German sports federation rule restricting non-EEA nationals in certain matches. The crux of the case was whether the Bosman ruling, that found nationality restrictions on EU nationals imposed by sporting federations to be prohibited by Article 45 TFEU, could be transposed to the working conditions non-discrimination clause of the Slovakia Agreement. The fifth Chamber predictably transposed the Full Court’s direct effect findings in Pokrzeptowicz-Meyer on the Poland Agreement. This was followed by holding that its Article 38(1) could apply to a sports federation rule, as

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126 Extra-judicial reservations were acknowledged due to this phrasing: Wathelet (1996: 619). Martin and Guild (1996: 297) suggested the Member States added this provision to avoid direct effect.

127 The only intervening Member State, like the Commission, supported direct effect, consistent with prior academic commentary: eg Cremona (1995: 112).

128 C-272/92 Spotti [1993] ECR I-5185. Indirect discrimination was first brought within an EU Trade Agreement in C-102/98 Kocak.


found with Article 45 TFEU in *Bosman*, and a citation to the *Pokrzeptowicz-Meyer* holding that it establishes an equal treatment right as regards employment conditions of the same extent as Article 45(2) TFEU. The *Bosman* ruling was essentially transposed to the Slovakia Agreement provision thus leaving the sports federation rules doomed.

*Kolpak* was significant in both being the first time that horizontal direct effect was accorded to an EU Agreement, and for the ease with which it transposed the *Bosman* ruling the logic of which was imbued throughout with the fact that the sporting rules challenged a fundamental freedom. Indeed, in rejecting attempts at justification in *Bosman* it was underscored that accepting the nationality clauses would deprive Article 45 TFEU ‘of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the [EU would be] rendered nugatory.’ The Europe Agreements conferred no such fundamental right of free access to employment and yet the outcome for the relevant sports federation rules was identical.

That the *Kolpak* logic was not confined to immediate accession contracting partners, was confirmed when the Grand Chamber’s *Simutenkov* ruling transposed the *Kolpak* ruling to Article 23 of the PCA with Russia such that Spanish football federation rules would have to give way. That the PCA provided that Article 23 was to be implemented on the basis of Cooperation Council recommendations did not, the Court held, make its applicability subject to the adoption of any measure. Nor was the absence of an association or accession dimension considered to prevent certain provisions having direct effect. The absence of an association with a view to gradual integration into the EU was held not to warrant a different interpretation of Article 23(1) of the Russia PCA than that provided in *Kolpak*.

Here, then, less than ten years after the seminal *Bosman* ruling which would then have appeared to be the quintessential of judgments in need of a

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133 Grounds which two Member States invoked for non-transposition of the *Bosman* ruling.

134 Hillion, however, emphasized that Member State derogations were subject to an effectiveness test rather than the EU law proportionality test: (2008: 829).

135 As it could have been read, see eg Van den Bogaert (2004: 274) underscoring the accession dimension.


137 This provision, and the more limited objectives of the Russia PCA, led Cremona (1995: 112) to suggest that this ‘may undermine . . . direct effect’, views expressed prior to an express direct effect finding of the counterpart provision in any EU Trade Agreement.
fundamental freedoms underpinning, we find it transposed to a ‘mere’ PCA. Admittedly, this transposition was not built in the face of substantial Member State opposition. It may have been relevant that Kolpak and Simutenkov had been preceded by national court ‘pre-emptive strikes’ finding the provisions directly effective and applicable to sports federations. The judgment, as Hillion put it, symbolized the active transposition of notions of EU substantive and constitutional law into EU bilateral agreements, regardless of their teleological variation.140

Just over three years later the Court, transposing Kolpak and Simutenkov, ruled that the same national rules would have to give way vis-à-vis the relevant non-discrimination provisions of Turkey Association law (Art 37 of the Additional Protocol and Art 10(1) of Decision 1/80). The Turkey Agreement has a strong integrationist agenda, however the earlier transposition of the Bosman and Kolpak rulings to the Russia PCA leave little doubt that it would be duly transposed to EU Agreements containing an equivalent provision.142

2.1.2.4 Establishment equal treatment provisions

The Europe Agreements all contained a provision on establishment in the EU Member States for self-employed nationals, and those seeking to establish a company, from the relevant third State. This led to five rulings pertaining to four different Agreements. The first three were handed down on the same day in response to rulings sought by a UK court in which it directly asked whether the relevant provision of the Poland (Art 44(3)), Bulgaria (Art 45(1)), and Czech (Art 45(3)) Agreements were directly effective.143 In all three, the analysis commenced with an identically

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138 As far as can be gauged from their submissions. In C-438/00 Kolpak three Member States were against the transposition of Bosman, but Germany and the Commission were in favour. In C-265/03 Simutenkov only Spain intervened and it, in contrast to the Commission, remained steadfastly against transposing Kolpak outside the Europe Agreement context.

139 On this ‘pre-emptive strike’, to use the terminology of Hillion, see Hillion (2008: 825).

140 Hillion (2008: 832–3).

141 C-152/08 Kahveci.

142 However, the terminology in the Agreements with the former Soviet republics is ‘shall endeavour to ensure’ rather than ‘shall ensure’ (employed in most language versions of the Russian PCA). The Advocate General’s Opinion in Simutenkov appeared to rule out direct effect where such phrasing has been employed.

reasoned affirmative conclusion. The ECJ looked at the wording of the provision in the respective Agreements which was held to lay down in clear, precise, and unconditional terms a nationality discrimination prohibition against the relevant third country nationals. The sentence that followed found the equal treatment rule to lay down a precise obligation to produce a specific result which individuals could rely upon to set aside discriminatory legislation.

The direct effect finding was a foregone conclusion given the bold approach generally taken in EU Trade Agreements, and whilst this trilogy of cases gave rise to a strikingly high number of Member State interventions (nine, ten, and seven respectively), this sought to shape the substantive scope interpretation. All intervening Member States, the Commission, and Advocate General contested the requested interpretation in line with Article 49 TFEU in order to limit the express proviso in the Europe Agreements permitting Member States’ laws and regulations regarding inter alia entry, stay, and establishment. The ECJ followed suit.

The two rulings that followed concerned the provisions in the three Europe Agreements already considered, alongside that in the Slovakia Agreement. The first reference was sought prior to the aforementioned trilogy and the questions included whether Polish and Czech nationals could directly rely on the Agreements. The ECJ reiterated the judgments from the preceding month on direct effect and scope of the relevant provisions; but also transposed an Article 49 TFEU interpretation, that of the

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144 This line of rulings, unlike those in the previous subsection, did not come with direct effect–entitled subsections (contrast the Advocates General Opinions in C-63/99 Gloszczuk and C-268/99 Jany).
145 Only one Member State (the UK) appeared to contest direct effect with four in support: see the Advocates General Opinions in C-63/99 Gloszczuk, paras 26 and 42, and C-257/99 Barkoci and Malik, para 32.
146 Provided they are not applied in a manner nullifying or impairing the benefits accruing under the terms of a specific provision.
147 It acknowledged that under its Art 49 TFEU and Turkey Agreement case law, rights of entry and residence were conferred as corollaries of the right of establishment, but held that this interpretation could not be transposed as the relevant Europe Agreements created a framework for gradual integration into the EU with a view to possible accession rather than creating an internal market. Prior entry clearance requirements were held in principle permissible under the three Europe Agreements, thus preserving the challenged domestic decisions: see further Hillion (2003).
148 C-268/99 Jany [2001] ECR I-8615; C-327/02 Panayotova [2004] ECR I-11055. The challenges were to ministerial decisions rejecting residence permit applications to work as self-employed prostitutes.
expression ‘activities as self-employed persons’ to the equivalent expression—‘economic activities as self-employed persons’—in the Europe Agreements, and the public policy derogations were also interpreted in line with those of the EU Treaty. The second reference seeking interpretations of the Bulgaria, Poland, and Slovakia Agreements saw the Grand Chamber reiterate both the earlier direct effect findings and the interpretations as to scope.149

In addition, the ECJ proffered an interpretation of the self-employed workers equal treatment provision in the bilateral free movement of persons Agreement with Switzerland (Art 15 of Annex I) which included self-employed frontier workers.150 As this was the first time this Agreement had been addressed,151 it was surprising that a direct effect analysis was not provided. Only two years earlier in Gattoussi (noted above) involving a provision arising for the first time concerning the Tunisia Euro-Med Agreement where the national court had also only expressly framed its question in terms of interpretation, and where, as in Stammb, an affirmative direct effect finding was also wholly predictable,152 the Court nonetheless expressly addressed direct effect.153 The next Swiss Free Movement of Persons Agreement ruling offered another example of provisions interpreted without reference to direct effect.154 As with the Swiss Agreement, the preliminary rulings interpreting the freedom of establishment provision of the EEA Agreement (EEAA) did not give any express consideration to the direct effect issue.155

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149 A reading of the relevant provisions, in line with the three intervening Member States as contrasted with the Commission submissions and the Advocate General’s Opinion, was proffered which amounted to a defence of the Dutch legislation by holding that there was in principle no requirement to permit short-duration legal entrants to make a within-territory application for establishment.

150 The Bundesgerichtshof’s interpretation of German law on agricultural leases would thus have to give way: C-13/08 Stammb [2008] ECR I-11087.

151 In a withdrawn case an Advocate General had addressed it (including a direct effect analysis): C-339/05 Zentralbetriebsrat der Landeskrankenhäuser Tirols [2006] ECR I-7097.

152 Peers (2000: 140) emphasized that the Agreement and many of its provisions, including that at issue in Stammb, can confer direct effect.

153 The provision was framed in almost identical terms to the equivalent Morocco Cooperation Agreement provision held directly effective in El Yassini (see above).

