REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 1, 155-174, PARIS LEGAL PUBLISHERS © 2020

Popławski II: A Half-Hearted Embrace of Hierarchical Supremacy

Sim Haket*

Assistant Professor of European Constitutional Law, and part of the Montaigne Centre for Rule of Law and Administration of Justice, at Utrecht University

Abstract

In the Popławski II judgment, it is held that primacy of EU law provides the legal basis for the duty of consistent interpretation and State liability. This corresponds to a perspective where there is a hierarchical relationship between EU and national law. However, another feature of this hierarchical model, i.e. the possibility to disapply conflicting national law, without having recourse to direct effect, is rejected.

1. Introduction

In a valuable contribution delivered by Avbelj in 2011, he notes that, even after almost five decades since the inception of supremacy of EU law in the European Court of Justice's (hereinafter: the Court) case law, the principle is still surrounded by a considerable degree of ambiguity.[1] Avbelj examined whether there is a difference between supremacy and primacy and suggests that the two seemingly comparable notions can be viewed as referring to considerably distinct perspectives on the position of EU law in the national legal orders. A similar issue was discussed previously by Dougan in the context of an extensive examination on the relationship between direct effect and supremacy, leading to the conclusion that the latter is best viewed as a mere remedy by means of which national courts are to determine conflicts between EU and national law – instead of it being a '(...) "constitutional fundamental" of the

* DOI 10.7590/187479820X15881424928435 1874-7981 2020 Review of European Administrative Law

1 M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744.

European Union, permeating all relations between national law and Community law'.[2] The ambiguity surrounding the principle is in his opinion partially explained by divergent visions that have found expression in the Court's case law.

Despite extensive treatment of the topic by legal scholarship[3] (less so, however, in the Court's case law) and the fact that it has by now been well over five decades since the introduction of supremacy/primacy – perhaps unsurprisingly – the ambiguity has not abated. A rare glimpse into the Court's vision on this essential characteristic of EU law is offered by the *Popławski II* judgment, whose relevance extends far beyond the specific facts of the case, and therefore merits a case note. It provides two points of interest, whereby an old question is answered but a new one is being raised as well. First, primacy (but perhaps supremacy would have been the more appropriate term here, see subparagraph 4.1) is referred to by the Court as the legal basis for the obligation to interpret national law in conformity with framework decisions and State liability. This is the point giving rise to new questions. Secondly, primacy does not require national courts to disapply incompatible provisions if the relevant EU law provision does not have direct effect. The first point embraces a view on the relationship between EU and national law that can be described as the hierarchical supremacy model: all EU law is integrated into the national legal orders and they, together, constitute a unitary legal order in which all EU law is hierarchically superior. However, the second point of interest is at variance with this view and fits in better with the idea of primacy as a conflict rule model. The precise meaning of these models and the role that they play in the *Popławski II*

---

2 M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931, 932-33.

3 See, for example, in addition to the contributions by Avbelj (n 1) and Dougan (n 2) referred to above, LFM Besselink, 'Curing a "Childhood Sickness"? On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights' (1996) 3 Maastricht Journal of European and Comparative Law 165; JH Reestman, 'Primacy of Union Law: Articles Draft Convention I-10' (2005) 1 European Constitutional Law Review 104; M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 97ff; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287; S Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in C Barnard (ed), *The Fundamentals of EU Law Revisited* (Oxford University Press 2007) 38; B De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in G De Búrca and PP Craig (eds), *The Evolution of EU Law* (Oxford University Press 2011); P Craig and G De Búrca, *EU Law. Text, Cases and Materials* (Oxford University Press 2015) 266ff; M Claes, 'The Primacy of EU Law in European and National Law' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 178ff and M Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 Common Market Law Review 1459. See also H Jarass and S Beljin, 'Die Bedeutung von Vorrang und Durchführung des EG-Rechts für die Nationale Rechtsetzung und Rechtsanwendung' [2004] *Neue Zeitschrift für Verwaltungsrecht* 1; R Barents, 'De voorrang van unierecht in het perspectief van constitutioneel pluralisme' (2009) 57 *SEW Tijdschrift voor Europees en economisch recht* 44 and WT Eijsbouts and others, *Europees Recht Algemeen Deel* (Europa Law Publishing 2015) 283-90.