154 In C-351/08 Grimmme [2009] ECR I-1077 it rejected the argument that legal persons were granted the same right of establishment as natural persons, thus preserving the validity of domestic legislation (it also rejected an argument relying on the services provisions and non-discrimination clause pertaining to employed workers of the Agreement).

155 In C-471/04 Keller Holding [2006] ECR I-2107, Art 31 EEAA was not actually raised by the referring court but an interpretation was proffered, drawing on the interpretative parallelism provision in Art 6 EEAA, in line with that of the right of establishment under EU law and thus
2.1.3 Other provisions

The other provisions category can be quickly dispensed with. Of the nine rulings, five were on the EEAA in which the questions were not framed in terms of direct effect, and one in which an EEAA question was not expressly asked. In the first four, jurisdiction was declined because they concerned the Agreement’s application in EFTA States prior to its accession. The fifth and sixth rulings both concerned the free movement of capital provision, Article 40 EEAA, and no attention was paid to direct effect. Two Swiss Free Movement of Persons Agreement cases also saw interpretations of relevant provisions without any express consideration of direct effect.

Finally, one ruling concerned Turkey Agreement provisions on the creation of the Association Council and the submission of disputes to it. A court asked whether a Portuguese customs authorities decision was valid without first initiating the Turkey Association Council Dispute

proscribing the German legislation at issue. In C-157/07 Krankenheim [2008] ECR I-8061 aspects of the German tax system were held to constitute a restriction under Art 31 EEAA but were justified by the need to ensure the coherence of the German tax system.


In C-452/01 Ospelt [2003] ECR I-9743 no express EEAA question was advanced but the ECJ ruled that Art 40 EEAA applied and had the same scope as its EU counterpart; it did not have enough information to determine whether the national legislation at issue unjustifiably discriminated against EEA nationals. In C-72/09 Rimbaud [2010] ECR I-10659 the ECJ, in line with nine intervening Member States, held that Art 40 EEAA did not preclude French legislation which made a tax exemption for companies with their seat in an EEA country that is not an EU Member State, conditional on an administrative assistance convention combating tax avoidance or on the fact that, pursuant to a treaty prohibiting nationality discrimination, those legal persons must not be taxed more heavily than companies established in France.

In C-541/08 Fokus Invest AG [2010] ECR I-1025 a provision on equal treatment concerning purchases of immovable property by residents in the host State was confined to natural persons (Art 25, Annex I). In C-70/09 Hengartner [2010] ECR I-7233, the referred question was surprisingly confined to Art 49 TFEU when the dispute clearly involved Swiss nationals. The ECJ interpreted the relevant services provisions of the Agreement in a manner preserving the validity of a higher regional tax on Swiss nationals. These cases were included in s 2.1.3 rather than the persons section as they involved rather different types of provisions to those in the s 2.1.2 cases. Alternatively, they can, along with C-72/09 Rimbaud, simply be seen as three more persons-related cases (including legal persons) taking the tally to 79 persons rulings since C-65/77 Razanatsimba.

C-251/00 Ilumitrónica [2002] I-10433.
procedures; a curious request because the provision expressly provides that
disputes ‘may’ be submitted to it, and it was found that this did not
constitute an ‘obligation of submission’.

2.2 Challenges to EU action

Preliminary rulings challenges to EU measures have given rise to a dozen
rulings coming from courts in six different Member States, concerning
eight different Agreements.160 The first three were touched in Chapter II
(\textit{Schroeder}; \textit{Schluter}, and \textit{Haegeman II}) and all saw the relevant interpre-
tations preserve the EU measure. Nine further cases have arisen, the first of
which came some 20 years after the preceding Article 267 challenge (\textit{Haeg-
eman II}).161 In \textit{Lubella} the Court was asked whether a Commission Regulation
complied with interim Trade Agreements with Poland, the Czech and
Slovak Federal Republic, and Hungary; the issue being whether the Com-
mision immediately entered into consultations with the other Contracting
Party.162 The sole intervening Member State and the Commission argued
that the Agreements were not infringed.163 The ECJ simply held that the
provision (Art 15) ‘is effective only between the contracting parties and
provides merely for a formal step to be taken after the adoption of protect-
ive measures . . . [and] cannot in any event be effectively relied on to contest
the validity of the protective measures themselves.’

In the next case, an Italian court referred questions as to validity vis-
à-vis the Lomé Convention of a Council Regulation, and Commission

160 The Greek Association Agreement (40/72 \textit{Schroeder}—Germany and 181/73 \textit{Haegeman II}—Belgium); a Swiss Tariff Agreement (9/73 \textit{Schluter}—Germany); an Interim Europe Trade Agree-
ments with three Contracting Parties (C-64/95 \textit{Lubella}—Germany); the Lomé Convention
(C-369/95 \textit{Somalfruit}—Italy); the Yugoslavia Cooperation Agreement (C-162/96 \textit{Racke}—
Germany); a Cooperation Agreement with six Arab States (C-74/98 \textit{DAT-SCHAUB}—Denmark);
the dispute settlement provisions of the Turkey Agreement (C-251/00 \textit{Humitrónica}—Portugal)
and provisions of Turkey Agreement Association Council Decisions (C-372/06 \textit{Asda Stores}—UK)
and the Additional Protocol (C-228/06 \textit{Soysal}—Germany); the EEAA (C-286/02 \textit{Bello}—Italy); a
Framework Cooperation Agreement with Latin American States (C-377/02 \textit{Van Purys}—
Belgium).

161 The GATT and WTO-related cases are considered in Chapter IV.


163 The Commission underscored that the day after the measures came into effect it informed
the Polish representative and that this constituted compliance which the Advocate General
accepted.
implementing Regulations, limiting imports of Somali bananas.\textsuperscript{164} That Somalia had not ratified the Convention led a Member State, the Commission, and the Council, to contest jurisdiction and the Advocate General to conclude that the Convention was irrelevant. Curiously, but without an intelligible explanation, the ECJ considered that the Convention compatibility of the Regulations was not obviously hypothetical but found no factors to suggest that their validity was affected by the Convention.

The Racke judgment that followed was also enigmatic.\textsuperscript{165} A preliminary reference asked whether a Council Regulation suspending trade concessions provided for in the Yugoslavia Cooperation Agreement was valid. That Agreement contained a provision permitting its denouncement on six months’ notice which the Council invoked on 25 November 1991, a Decision that came into effect on 27 November 1991, nearly two weeks after the Council Regulation suspending the trade concessions.\textsuperscript{166} Ultimately, Racke wanted to benefit from the Agreement’s preferential tariffs (Art 21) and the fact that it only expressly permitted denouncement with a six-month notice period. Accordingly, but for justification of the suspending Regulation using customary international law, supported by the Commission and Council and contested by Racke, the EU would be breaching the Agreement. Before the ECJ, the case appears to have been framed in terms of whether the Regulation itself was void for incompatibility with customary international law and it was held justified by the fundamental change of circumstances doctrine.\textsuperscript{167} Prior to reaching this conclusion it was considered necessary to determine whether the tariff provided for in the Agreement was directly effective, the logic apparently being that only an affirmative response permitted the trader to benefit from reduced duties were the Regulation held to be invalid. A brisk two-part direct effect test followed. It commenced with the wording of the provision, which required EU implementing measures, but there being no discretion as to their adoption they were held to confer domestically judicially enforceable individual rights.\textsuperscript{168} This direct effect finding was to no avail for Racke as


\textsuperscript{166} A German Finance Court found the suspension justified as a fundamental change of circumstances under customary international law and the VCLT given the outbreak of war in Yugoslavia and an appeal to the Federal Finance Court led to the preliminary reference.

\textsuperscript{167} See generally Eeckhout (2011: 387–91, 393–5).

\textsuperscript{168} This was held to be consistent with the purpose and nature of the Agreement the aim of which was to promote trade development.
the suspending Regulation was held unaffected by the customary international law rules invoked. Whilst the case was thus a customary international challenge to the suspending Regulation, one wonders if it could have been framed more expressly in terms of non-compliance with the Agreement itself. After all, if the suspending Regulation and the denouncing Council Decision, which appeared to operate with immediate effect contrary to the Agreement’s terms, could not be supported by customary international law rules, this would attest to a breach of the Agreement itself.

The fourth case concerned an attempt to have a Commission Regulation on export refunds interpreted in line with a Cooperation Agreement concluded with six Arab States and specifically a non-discrimination provision as to how the EU applies the arrangements between those six States, their nationals, or their companies and firms. The ECJ reiterated the Commission submission that the Regulation applied without distinction to the Arab States and did not discriminate between them. Interestingly, the Commission had, in the words of the Court, argued: ‘this is only a framework agreement which lays down certain objectives and principles but implies that a proper trade agreement will subsequently be concluded, and therefore cannot be of direct application.’

The fifth ruling was the Ilumitrónica case noted earlier. A Commission Decision was challenged on the same grounds as the Portuguese customs authorities Decision. As the Court found nothing in the reference identifying the Decision, it was unable to adjudicate the point. In the next case the referred questions concerned whether the EU free movement of goods provisions and their EEA counterpart precluded a particular interpretation of two Decisions. The ECJ pointed to a sector-specific counterpart to Article 34 TFEU applicable to the dispute and the relevant justificatory provision to Article 36 TFEU (Art 13 EEA) and held in line with the two intervening Member States, the single intervening EEA State, the Commission, and the Advocate General, that the EU measures were justified under Article 13 EEA.