judgment, is further examined in the case note's analysis, which also adopts a position on the persuasiveness of the approach adopted by the Court in this judgment. The analysis is preceded by a description of the background of the case and the Court's ruling. A synthesis of the analysis's findings is provided in the conclusion, where I also briefly reflect on a possible explanation for the Court's approach and, by focussing on the role of primacy in the context of the duty of consistent interpretation, suggest an alternative way in which this principle could be relevant beyond the situation where EU law is directly relied upon by means of direct effect.

2. Facts of the case and preliminary questions

A Polish court issued a European Arrest Warrant against Mr Popławski, a Polish national residing in the Netherlands, for the purposes of executing a one-year custodial sentence. Proceedings were instituted before the District Court (*rechtbank*) Amsterdam relating to the execution of the European Arrest Warrant. The District Court Amsterdam considered that it follows from Article 6(2) and (5) of the Dutch Law on surrender that a national, or a foreign national who holds a residence permit of indefinite duration or has lawfully resided in the Netherlands for a continuous period of five years, shall not be surrendered, which then triggers the third paragraph, which stipulated that the public prosecutor declares itself to be 'willing' to assume responsibility for executing the sentence in accordance with Article 11 of the Convention on the Transfer of Sentenced Persons or on the basis of another applicable convention. This construction entailed that the actual execution of the sentence by the Netherlands is not certain and, since the decision refusing surrender on the basis of the European Arrest Warrant is not amenable to appeal and takes place before it is clear whether the assumption of responsibility to which Article 6(3) refers is in fact possible, there is the risk of impunity of the requested person. The District Court Amsterdam referred to the Court the preliminary question whether Article 6(2), (3) and (5) had correctly implemented Article 4(6) of the Framework Decision on the European Arrest Warrant (it is noted that, in as far as a reference is made to 'Framework Decision', this concerns the one on the European Arrest Warrant),[4] which states the following ground for optional non-execution of the European Arrest Warrant: 'if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of

4 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.

In the ensuing *Popławski I* judgment, it was found that Article 4(6) of the Framework Decision precludes legislation which, without more, does not authorise the surrender of a foreign national holding a residence permit of indefinite duration of the Member State receiving the request, and which merely lays down the obligation to declare a willingness to assume responsibility for executing the sentence, which follows after the incontestable decision refusing surrender. In the same judgment, it was reiterated that framework decisions do not have direct effect but that the national courts are required to apply the duty of consistent interpretation, which here entailed pursuing an interpretation whereby, if execution of the European Arrest Warrant is refused, the judicial authorities of the refusing Member State are themselves required to ensure that the sentence is actually executed.[5]

When the case returned to the District Court Amsterdam, it pointed out that it had initially presumed that there was sufficient scope to adopt a consistent interpretation of Article 6(3) of the Law on surrender by designating Article 4(6) of the Framework Decision as the legal basis required by that provision. However, it considered that it cannot be ensured that, in a case such as that of Mr Popławski, the sentence will in fact be executed as the competent organ under Dutch law (the Minister of Security and Justice) takes the view that this interpretation is not possible (I should add that, if I am correct, this is problematic because the procedure of executing a foreign court decision is terminated if the Minister of Security and Justice takes the view that there is not a legal basis in the sense of Article 6(3), which means that no judge gets involved). The District Court Amsterdam decided, again, to stay the proceedings and referred the following questions to the Court for a preliminary ruling:

1. 'If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the primacy principle, disapply those national provisions not in conformity with that framework decision?
2. Does a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909, which it did not make "on the adoption of this Framework Decision", but at a later date, have legal effect?'