The Van Parys ruling that followed concerned the WTO compatibility of the EU’s banana imports regime. A Belgian court queried the validity

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169 C-74/98 DAT-SCHAUB [1999] ECR I-8759. A Danish exporter argued that one particular interpretation would be inconsistent with the non-discrimination prohibition.


of EU measures in relation to a Framework Cooperation Agreement’s provisions providing for GATT most-favoured-nation treatment. The Commission and Council rejected the capacity to use the provision to challenge the EU measures as it did not go beyond WTO obligations, and the Court held that the reasoning it applied to the WTO challenge applied equally here. The ruling turned on the WTO argumentation, considered in Chapter IV, with the Cooperation Agreement creatively invoked to seek to bypass the outcome of unsuccessful WTO validity review.

The Asda Stores ruling in 2007 concerned a UK customs dispute where a trader contested provisions in a Commission Regulation that resulted in several questions concerning whether provisions of Turkey Association law required the EU to apply for Turkey Association Council recommendations and imposed requirements prior to imposing anti-dumping duties to inform and/or notify the Association Council, the Customs Union Joint Committee, and traders and, if so, the consequences of non-compliance.\(^{173}\) The final question asked whether the relevant Turkey Association provisions were directly effective so that traders could rely on their breach to resist anti-dumping duties. As the duties are domestically imposed, it is in effect challenging domestic-level activity, but that domestic activity simply sought to give effect to EU Regulations and this could accordingly be viewed as indirectly challenging the EU measure. Curiously, the Court started with the final question, reasoning that if the provisions were not directly effective their interpretation would be of no interest to the traders. Several provisions were held not to be directly effective.\(^{174}\) It was also held that notification requirements only created an obligation between the parties to the Agreement and that a simple formality of inter-institutional information is not capable of direct effect. However, a provision (Art 47 of Decision 1/95) requiring importing State authorities to ask importers to indicate the origin of certain products was held to be a clear, precise, and unconditional obligation, not subordinate in execution or effect to further measures, and thus directly effective. Reverting back to the first batch of questions, several were dispensed with as involving non-directly effective

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\(^{174}\) One provision because it required the intervention of other parties and was thus not unconditional (Art 44(1), Decision 1/95); four others because they either provided for the possibility of taking certain measures or encouraged coordinated action (Art 45, Decision 1/95) without containing an obligation (Art 47(1)–(3) of the Additional Protocol and Art 46 of Decision 1/95).
provisions. And it was reiterated that the information and notification requirements provisions were a simple formality of inter-institutional information governing only relations of international law between the EU and Turkey which could not be regarded as containing an obligation to inform individuals. In short, there was no obligation under Turkey Association law to inform individuals.

The most recent ruling is the only one to have actually impacted on the relevant EU measure. Whilst the outcome in Soysal (C-228/06) concerning the establishment and services standstill clause in the Turkey Agreement’s Additional Protocol, noted above, flowed inexorably from the Savas ruling, this caught the EU legislature by surprise,175 because the impugned German law implemented the Common Visa List Regulation (Council Regulation 539/2001) that lists Turkey as a country whose nationals must obtain a visa when crossing the EU’s external borders. For the Court, this could not call into question its conclusion and it pointed to the consistent interpretation obligation flowing from the primacy of EU Agreements. This ruling appeared to authorize Member State authorities including their courts, in States where the visa requirement post-dates their obligation to apply the Additional Protocol, to ignore the Visa List Regulation. To call this consistent interpretation would be disingenuous for it required an expressly contra legem reading.176

2.3 Concluding assessment

One striking factor concerning the 131 preliminary rulings pertaining to EU trade agreements is the sharp dissonance between judicial activity concerning challenges to domestic action and EU action. As Figure III.3 illustrates, challenges to EU action have constituted 9 per cent of this case law as contrasted with 91 per cent for challenges to domestic action.

One factor that might be assumed to contribute to this dearth of individuals challenging EU measures via the preliminary rulings procedure is the existence of an alternative direct route to such a challenge before the EU

175 Indeed, the Commission appeared to defend the regime by emphasizing that the visa requirement introduced offered the advantage of Schengen free movement in contrast to the visa-free but Germany-exclusive access applicable when the Additional Protocol entered into force.

176 For Peers (2011: 115) the direct conflict of the two sources of law was overlooked, which he rightly noted could not be solved by consistent interpretation.
Courts which is not an option available to individuals with domestic measures.\footnote{Two cases are categorized as both challenges to EU and domestic action: C-251/00 Ilumitrónica and C-228/06 Soysal. The total of 133 challenges in Figure III.3 is explained by the fact that C-251/00 Ilumitrónica and C-228/06 Soysal are categorized as both challenges to EU and domestic action.}

One gleans little from the few challenges to EU action, not least given that some, especially the plea concerning the Lomé Convention (Somal-\mente{\textit{fruit}}) and the unidentified challenged decision (Ilumitrónica),\footnote{However, the stringent standing requirements would suggest otherwise.} hardly appeared realistic prospects for success. Soysal is clearly of interest for it effectively sanctioned, for certain Member States in certain limited contexts, non-application of an EU Regulation. The EU legislature has been slow to respond to this for it took over two years for even a formal proposal to amend the Visa List Regulation to allow Member States to derogate from the visa requirement where required by the standstill clause.\footnote{Presumably the absence of an ‘obligation of submission’ in the Turkey Agreement dispute procedures would in any event have resolved this aspect of the dispute.} Soysal aside, perhaps the most interesting detail is the Commission’s recourse to the argument against direct application of a Cooperation Agreement where it was a Commission measure being challenged (DAT-SCHAUB). Lawyers are tasked with winning cases, but it remains striking that in the goods and persons case law challenging national measures, the Commission has rarely opposed direct effect and has frequently sought the boldest of substantive readings, and yet resorts so casually to this argument on that rare occasion where a Commission measure is challenged. The Lubella ruling was also noteworthy insofar as the ECJ did not, unlike the Advocate General,

\textbf{Figure III.3} Preliminary rulings concerning EU Trade Agreements (131 rulings,\footnote{COM(2011) 290 final (24.5.2011), on which no further action seems to have taken place.} challenges to domestic action/EU action)
actually acknowledge Commission compliance but rather asserted that the provision in the Interim Trade Agreements was only effective between the Contracting Parties and could not be relied upon to contest the validity of the relevant measures; the ECJ has arguably rejected more persuasive arguments to shield domestic action from review vis-à-vis EU Trade Agreement provisions.

The 121 preliminary rulings concerning challenges to domestic action in contrast provide a rich body of case law for analysis. The points that the remainder of this subsection seeks to articulate in this respect can be grouped around four sub-categories: first, the contrasting levels of judicial activity; secondly, use of the direct effect lens; thirdly, the nature and application of the direct effect test; and, fourthly, the scope of the interpretation proffered of the relevant EU Agreement provisions.

As to the **contrasting levels of judicial activity**, whilst there was an initial burst of activity as to goods-related provisions, the post-*Kupferberg* period has only generated a further 27 rulings. In contrast, the sphere of persons which generated a first ruling in 1977 (*Razanatsimba*), and no further ruling until 1987 (*Demirel*), has given rise to a further 75 rulings. As Figure III.4 illustrates, over 60 per cent of the rulings to date have concerned the persons-related provisions in EU Trade Agreements.\(^\text{181}\)

If we break this down further, we find that of the 77 persons-related cases, a clear majority (51, or 66 per cent) are accounted for by Turkey Agreement

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\[^{181}\] It would be over 70 per cent if we looked simply at the case law since 1990.

\[^{182}\] C-251/00 *Ilumitrónica* is included as the ‘other’ categorization because provisions of the Turkey Agreement on the Association Council were involved even though the dispute itself did concern goods. As noted above at n 158, three cases in the other categorization (C-541/08; C-70/09; C-72/09) could instead be included in the persons categorization.
litigation. Put another way, 42 per cent of the preliminary rulings Trade Agreement cases involving challenges to domestic action have concerned the persons-related provisions of the Turkey Agreement. Given that Germany has a vastly greater number of Turkish workers and their family members present than any other Member State, some may not be surprised to find that German preliminary references account for fully 33 (65 per cent) of those 51 cases.\textsuperscript{183} In effect, then, German preliminary references on Turkey Agreement persons provisions in challenges to domestic action account for over one-quarter (27 per cent) of the 121 preliminary rulings.

In terms of the \textit{use of the direct effect lens}, a dissonance has emerged in the manner in which it has been employed in the contrasting spheres of goods and persons-related provisions. In the goods line of case law, only six rulings saw matters conceptualized in the express language of direct effect, three being the first express direct effect conclusions pertaining to EU Agreements (\textit{Bresciani, Pabst,} and \textit{Kupferberg}). Two of the later cases to do so resulted from the need to respond to challenges to the direct effect of the relevant provisions (\textit{Anastasiou}\textsuperscript{184} and \textit{Chiquita Italia}). The sixth case rejected the direct effect of a provision and thus clearly required conceptualization in direct effect terms (\textit{Katsivardas}). Additionally, most recently in \textit{Camar} a direct effect analysis was evaded in a manner reminiscent of the early EU Agreement cases where interpretations were proffered preserving the validity of challenged measures.

Of course, with ‘internal EU law’ it constitutes normal practice simply to proffer interpretations without forever reiterating the direct effect of particular provisions. For many, this absence of constant recourse to the language of direct effect where a presumption of judicial enforceability analogous to that of internal EU law is apparent, is to be celebrated. It might initially seem that the failure expressly to resort to this language is conditioned by the framing of questions by the national courts and submissions before the ECJ.\textsuperscript{185} This, however, is clearly belied by the

\textsuperscript{183} Perhaps more surprising is the fact that none of the cases have resulted from rulings sought by courts in Belgium or Denmark. On Eurostat figures from 2011, the greatest number of Turkish nationals reside respectively in Germany, Austria, the Netherlands, Belgium, and Denmark (the latter two swap places if we adjust for population size). The ECJ case law only emanated from courts in five different Member States (in descending order: Germany, the Netherlands, Austria, the UK, and Spain).

\textsuperscript{184} None of the rules of origin cases post-\textit{Anastasiou} employed the language of direct effect.

\textsuperscript{185} There are goods-related cases where the Court avoided express questions as to direct effect, as in 270/80 \textit{Polydor} and 174/84 \textit{Bulk Oil}.
persons-related jurisprudence. For where the persons provisions have been at issue, express conceptualization in terms of direct effect has usually followed notwithstanding that the referred questions were rarely framed in such terms. Indeed, in the social security and non-discrimination as regards working conditions line of cases the initial assertion of direct effect of such a provision and subsequent affirmations are expressly attributed their own specifically entitled direct effect subsection. And only a handful of the persons-related rulings have not expressly conceptualized matters in terms of direct effect and, perhaps tellingly, the main examples stem from recent cases concerning the Swiss Agreement (Stamm; Grimme) and the EEAA (Keller Holding; Krankenheim) which are precisely the Agreements premised on extending EU free movement law to the States concerned, thus perhaps explaining why it was felt unnecessary to embark on express direct effect analysis. Ultimately, despite the reluctance to use express direct effect language in the goods line of cases (evinced most recently in Camar), other than when left without alternative (Brescia; Pabst; Kupferberg; Anastasiou; Chiquita Italia; Katsicardas), direct effect largely remains the conceptual lens for the impact of these Agreements in the domestic legal order.

Turning to the actual nature and application of the direct effect test, it has been flexibly and boldly applied. Where the two-part test has been employed, the Court has only rarely diverged from commencing with the express wording of the relevant provision. And on no occasion has the second part of the test alone, concerned with the purpose and nature of the Agreement, stood in the way of according direct effect to a provision. The indications that particularly special and close relationships between the EU and the other Contracting Parties—initially fostered via the Brescia and Pabst rulings—that were dispelled in Kupferberg was further consolidated with the express direct effect finding for the first time of a Cooperation Agreement provision with the 1991 Kziber ruling and most recently with the Simutenkov ruling on the PCA with Russia. Crucially, the application of the test has led to affirmative findings, frequently in the

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186 Exceptions are C-101/10 Pavlov and C-351/08 Grimme.
187 12/86 Demirel and C-277/94 Taflan–Met being two exceptions since Kupferberg.
188 As well as rejecting the argument in Katsicardas that individuals cannot rely upon Cooperation Agreement provisions.
face of substantial Member State opposition. The classic example since Kuferberg was Sürlül which involved a third of the then Member States arguing unsuccessfully against direct effect. That case is testament to a fascinating dynamic. The ECJ has been able to put in place aspects of the doctrinal edifice with limited Member State opposition (e.g., Kziber on the direct effect of the non-discrimination social security provision of the Morocco Agreement). Accordingly, when the Member States present a more united front—five Member States argued against direct effect of the Turkey Agreement counterpart in Sürlül—they are doing so against the grain of the previously constructed doctrinal edifice. The ECJ was, therefore, able simply to transpose the logic to ensure consistency across similar provisions of EU Trade Agreements. This bears some parallel with what occurred in the foundational era: the seminal Bresciani and Pabst findings as to the direct effect of provisions of the Yaoundé Convention and the Greek Association Agreement saw no Member States intervene, accordingly when they turned out in force in Kuferberg to contest the direct effect of the equivalent provision in the Portugal Agreement to that held directly effective in Pabst their pleas fell on deaf ears. Inevitably, alternative outcomes in cases like Kuferberg and Sürlül would have been viewed as egregious instances of judicial capitulation to political pressure. The more interesting counterfactual would be to speculate on whether the affirmative direct effect findings in path-breaking cases such as Pabst and Kziber would have been forthcoming had the ECJ been faced with the level of Member State opposition exhibited in Kuferberg and Sürlül vis-à-vis the same provisions in different Agreements. After all, the Member States were advancing perfectly viable textual arguments against direct effect. What cannot be gainsaid is that the outcome in Kziber was of immense significance, for had the French, German, and Commission submissions been followed it is difficult to see how an alternative outcome could have been reached for the Tunisia, Algeria, and Turkey Agreements. One commentator presciently remarked in the wake of Kziber that it was ‘up to politicians to decide, whether it should give rise to different strategies as regards the framing of international agreements’. They have heeded that suggestion because the Member States have refused, except with EFTA countries and in the upgrading of the trio of 1976 Maghreb Cooperation Agreements (Algeria,

189 The rare exception in which the Commission unsuccessfully joined the Member States in arguing against direct effect is C-18/90 Kziber, but it changed sides on the same point for the C-262/96 Sürlül ruling.

Morocco, and Tunisia) into Euro-Med Agreements, to include that clause in other Agreements.\textsuperscript{191} If proof is needed that a generous approach to direct effect (and the substantive scope interpretation of norms) has consequences for the obligations to which executive and legislative actors are willing to agree, then this provides it.\textsuperscript{192}

Furthermore, even where there has been limited Member State intervention against direct effect as in \textit{Kziber}, \textit{Gürol}, and \textit{Sevince}, weighty textual arguments have been brushed aside. In \textit{Gürol} the interpretation of the relevant provision appeared to fly in the face of the text. Whilst \textit{Kziber}, along with rulings such as \textit{Sevince}, \textit{Süriül}, and \textit{Simutenkov}, are manifestations of a willingness to transpose a key aspect of how it treats internal EU law, namely, not allowing explicitly textually envisaged implementation measures to preclude an affirmative direct effect finding as to a justiciable core of the relevant provision.\textsuperscript{193} The significance of the latter point should not be underestimated. Developments taking place seemingly at the purely internal EU law level can in due course shape the judicial approach to external EU law, and it seems likely that there is judicial awareness of the sensitivity of relying expressly on the internal EU analogy.\textsuperscript{194}

There are other notable manifestations of the flexibility and boldness on the direct effect question that deserve reiterating. One is the willingness to permit Agreements to have horizontal direct effect (\textit{Kolpak}; \textit{Simutenkov}; \textit{Kahveci}) which can be read as inconsistent with the famous \textit{Faccini Dori} holding, refusing to extend horizontal direct effect to Directives, that the EU only has the power to enact obligations for individuals with immediate effect where it is empowered to adopt Regulations;\textsuperscript{195} for in some contexts such a power now appears possible via EU Agreements.\textsuperscript{196} Another significant manifestation was that non-publication of the Association Council


\textsuperscript{192} It might be thought preferable to have judicially enforceable obligations rather than vaguely worded non-judicially enforceable aspirations. But this can preclude otherwise beneficial treaty-making from taking place: Jackson (1992).

\textsuperscript{193} This is precisely where the domestic courts of automatic treaty incorporation States have a strong peg on which to hang unwillingness to engage judicially with provisions of certain Agreements.

\textsuperscript{194} Contrast the Advocate General’s willingness in C-18/90 \textit{Kziber} to rely on 2/74 \textit{Reyners} by analogy on the direct effect finding with the Court’s silence.


\textsuperscript{196} The Agreements where horizontal direct effect has been affirmed were all concluded via Decisions. Peers (1996a: 30) had anticipated a reluctance to grant horizontal direct effect.
Decisions at issue in Sevince did not stand in the way of a direct effect finding nor did the absence of a date of entry into force for Association Council Decision 3/80. In both contexts, textually powerful contrary submissions were advanced, indeed, five Member States in Taflan-Met and the Advocate General viewed the absence of an express entry into force date for the Decision as conclusive. It seems rather unlikely that domestic courts dealing with treaty law would have been so unwilling, particularly when faced with vigorous submissions from their executive branch, to allow non-publication and absence of a clear entry into force date to impede the domestic applicability of treaty law. The aforementioned judgments brought the Association Council Decisions to life and sowed the seed for a line of case law that has had an immeasurable impact on the lives of Turkish workers and their family members. Whilst that is undoubtedly a most laudable outcome, the cogency of the textual objections marshalled to the contrary should not be ignored.\(^{197}\)

In the final analysis, the ECJ’s contribution can only be assessed on how it has dealt with the cases that have presented themselves and on this basis one cannot but conclude that the results can be situated within a similar maximalist enforcement paradigm to that of internal EU law. Inevitably, as with internal EU law, there will be rulings rejecting the direct effect of particular provisions. But amongst this data-set of 121 rulings, the cases doing so can be counted on one hand.\(^{198}\) And it is revealing that mainstream academic criticism of those particular conclusions has not been forthcoming.\(^{199}\) In sum, there can be no doubt that the direct effect findings have represented a strikingly bold line of jurisprudence. But without seeking to diminish the judicial contribution, it must also be acknowledged that the ECJ has mainly addressed a handful of different types of provision across a select batch of mainly bilateral Trade Agreements. And the provisions litigated have primarily, though certainly not exclusively, concerned non-discrimination and standstill clauses which frequently have a similar counterpart in EU law proper. These are exactly the types of treaty provision which courts in automatic treaty incorporation States would be most comfortable applying, and the ECJ itself in its own direct effect determination

\(^{197}\) The limited critical comment on the Turkey Agreement case law suggests it may have had this effect. For two recent uncritical accounts, see Karayagit (2011) and Tezcan/Idriz (2009); indeed, the former dismissively categorizes the submissions of the UK and the Netherlands in C-16/05 Tum as those of proponents of ‘Fortress Europe’.

\(^{198}\) 12/86 Demirel; C-277/94 Taflan-Met; C-37/98 Savas; C-160/09 Katsivardas.