5 Case C-579/15 *Popławski* I [2017] EU:C:2017:503.

3. The preliminary ruling

The Court first addresses the second question. I will discuss this point only briefly as it is not relevant for the analysis in paragraph 4. This question relates to Framework Decision 2008/909, which replaces, in relations between Member States, the provisions laid down in conventions on the transfer of sentenced persons.[6] Article 28(2) of that framework decision allows Member States to make a declaration having the effect that the application of the framework decision is delayed. The Netherlands and Poland had made such a declaration, but both were made after the adoption of the framework decision. The Court provides that '(...) Article 28(2) of Framework Decision 2008/909 must be interpreted as meaning that a declaration made pursuant to that provision by a Member State, after that framework decision was adopted, is not capable of producing legal effects'.[7] Even though the Netherlands had already withdrawn its declaration, the question remained relevant as Poland had not and this entails that, in relations with this Member State, the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011 (the date on which the Framework Decision had to be implemented in the Member States) continue to apply – which, for the Netherlands, meant that the requirement applied that there be a legal basis in a convention for assuming responsibility to execute the sentence.

When it addresses the first question regarding the circumstances under which it is possible to disapply national provisions incompatible with EU law, the Court delivers an exposé on primacy. Recalling its previous considerations from, among others, Opinion 2/13 concerning the accession of the EU to the ECHR, it is considered that '(...) EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'.[8] Primacy establishes the pre-eminence of EU law, therefore requiring that full effect is given to that law.[9] This full effectiveness of EU law entails the duty of consistent in-

6 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27.

7 Case C-573/17 *Popławski II* [2019] EU:C:2019:530, para 49.

8 ibid, para 52, referring to, among others, opinion 2/13 of the court (Full Court) of 18 December 2014 [2014] EU:C:2014:2454, paras 166-67.

9 ibid, paras 53-54.

terpretation as well as the principle whereby a Member State is liable for breach of EU law. This leads to the conclusion that '(...) in order to ensure the effectiveness of all provisions of EU law, the primacy principles requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State'.[10]

It is also in the light of primacy of EU law that, where a consistent interpretation is not possible, national courts are required to refuse to apply any conflicting national provisions. Nevertheless, '(...) the principle of the primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not (...)'.[11] It then states the major premise that provisions that do not have direct effect cannot be relied upon to disapply an incompatible provision of national law, the minor premise that framework decisions do not have direct effect, leading to the conclusion that '(...) a court of a Member State is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to those framework decisions'.[12]

After these considerations, the Court turns to the duty of consistent interpretation, pointing out that '(...) although the framework decisions cannot have direct effect, their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law (...)'.[13] It devotes no less than 28 paragraphs to discussing how the referring court might proceed when it applies the duty of consistent interpretation in the case before it. I wish to highlight two points. First, the Court's considerations regarding the impediment deriving from the position adopted by the Minister of Security and Justice. It considers that, as a Member State authority, the Minister is itself subject to the requirement to interpret national law, to the greatest extent possible, in conformity with EU law, and also points out that the position adopted by the Minister cannot affect the referring court's independent obligations concerning consistent interpretation.[14] Accordingly, '(...) the referring court cannot (...) validly claim that it is impossible for it to interpret Article 6(3) in a manner that is compatible with EU law, for the sole reason that that provision has been interpreted, by the Minister, in a way that is not compatible with EU law'.[15] By

10 ibid, para 57.
11 ibid, para 60.
12 ibid, paras 62, 69 and 71.
13 ibid, para 72.
14 ibid, paras 94-96.
15 ibid, para 97.

way of an analogy, reference is made to the *Ognyanov* judgment which stated that the national court cannot claim that it is impossible to adopt a consistent interpretation because another, higher-ranking, judicial authority of that Member State has rejected such an interpretation.[16] Secondly, it is interesting to see that a distinction is made between an interpretation that would be entirely in accord with the Framework Decision and one that is at least not incompatible with the objectives pursued by it. The former would require that Dutch law is interpreted as not only ensuring that, if execution of the European Arrest Warrant is refused, the sentence is actually executed by the Netherlands but also that the executing judicial authority has a margin of discretion in relation to the application of the ground for non-execution. If the latter interpretation would not be possible (which seemed to be the case), the referring court should nevertheless seek an interpretation that does not run counter to the Framework Decision's objective to avoid any risk of impunity.[17]

4. Analysis

The *Popławski II* judgment contains a number of interesting points with regard to the effects of EU law in the national legal orders. I focus on what in my opinion constitutes the most fundamental contribution of the judgment, namely the Court's vision on the position which EU law adopts *vis-à-vis* national law, and the concrete consequences flowing from this, which ties together its considerations regarding the legal basis for the duty of consistent interpretation and State liability, and the conditions for disapplying an incompatible national provision.

It is noted that the judgment in *Popławski II* concerned a framework decision. This type of instrument no longer exists under the Lisbon Treaty but Article 9 of Protocol 36 to that Treaty provides that the legal effects of, among others, framework decisions shall be preserved until they are repealed, annulled or amended. As was again confirmed in *Popławski II,* these effects include the exclusion of direct effect. It also means that a large number of framework decisions and their legal effects continue to be part of the EU legal order to this day. Hence, despite the abolishment of framework decisions under the Lisbon Treaty, the judgment does not concern a matter that will soon belong to the realm of legal history. Moreover, it contains statements on EU law that are highly important for the whole body of EU law and in particular directives,

16 Case C-554/14 *Ognyanov* [2016] EU:C:2016:835, para 69 which, in turn, referred to Case C-441/14 *Ajos* [2016] EU:C:2016:278, para 34, where this further interpretation of the scope of the duty of consistent interpretation was first provided.

17 Case C-573/17 *Popławski II* [2019] EU:C:2019:530, para 107.

which share many characteristics with framework decisions. Of course, unlike framework decisions, directives can in principle have direct effect, but this is subject to the condition that the concerned provision is unconditional and sufficiently precise and there is the important limitation that directives cannot be invoked against an individual.

4.1. The conflict rule and hierarchical model

In order to understand the Court's vision on the position which EU law adopts in relation to national law, it is necessary to discuss the terminology that is traditionally used by the Court and legal scholarship for describing the Court's perspective. For this, the terms 'primacy' and 'supremacy' are used, but they are often used interchangeably. In order to prevent confusion, it is necessary to elucidate, and further differentiate, their meaning. It is contended that primacy must be viewed as a conflict rule model whereas supremacy corresponds to a hierarchical model.[18] This meaning is also fitting from a linguistic point of view. While this already gives a better impression of what primacy and supremacy refer to, the conflict rule and hierarchical model will be further discussed in order to understand the consequences that flow from the choice for one of these models. By the way, the Court rarely refers to supremacy and seems to prefer referring to primacy or precedence. Nevertheless, the former remains the preferred option for legal scholarship.[19]

---

18 The link between primacy and the conflict rule, and supremacy and the hierarchical understanding of the relationship between the EU and national legal orders, can be found in M Claes, 'The Primacy of EU Law in European and National Law' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 182. The same link is drawn in M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744, 746-51 and JH Reestman, 'Primacy of Union Law: Articles Draft Convention I-10' (2005) 1 European Constitutional Law Review 104 (albeit the latter uses the term primacy as an umbrella term, covering supremacy for the hierarchical model, and 'precedence' is preferred when describing the conflict rule). It should be noted that variants of primacy or supremacy can be linked to the distinction between the conflict rule and hierarchical model, e.g. judicial vs. normative primacy or supremacy (concerning the question whether EU law is superior in rank or whether it merely cannot be *judicially* overridden), and *Anwendungsvorrang* vs. *Geltungsvorrang* (concerning the question whether primacy or supremacy concern the application of rules or their validity): see M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 98 and M Claes, 'The Primacy of EU Law in European and National Law' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 182.