\(^{199}\) The Taflan-Met logic was criticized for implying, though later disavowed by the ECJ, that the social security equal treatment provision in Decision 3/80 was devoid of direct effect.
of internal EU law was also especially receptive to such provisions. Accordingly, a contrasting approach to non-discrimination and standstill provisions in ‘external EU law’ would inevitably have exposed the ECJ to a prima facie potent double-standards critique.

Turning to the scope of the interpretation proffered of the relevant provisions, it is essential to recognize that limiting ourselves, when assessing the judicial contribution, to a mere yes/no tick-box approach on the direct effect question generates a relatively superficial picture. A considerably richer picture emerges with an analysis of the substantive interpretation accorded to the relevant provisions. Admittedly, a single section providing coverage of such a substantial body of cases inevitably risks bias of selection in terms of those singled out for closer consideration. Nevertheless, it is hoped that enough has been done to substantiate the basic conclusion that here too there has been a marked willingness to pursue a bold line, usually consistently with Commission submissions, frequently in the face of stiff Member State opposition and occasionally Advocates General as well.

In fact, Member State submissions have more commonly centred on influencing the scope of relevant provisions rather than direct effect, which is to be expected given that most rulings concern provisions that established jurisprudence holds to be directly effective. Inevitably across such a large body of cases, there are rulings that can be picked out which commentators consider to be overly restrictive on a particular point, but this does not detract from the broader trends. Ultimately, we have seen a judicial actor building a bold line of jurisprudence as to the substantive scope of the provisions, often with limited foundation in the text or at least in the face of perfectly coherent textual arguments to the contrary. This has been most noticeable where we see the transposition of the substantive interpretative logic from internal EU law. This has been especially apparent with the heavily litigated Turkey Agreement. As with the direct effect finding itself, this substantive interpretation transposition has often not been precluded by vociferous Member State opposition as with, for example, Bozkurt (C-434/93) where the internal EU law meaning of legal

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201 On occasion the Court has been bolder than the Commission submissions, eg C-207/91 Eurim-Pharm; C-317/01 & 369/01 Abatay & Sabin; C-188/00 Kurz; C-228/06 Soysal. And on occasion less so: C-434/93 Bozkurt (on the right to remain for someone permanently incapacitated); C-179/98 Mesbah; C-327/02 Panayotova.
202 Both C-16/05 Tum and C-294/06 Payir offer recent examples of this in the Turkey Association law context.
employment was transposed to the Turkey Agreement contrary to the views of the four intervening Member States. But such transposition has by no means been confined to the Turkey Agreement.\textsuperscript{204} The Kziber ruling saw the EU seek to transpose the EU Social Security Regulation meaning of social security to the Morocco Cooperation Agreement against the views of the intervening Member States without even proffering a justification. Perhaps most surprisingly, the logic from the seminal Bosman ruling was transposed not only to the Europe Agreements (a reading contested by three intervening Member States in Kolpak), but also to a PCA in the Simutenkov ruling. It is significant that we are dealing here with Agreements that do not have the interpretative parallelism anchor for which recourse can be had in the Turkey Agreement context. But even with the Turkey Agreement, we have seen far-reaching conclusions reached via analogy with internal EU law to which the Turkey Agreement does not refer. Thus in Toprak & Oguz the ECJ relied on earlier dynamic readings of standstill clauses in relation to free movement of capital and the VAT Directive in support of a dynamic reading of the employment restrictions standstill clause thus precluding Member States from retreating from liberalizations post-entry into force of that standstill clause. When Toprak & Oguz is combined with the earlier Abatay ruling, rejecting the permissibility of new restrictions subject to non-applicability for existing lawfully employed workers, one further realizes how crucial to the effectiveness of the employment restrictions standstill clause the ECJ has been. Those outcomes were not inevitable and wholly predictable readings of the text. In both cases, the ECJ stance was adopted in the face of contrary interventions from three Member States, and in Abatay they were supported by the Commission and the Advocate General.

Furthermore, we have seen instances where the ECJ was potentially influenced by its approach to internal EU law whilst exhibiting an unwillingness to acknowledge the analogy. Thus, the creation of the El Yassini caveat on residence permit extension refusals in the Morocco Agreement context came with a fundamental freedoms analogy as support in the Advocate General’s Opinion, that was wholly absent from the ECJ ruling. And its maintenance in the Tunisia Euro-Med Agreement context (Gat-toussi) came notwithstanding the assault from Germany; the latter armed with a joint declaration that suggested that the Member States had

\textsuperscript{204} Such substantive transposition was rejected, in line with powerful Member State submissions, in the trilogy of Europe Agreement cases: C-63/99 Gloszczuk; C-235/99 Kandova; C-257/99 Barkoci and Malik.
responded to the link created by the ECJ between lawful employment and residence permits in the Turkey Agreement context by seeking to preclude any judicial constraint on the Member States’ exclusive competence to determine the right to remain. 205

In sum, the judicial interpretation as to scope has, like the direct effect question itself, evinced a strong attachment to the maximalist enforcement paradigm with the Court time and again resisting arguments from Member States (as well as occasionally Advocates General and more rarely the Commission) to provide less generous readings of the text.

3. Direct Actions

The direct actions line of cases divides into two core categories concerning, respectively, challenges to domestic or EU action allegedly incompatible with EU Agreements.

3.1 Challenges to domestic action

The direct action mechanism for challenging domestic measures is provided for by the infringement procedures. The Haegeman II ruling, consolidated by Kupferberg, left little doubt that if the textually more dubious preliminary ruling procedure could be employed for policing compliance with EU Agreements, then so could the infringement procedure which posed no equivalent textual hurdle. 206 It was not until 1988 that the first EU Agreement infringement proceeding ruling arose, with cases two, three, and four coming in respectively 1989, 1992, and 1993. 207 These four cases share certain traits. First, jurisdiction was taken for granted with no reference to Article 216(2) TFEU or Haegeman II or Kupferberg. Secondly, they were all challenges to domestic action for being incompatible with EU law proper and EU Trade Agreements, and in all bar one infringements of both were

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205 In some quarters the judgment led to cries of judicial activism: Herzog and Gerken (2008).
206 The infringement procedure is a tool for policing failures to fulfil EU Treaty obligations, and Art 216(2) expressly stipulates that EU Agreements bind the Member States.
The relevant national measures were not solely alleged to breach EU Agreements and, accordingly, could be referred to as cases pertaining to ‘incidental infringements of EU Agreements’. The third case is prima facie the closest to a pure infringement given that the national measure did not apply to intra-EU trade as such, but rather the refusal to issue certain import permits breached both the Sweden Agreement and an EU Regulation on import arrangements. However, it concerned much more than a product-specific import prohibition applicable to one non-Member State. Moreover, Greece displayed a cynical disregard for EU law and the Commission’s role in the infringement procedure by refusing to cooperate. Clearly, the Commission had plenty of reason to pursue these proceedings vigorously wholly independently of the Sweden Agreement.

With the exception of a GATT Agreement case, it took another nine years for the next EU Agreement infringement ruling. The Irish Berne case concerned a pure EEAA infringement ruling brought against Ireland for failing to adhere to the Berne Convention as required by the EEAA. Curiously, one Member State intervened to contest the alleged breach by another Member State that conceded that it was in breach. The UK was

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208 In 194 & 241/85 following a finding of an Art 34 TFEU violation for intra-EU trade, the violation of the Lomé Convention counterpart (Art 3(1)) was found. In 340/87 following an infringement finding on intra-EU trade (Arts 28 and 30 TFEU), the ECJ essentially rejected the alleged breach of the standstill counterpart to Art 30 TFEU in the Norway Agreement (Art 6) because of an absence of reasoned argumentation. The charge in the extra-EU trade context was the subject matter of C-125/94 Aprile considered earlier. In C-65/91 the national import restriction applying to, inter alia, certain Swedish imports simultaneously infringed Council Regulation 288/82/EEC on common import rules and the Swedish Agreement (Art 13). In C-228/91 an inspections practice based on national legislation simultaneously infringed both Art 34 TFEU with respect to intra-EU trade and a standstill provision in the Norway Agreement on new measures unduly obstructing trade (Art 15(2)).

209 In C-194 & 241/85 infringement proceedings were brought separately against a national measure pertaining to ACP bananas, where the Lomé Convention was invoked, later being joined with the already initiated proceedings against a national measure in intra-EU trade. However, the two measures arose out of Greece’s organization of the market for bananas, and had the same practical consequence, namely an import prohibition whether in intra-EU or direct ACP trade (for the former an import licence requirement was imposed with a systematic refusal to issue, and for the latter an outright import prohibition).

210 It was suspected of both applying to all non-Member States and not being confined to a single product.

211 A duty of cooperation infringement was duly found.

212 Sweden had, however, been pressing the Commission for some time before the Court application was made.

213 C-61/94 IDA, see Chapter IV.

214 C-13/00 Commission v Ireland (Irish Berne) [2002] ECR I-2943.
seeking to ensure its input into the emerging judicial construct pertaining to jurisdiction over mixed agreements, and argued that the Berne Convention did not fall wholly within EU competence and therefore neither did the obligation to adhere to it. The ECJ rejected these submissions on procedural grounds, but nevertheless commenced by affirming its jurisdiction before confirming the breach of both Article 216(2) and the EEAA. Its logic on jurisdiction was that the Berne Convention provisions covered ‘an area which comes in large measure within the scope of [EU] competence’. It pointed, inter alia, to the protection of literary and artistic work being ‘to a very great extent governed by [EU] legislation’ and concluded that there was an EU interest in ensuring adherence to the Berne Convention.

There has been a sizeable increase in Trade Agreement infringement rulings in the wake of the Irish Berne case as illustrated in Figure III.5.

Of the 26 infringement rulings concerning EU Trade Agreements, 22 have come since the turn of the century and 21 in the post-Irish Berne

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215 C-61/94 IDA, a case on an EU-concluded GATT Agreement considered in Chapter IV, is not included in this figure.
216 This issue had also previously arisen in a batch of WTO-related cases, considered in Chapter IV.
217 The Commission argumentation revealed a weakness in the UK’s logic which conceded that Berne Convention provisions fell within EU competence, namely, that adherence could only be to the Convention as a whole.
period. Put another way, four times the number of Trade Agreement infringement rulings have been generated in less than a decade than in all the previous years.

This increased activity (2004–2011, 21 cases) exhibits two distinctive features. First, only one is a pure infringement, the remaining 20 can all be seen as incidental breaches. That one pure infringement case is noteworthy because it concerned the Turkey Agreement which has generated a voluminous body of case law (as Section 2 illustrated) but was not the exclusive Agreement in an infringement ruling until 2010.219 In that case, Dutch residence permit charges for Turkish nationals were held disproportionate compared to those for similar documents for Member State nationals thus breaching non-discrimination clauses and standstill clauses in the Turkey Agreement.220

Secondly, the vast bulk of this activity has concerned one Agreement, the EEAA. Of the two cases not involving the EEAA, one is the previously mentioned Turkish Residence Permit Charges case and the other a case in which a Sicilian environmental tax on gas imported from Algeria infringed Articles 28 and 207 TFEU as well as the Algeria Cooperation Agreement’s customs duties and quantitative restrictions prohibition.221 The other 19 cases all involved alleged breaches of the fundamental freedoms and the counterpart EEAA provisions. All bar five shared the same pattern of the Court finding national measures in breach of one or more of the fundamental freedoms and then holding that they also breached the counterpart EEAA provisions;222 in three of the remaining five the counterpart breach

\[\text{219 C-92/07 Commission v Netherlands [2010] ECR I-3683. The only previous infringement ruling appearing to involve the Turkey Agreement was C-465/01 Commission v Austria.}\]

\[\text{220 Respectively, Art 9 of the Agreement, Art 10 of Decision 1/80 and Art 41 of the Additional Protocol, and Art 10 of Decision 1/80.}\]

\[\text{221 C-173/05 Commission v Italy [2007] ECR I-4917.}\]

\[\text{222 C-465/01 Commission v Austria [2004] ECR I-8291 (discriminatory legislation breached Art 45 TFEU and the EEAA counterpart in Art 28, and breaches of the non-discrimination provisions concerning working conditions in other EU Agreements were also found); C-219/03 Commission v Spain, Judgment, 9 December 2004 (breaches of Arts 56 and 63 TFEU and Arts 36 and 40 EEAA); C-345/05 Commission v Portugal [2006] ECR I-10633 (breaches of Arts 45 and 49 TFEU and Arts 28 and 31 EEAA, it not being considered necessary to address Art 63 TFEU and Art 40 EEAA); C-104/06 Commission v Sweden [2007] ECR I-671 (breaches of Arts 45 and 49 TFEU and Arts 28 and 31 EEAA); C-522/04 Commission v Belgium [2007] ECR I-5701 (breaches of Arts 45, 49, and 56 TFEU and Arts 28, 31, and 36 EEAA, it not being considered necessary to address Art 63 TFEU and Art 40 EEAA); C-248/06 Commission v Spain [2008] ECR I-47 (breaches of Arts 49 and 56 TFEU and Arts 31 and 36 EEAA); C-265/06 Commission v Portugal [2008] ECR I-2245 (breaches of Arts 34 and 36 TFEU and Arts 11 and 13 EEAA); C-406/07}\]
was not established,223 in another neither internal EU law nor an EEAA breach were established224 and, finally, one case saw the Member State

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223 C-267/09 Commission v Portugal, Judgment of 5 May 2011 (breach of Art 63(1) TFEU, but not of Art 40 EEA as the restriction could be justified in the EEAA context); C-540/07 Commission v Italy [2009] ECR I-10983 (breach of Art 63(1) TFEU but not of Art 40 or 31 EEAA as justified in that context); C-487/08 Commission v Spain [2010] ECR I-4843 (breach of Art 63 TFEU, but insufficient evidence supplied to determine alleged breach of Art 40 EEA).

224 C-105/08 Commission v Portugal [2010] ECR I-5331 (alleged breaches of Arts 56 and 63 TFEU and Arts 36 and 40 EEA dismissed as Commission had not proved the alleged failure to fulfil obligations).
respond to the pre-litigation procedure by amending its legislation concerning EU Member States with the Commission proceeding successfully to challenge the legislation’s compatibility vis-à-vis the EEA.225

Bringing together these infringement rulings, two important findings deserve underscoring. First, on the divide between pure and incidental infringements, there have been two pure EU Agreement infringement rulings. One concerned the EEAA (Irish Berne) and the other the Turkey Agreement (Residence Permit Charges).226 As illustrated in Figure III.6, 92 per cent of the rulings have thus concerned incidental infringements.

Secondly, only six cases have not concerned the EEAA, and four of these predate its birth.227 As illustrated in Figure III.7, that equates to 77 per cent of the rulings having involved the EEA.228

3.2 Challenges to EU action

In the 40 years since the unsuccessful challenge to an EU measure in relation to an EU Trade Agreement in Haegeman I (touched on in Chapter II), an additional 26 challenges involving an assortment of EU Trade Agreements have been identified. In 12 cases the Agreements being invoked were not substantively addressed. The EU Courts dispensed with seven of these cases on admissibility grounds.229 Of the remaining five, two

225 C-521/07 Commission v Netherlands [2008] ECR I-4873 (breach of Art 40 EEAA). Because of the pre-litigation context it has been classified as an incidental rather than pure EU Agreement infringement ruling.

226 Both 194 & 241/85 Commission v Greece and C-521/07 Commission v Netherlands were classified as incidental infringements for the reasons enunciated earlier.

227 C-465/01 Commission v Austria is included as an EEAA-related case although it did also find infringements of other EU Trade Agreements.

228 This figures rises to 91 per cent if we only include infringement rulings (22) since the birth of the EEA.

229 Three were actions brought against measures not having legal effects: 114/86 UK v Commission [1988] ECR 5289 (an annulment action in which the UK unsuccessfully invoked the Lomé Conventions); C-50/90 Sunzest v Commission [1991] ECR I-2917 (annulment action invoking Cyprus Association Agreement); and T-75/96 Söktas v Commission [1996] ECR II-1689 (damages action relying on the Turkey Agreement; the application for interim measures had been unsuccessful on the same grounds: T-75/96R Söktas v Commission [1996] ECR II-859); two were damages actions dispensed with for not having been brought within the five-year time limit laid out in Art 46 of the Statute of the Court (T-367/08 Abouchar v Commission [2009] ECR II-128 alleging a breach of the Lomé Convention and T-210/09, Formenti Soleco v Commission, order of 19 May 2011, involving alleged breaches by the Commission of the Turkey
Annulment actions brought by individual Member States saw the ECJ annul the respective Commission Decision and Regulation on alternative grounds without considering the alleged EU Agreement infringements. In a combined annulment and damages action, the applicability *ratione temporis* of the EEAA was rejected. An additional annulment action was held devoid of purpose, and finally a damages action relying on an alleged Lomé Convention infringement that was declared admissible by the GC was overturned by the ECJ.

The remaining 14 cases, however briefly, do substantively explore the relevant Agreements. Five involved unsuccessful challenges to EU action relying on the successive Trade Agreements with the ACP States in which the claims arguably ranged from the unconvincing to the patently unmeritorious. Three cases concerned Turkey Agreement provisions. Two

Association Agreement and Association Council Decision 1/95); 247/87 *Star Fruit Company SA v Commission* [1989] ECR-291 was an action for failure to bring infringement proceedings against France for allegedly failing to comply with, inter alia, the Lomé Convention which the ECJ would not countenance as commencement of infringement procedures is at the Commission’s discretion; T-47/95 *Terres Rouges v Commission* [1997] ECR II-481, saw the ECJ accept the Commission’s standing-based inadmissibility objection (individual concern), supported by the Council and two Member States, in an annulment action against a banana-related Regulation allegedly breaching Lomé IV.


232 Because to the extent that it constituted a Decision, it had been revoked: 82/85 *Eurasian Corporation v Commission* [1985] ECR 3603 (Cooperation Agreement with Thailand on manioc production).

233 C-214/08 P *Guigard v Commission* [2009] ECR I-91 (the ECJ holding that as this was a contractual dispute the GC had no jurisdiction).

234 C-280/93 *Germany v Council* [1994] ECR I-4973 was an annulment action against a Council Regulation, organizing the EU banana market, alleging that it infringed the customs duty prohibition in Lomé IV (Art 168(1)). The ECJ’s terse two-paragraph response, in line with the submissions of the Council, six Member States, and the Advocate General’s Opinion, was that the banana tariff quota scheme came within a different provision (Art 168(2)(a)(ii)) and that the EU obligation was to maintain the advantages from prior to Lomé IV and thus the Council Regulation was able to impose a levy without breaching the Convention. The GC invoked this ruling, in line with Council and Commission submissions, in dispensing with a private party challenge to the same Council Regulation as allegedly incompatible with Lomé IV and the Banana Protocol: T-521/93 *Atlanta* [1996] ECR II-1707. A recently decided damages action involved both Lomé IV and its successor (Cotonou) as a banana-exporting company sought damages allegedly suffered as a result of the EU’s banana regime. The GC acknowledged the direct effect of the customs duty and charges having equivalent effect prohibition (Art 168) but
were successful annulment actions brought by individual traders against Commission Decisions finding remission of customs duties unjustified and in certain cases requiring recovery of customs duties.\footnote{Respectively Joined Cases T-186/97, T-187/97, T-190–2/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97, and T-147/99 \textit{Kaufring} v \textit{Commission} [2001] ECR II-1337 and C-204/07 P \textit{CAS} v \textit{Commission} [2008] ECR I-6135, setting aside judgment in T-23/03 \textit{CAS} v \textit{Commission} [2007] ECR II-289.} They were included hesitantly within this section because in neither case was the issue whether the Decisions themselves breached relevant Turkey Agreement law, but rather whether their improper implementation by Turkish authorities and Commission implementation monitoring deficiencies was such that the Commission made a manifest error of assessment in applying EU import duty rules. The GC first held that this was so in \textit{Kaufring} in 2001, and in 2008 the ECJ’s \textit{CAS} judgment reached a similar conclusion in a factual setting with parallels to \textit{Kaufring}.\footnote{On a successful appeal from a GC judgment.} These two judgments are significant because they hold that the Commission is obliged to police compliance with an EU Agreement by third States and failure to fulfil this obligation had legal consequences for the legality of Commission Decisions based on secondary EU law.

The remaining Turkey Agreement case was a damages action brought by a trading company, Yedaş Tarim, against the Council and Commission for losses allegedly resulting from implementation of the Turkey Agreement and the Association Council Decision on the customs union (No 1/95). It was alleged that the institutions breached various provisions of the Turkey Agreement,\footnote{Articles 2(1), 3(1), and 6.} annexed financial protocols, and its Additional Protocol. this was, however, to no avail due to an absence of any explanation as to why the EU measure was in breach, whilst the relevant Banana Protocol provision (Art 1 of Protocol 5 of Cotonou) was held not directly effective because it clearly depended on further measures: T-128/05 \textit{SPM} v \textit{Council} \& \textit{Commission} [2008] ECR II-260; upheld on appeal C-39/09 P \textit{SPM} v \textit{Council} and \textit{Commission} [2010] ECR I-38. T-71/99 \textit{Meyer} v \textit{Commission} [1999] ECR II-1727 was a combined annulment and damages action against a Commission Decision refusing emergency aid. The Lomé provision invoked (Art 366) established the Agreement’s duration and the procedure for its revision and was held not to cover any payment of special emergency aid to individuals established in an ACP State. C-342/03 \textit{Spain} v \textit{Council} [2005] ECR I-1975 was an annulment action brought against a Council Regulation opening a tariff quota which Spain contested, inter alia, as incompatible with a Cotonou Agreement provision providing for the EU to inform the ACP States in good time where it intends to take a measure which might affect their interests as far as the Agreement’s objectives are concerned. In line with the Council and Commission submissions, and the Advocate General, it was held that there was no infringement because they had been duly informed.
The GC held that for reliance upon these provisions to establish the unlawfulness of the institutions’ conduct it was necessary to consider whether the provisions were directly effective.\(^{238}\) The GC then invoked Demirel, and the holding therein that the Agreement does not establish the detailed rules for attaining its aims, in concluding that the Turkey Agreement is not included in the norms in light of which it reviews the lawfulness of EU acts. For good measure, the specific provisions invoked were held to be insufficiently precise and unconditional as well as subject to further implementing measures.\(^{239}\)

An additional unsuccessful damages action was brought against the Council and the Commission for failing to suspend the Lebanon Association Agreement due to violations of fundamental rights.\(^{240}\) The GC emphasized that the provision relied upon pertaining to suspension (Art 86) imposed no obligation to terminate or suspend the Agreement, and that even if the institutions had manifestly and gravely exceeded the limits of their discretion and thus infringed Article 86, which the applicant had not established, that provision did not give rights to individuals.\(^{241}\)

One of the remaining cases saw the rejection of the argument that provisions of the Finland Trade Agreement precluded the application of the EU prohibition on anti-competitive agreements (Art 101 TFEU) on the ground that those provisions presupposed that the EU had rules enabling it to take action against agreements regarded as incompatible with the Finland Agreement.\(^{242}\) Another was an annulment action against Commission countervailing charges Regulations on the grounds, inter alia, of an alleged breach of the principle of legitimate expectations, which alongside the Framework Cooperation Agreement with Chile created a climate of


\(^{239}\) The alleged Financial Protocol violation was rejected for failure to identify the relevant provisions, as was reliance on the Additional Protocol as the applicant was relying on the preamble which was held to have ‘no inherent legal significance’. Yedas Tarım was upheld on appeal, however the sweeping rejection of review vis-à-vis the Turkey Agreement was not addressed as contrasted with concluding that the GC did not err in law in concluding that Arts 2(1), 3(1), and 6 were programmatic in nature: C-255/06 P Yedas Tarım v Council and Commission [2007] ECR I-94.

\(^{240}\) T-292/09 Mugraby v Council and Commission, Order of 6 September 2011. Actions for failure to act were rejected as manifestly inadmissible.

\(^{241}\) The Court emphasized that the provision could not be directly effective as it was not sufficiently clear or precise and was subject to the adoption of subsequent measures by EU institutions.

confidence precluding the adoption of a unilateral measure without prior negotiation. The GC simply held that a reading of the Agreement—albeit without actually providing a reading!—revealed that it did not intend to amend the Council Regulation which provided the basis for the subsequent, Commission-imposed, charges. 243

There are two unsuccessful challenges which are notable because of the defending institutions’ argumentation. One involved an alleged breach of a Romania–Europe Agreement provision on consultation requiring, inter alia, the Association Council to be informed of a dumping case as soon as it was initiated. 244 The Council resorted to the argument that the relevant provision did not have direct effect. The GC’s interpretation of the provision was such that the alleged breach was not sustained while considering it unnecessary to examine whether it could be relied upon. It reached essentially the same outcome in a challenge to a Commission aid Decision allegedly infringing EEAA provisions pertaining to consultation where the Commission argued that no individual right could be derived from any infringement of EEAA procedural rules. 245

Finally, the most striking judgment was an annulment action against a Council Regulation, withdrawing tariff concessions on gearboxes produced by an Austrian company, alleging that it infringed, inter alia, the EEAA and the Trade Agreement with Austria. 246 The Regulation was adopted shortly after EU approval of the EEAA and less than two weeks before its entry into force. In its Opel Austria ruling the GC addressed a plea concerning infringement of the international law obligation not to defeat the object and purpose of a treaty before its entry into force, together with a plea alleging infringement of the EEAA, and in conjunction found these pleas well founded. 247 It held that the customary international law principle of good faith, recognized by the ICJ and codified in the VCLT (Art 18), was a corollary of the EU law principle of legitimate expectations; a principle which traders may rely on where the EU has deposited their instruments of approval of an Agreement the date of entry into force of which is known, to

244 T-33/98 Petrotub [1999] ECR II-3837. The appeal, which did not raise the Europe Agreement point, is considered in Chapter IV.
245 T-244/94 Stabl [1997] ECR II-1963 (the appeal, which did not involve the EEAA, was upheld: C-441/97 P Stabl [2000] ECR I-10293).
246 Articles 10, 26, and 62 of the former and Arts 23 and 27 of the latter.
challenge EU measures adopted since its approval but prior to its entry into force and which are contrary to what would be its directly effective provisions upon entry into force. Whilst the direct effect analysis was as curt as those frequently conducted in the EU Trade Agreement context, it was curious that the GC cited Bresciani alongside Kupferberg as confirmation that unconditional and sufficiently precise provisions of EU Agreements have direct effect, for this is but one aspect of the classic two-part direct effect test consolidated in Demirel. In any event, it quickly concluded that the customs duties prohibition (Art 10 EEAA) was indeed directly effective.

The bulk of the judgment then focused on whether the Council Regulation infringed Article 10 EEAA. The Council had argued that it was not to be interpreted in the same manner as its EU law counterpart (Art 30 TFEU) because of major differences between the TFEU and the EEAA. This was never likely to succeed given the presence of the interpretative parallelism provision of Article 6 EEAA, and alongside reliance on this provision the GC provided a detailed analysis of the EEAA objectives in rejecting that argument. The Commission, at the forefront of pushing for the most expansive reach for EU Trade Agreements where domestic measures are challenged, invoked dubious legal reasoning in defence of EU measures. Thus, it argued that the EEAA and TFEU prohibitions were not identical in substance and that parallel interpretation would run contrary to other EEAA provisions. This was appropriately rejected and the reintroduced duties were held to be a prohibited charge within Article 10 EEAA; the Regulation was contrary to that provision and the Council infringed the applicant’s legitimate expectations by adopting the Regulation prior to the Agreement’s entry into force but following deposit of the EU instruments of approval. The Council also breached legal certainty by knowingly creating a situation in which two contradictory rules of law would coexist.

In sum, infringements of the general principles of legitimate expectations and legal certainty resulted in annulment of the Council Regulation.

In an annulment action, the legality of the measure is assessed in light of the facts and state of the law at the time it was adopted. For the Regulation in Opel Austria this was prior to the EEAA’s entry into force, even if

248 The GC invoked in support C-163/90 Legros, where it was held that the term ‘charge having equivalent effect’ in the counterpart provision in an EFTA Agreement, which have much more limited objectives than the EEAA, would be deprived of much of its effectiveness if interpreted more narrowly than the same EU Treaty term.

249 In deliberately backdating the Official Journal issue in which the Regulation was published, the Council committed an additional legal certainty infringement.
publication took place later. This posed an obvious obstacle to straightforward legality review vis-à-vis the EEAA. Accordingly, whilst the EU measure’s incompatibility with the directly effective EEAA customs duty prohibition was clearly acknowledged, it was the general principles of EU law that offered the mechanism for bypassing the procedural incapacity to challenge a measure for infringing an Agreement where the measure was adopted post-approval but pre-entry into force of the Agreement.\footnote{250}

The 27 rulings are represented by decade in Figure III.8.\footnote{251}  

\subsection*{3.3 Concluding assessment}

The direct actions jurisprudence has given rise to 53 cases. As illustrated in Figure III.9, the split between infringement proceedings and challenges to EU action is strikingly even with 49 per cent in the case of the former and 51 per cent in the case of the latter,\footnote{252} although of course initiation of infringement proceedings are intended to operate as an incentive to

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure_iii_8.png}
\caption{Direct challenges to EU action invoking EU Trade Agreements (27 cases)}
\end{figure}

\footnotetext{250}{For critical comment, see Kuijper (1998: 13–16).}
\footnotetext{251}{A case heard by the ECJ on appeal is counted once as are joined cases.}
\footnotetext{252}{This is so even if one excludes the two cases (Kaufring and Cas) that were hesitantly included in the challenges to EU action category, above at n 235.}
compliance upon Member States without the need for a ruling, in contrast to the initiation of Luxembourg-based litigation against the EU institutions.

The split between successful challenges is a rather different matter. Thus, in only one direct action has an infringement of an EU Trade Agreement by an EU measure been found and there the annulment was the result of linking this breach to a violation of the general principles of EU law (Opel Austria).\textsuperscript{253} In contrast, if we look to infringement rulings, the alleged violation of an EU Trade Agreement has proved unsuccessful on only five occasions,\textsuperscript{254} which is unsurprising given that infringement rulings overwhelmingly uphold the Commission stance.\textsuperscript{255} Likewise, direct action challenges to EU action are also overwhelmingly unsuccessful,\textsuperscript{256} and thus it is perhaps unsurprising in general terms that the ratio of initiated actions to successful actions has not been greater. Nor would it be fair to say that there has been a patently meritorious argument in any of those judgments in which an annulment action invoking an EU Agreement had not been upheld. Ultimately, the annulment action cases pertaining to EU

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure.png}
\caption{Direct actions alleging infringements of EU Trade Agreements (53 cases, challenges to EU action/infringement rulings)}
\end{figure}

\textsuperscript{253} Two cases, however, did see successful annulments without the need to address the arguments concerning the EU Agreements themselves (C-267/94 France v Commission and C-159/96 Portugal v Commission), and two of the cases involved successful annulment actions due to Commission implementation monitoring deficiencies (Kaufring and Cas).

\textsuperscript{254} C-340/87; C-267/09; C-540/07; C-487/08; C-105/08, of which all bar C-105/08 found breaches of internal EU law.

\textsuperscript{255} As is evident from the annual statistics produced by the Court. To take the most recent data: in 2010, 83 of 95 rulings declared an infringement; in 2009, 133 of 143 rulings declared an infringement; in 2008, 94 of 103 rulings declared an infringement, and in 2007, 127 of 143 rulings declared an infringement.

\textsuperscript{256} See generally Tridimas and Gari (2010); Chalmers (2005).
Agreements have been so few, and even fewer where the EU Courts have actually engaged with the Agreements at stake, that only two additional comments need be made. The first is to underscore how willingly the political institutions resorted to the argument that a provision does not have direct effect or does not confer rights where the provisions are relied upon to challenge EU action (eg Petrotub and Stahl) or support strongly contestable substantive interpretations (Opel Austria) where their activity was challenged. The Yedas¸ Tarim ruling was also curious for there the GC sought to insulate EU action from Turkey Agreement review.

Finally, it is ultimately quite surprising how little judicial activity flowing from the direct action route to contest domestic or EU action has taken place. As regards challenges to EU action, Figure III.8 above illustrated that the 1980s witnessed a greater number of such challenges than the 1970s, and the 1990s an increase on the preceding decade. However, a range of factors aside from the growth in number of Agreements would also lead one to expect increased challenges, notably the considerable increase in both numbers of Member States and EU-level legislative and executive activity capable of being challenged, as well as greater recourse to majority voting which encourages Member State litigation. It is, accordingly, surprising that since the turn of the century there have been less rulings than in the 1990s, and that the case law since 2000 accounts for barely one-third of the rulings. The challenges to domestic action attests to a prima facie starkly different trend with only four infringement rulings predating 2000 (15 per cent) and the remainder (85 per cent) having occurred since then. The vast bulk of that activity is not only of the incidental infringement variety but also concerned exclusively with the EEAA.

4. Conclusions

As illustrated by Figure III.10, over 70 per cent of the 184 EU Trade Agreement cases have been generated via preliminary rulings.

And as Figure III.11 illustrates, nearly 80 per cent of the combined preliminary rulings and direct actions cases have involved challenges to domestic action.

Clearly, then, the EU Courts have been overwhelmingly called upon to adjudicate the compatibility of domestic action, rather than EU action, with EU Trade Agreements. And if we inspect more closely the challenges to
domestic action there was a clear willingness to adjudge them incompatible with EU Trade Agreements. This is wholly predictable for the 26 infringement rulings, given that infringement rulings generally overwhelmingly uphold the Commission line. Of more significance is the case law largely generated via preliminary rulings in which the ECJ rejected reasonable Member State attempts to ensure that it would not be in a position to adjudge their action incompatible with EU Agreements, as with the non-publication and absence of entry into force provision arguments employed vis-à-vis

Figure III.10 EU Trade Agreement cases (184 cases, preliminary rulings/direct actions)

Figure III.11 EU Trade Agreement cases (186 cases, challenges to domestic action/EU action)²⁵⁷

domestic action there was a clear willingness to adjudge them incompatible with EU Trade Agreements. This is wholly predictable for the 26 infringement rulings, given that infringement rulings generally overwhelmingly uphold the Commission line. Of more significance is the case law largely generated via preliminary rulings in which the ECJ rejected reasonable Member State attempts to ensure that it would not be in a position to adjudge their action incompatible with EU Agreements, as with the non-publication and absence of entry into force provision arguments employed vis-à-vis

²⁵⁷ C-251/00 Ilumitrónica and C-228/06 Soysal are included in both categories. The total of 186 challenges in Figure III.3 is explained by the fact that C-251/00 Ilumitrónica and C-228/06 Soysal are categorized as both challenges to EU and domestic action.
Association Council Decisions (Sevince and Taflan-Met respectively), as well as by contesting its jurisdiction over certain provisions of mixed agreements (as in Demirel and Irish Berne). In addition, the ECJ has addressed EU Agreements even when the issue was not raised by a question from the national court (Nijman; Ludwigs-Apotheke; Ospelt; Keller Holding; Hengartner), including by leaving the national court in little doubt that the domestic measure appeared to breach an EU Agreement (Simba).

In the preliminary ruling context, it is supposedly ultimately for the national court to draw the appropriate conclusions from the ruling, but the boldness of that line of case law, as evidenced by the direct effect findings and the substantive interpretation accorded to the provisions, cannot be denied. A maximalist approach to treaty enforcement has evidently taken hold with respect to EU Trade Agreements which has brought to bear powerful EU law enforcement tools for the policing of international treaty obligations entered into by the EU. It is perhaps not surprising, then, to find that in the particularly sensitive context of the persons line of authorities, a study published in 2002 documented a considerable level of Member State resistance, if not wilful non-compliance.

With the exception of Soysal, no preliminary ruling involving challenges to EU action invoking EU Agreements was successful, and in Soysal itself the ECJ curiously avoided engaging with the direct implications of what a decree to employ consistent interpretation actually entailed. Only one direct action has found an infringement of an EU Trade Agreement and the annulment of the EU measure required tortuous reasoning linked to general principles of EU law (Opel Austria). Little should be read into such a crude statistic. The ratio of challenges to domestic action versus EU action has been of the order of three to one and, more significantly, challenges to EU action involving EU Trade Agreements have rarely appeared meritorious, as evinced partly by the numerous direct actions where it was not even necessary to address the substance of the Agreements themselves. Accordingly, one might surmise that the litigation activity before the EU Courts as to the EU’s Trade Agreements indicates that the EU has been more assiduous in its compliance with its international, and indeed EU (Art 216(2) TFEU), obligations than have its constituent Member States. That said,

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258 Though in C-13/00 Irish Berne the Member State subject to infringement proceedings had conceded the breach.

259 For recent consideration of the level of specificity in the rulings, see Tridimas (2011).

a clear majority of challenges to domestic action have been concerned with
the persons-related provisions in EU Trade Agreements (around 100 of the
147 cases can be so classified). However, because of the absence of EU
legislative competence, which only began to emerge with the Maastricht
Treaty, EU institutions had not been able to legislate to determine whether
and under what conditions third country nationals—family members of EU
nationals aside—could enter and remain on the territory of EU Member
States. In short, the contrasting litigation patterns will partly be accounted
for by the fact that the EU has only recently acquired immigration compe-
tence and thus did not have legislative output in potential tension with these
Agreements.

Nevertheless, the result is that it would be possible to suggest that to the
extent that the maximalist treaty enforcement logic has been unleashed in
the Trade Agreements context, it has, at least as a matter of practice, been so
in a one-sided fashion in relation to the domestic action of the EU’s
constituent parts. It is in this sense, above all, the Member States and
their authorities that have had to grapple with the bold readings, and the
implications for the domestic legal order, of this additional external, and
now supra-constitutionalized, body of EU law.

261 Already included with the 1968 Free Movement of Workers Regulation (1612/68).