19 M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744, 744-745 and M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 98.

Besselink describes the conflict rule model of primacy as '(...) the precedence which a rule of Community law has over national law in cases of conflict'.[20] In other words, it 'merely' provides what should happen if a conflict between EU and national law can be identified. If there is a conflict, primacy requires the national provision to be disapplied in the concrete case and only to the extent that it is incompatible with EU law.[21] The conflict rule model neither makes claims based on primacy as regards the origins of other key principles of EU law such as the duty of consistent interpretation and State liability nor does it determine when a conflict between EU and national law is cognisable. The conflict rule model can be distinguished from the hierarchical model envisaged by supremacy, which is premised on the idea of the autonomy of the EU legal order, whose provisions are all part of 'the law of the land' ('from the moment of its inception') and therefore necessarily integrated into the national legal orders. Moreover, they together constitute a unitary legal order in which all EU law is hierarchically superior. If it is found that a national provision is incompatible with EU law, it becomes invalid.[22] The hierarchical model operates as a 'grand structural principle of integration' from which all other principles, such as direct effect, consistent interpretation and State liability, derive.[23] Support for this model can be found in the *Simmenthal* judgment, where it is provided that '[i]n accordance with the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence

---

20 LFM Besselink, 'Curing a "Childhood Sickness"? On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights' (1996) 3 Maastricht Journal of European and Comparative Law 165, 168. See also JH Reestman, 'Primacy of Union Law: Articles Draft Convention I-10' (2005) 1 European Constitutional Law Review 104; B De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in G De Búrca and PP Craig (eds), *The Evolution of EU Law* (Oxford University Press 2011) 323 and M Claes, 'The Primacy of EU Law in European and National Law' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 182.

21 Case C-226/97 *Lemmens* [1998] EU:C:1998:296, paras 35-7; Case C-97/11 *Amia* [2012] EU:C:2012:306, para 27 and Case C-619/16 *Kreuziger* [2018] EU:C:2018:872, para 23.

22 See, for a description, M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744, 746-50. See also M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931, 943. Support for the hierarchical model, or elements attached to this model, is provided in M Lenz, 'Horizontal What? Back to Basics' (2000) 25 European Law Review 509; T Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2001) 21 Yearbook of European Law 327; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287.

23 M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744, 746.

in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'.[24] However, this position is clearly contradicted by later case law.[25]

Primacy is extensively discussed in the contribution delivered by Avbelj in 2011. The above statements can also be found there. Additionally, he makes an interesting assertion concerning the relationship between EU and national law. He argues that primacy denotes a heterarchical model and the primacy of EU law is subject to compliance with a Member State's own irreducible epistemic core (standing for 'the essential formal and substantive features in whose absence it cannot exist qua a specific autonomous legal order').[26] It should be noted that the current contribution does not adopt a position with regard to this latter aspect of Avbelj's argument. The question whether it may sometimes be necessary to balance EU law against essential features of national law, does not have any added value for the analysis of the *Popławski II* judgment.

4.2. The legal basis for the duty of consistent interpretation and State liability

The hierarchical supremacy model views the duty of consistent interpretation as an inherent feature of hierarchically superior EU law which, by its very nature, has become part of the national legal orders, and as deriving directly from the idea of supremacy.[27] This also applies to framework decisions which, just as directives, always require transposition into national law (see Article 34(2)(b) of the EU Treaty in the version applicable under the Nice Treaty, which was to a large extent modelled on the predecessor of Article 288 TFEU, i.e. they state the binding nature *vis-à-vis* Member States and the implementation obligation for framework decisions and directives respectively). It should be noted that it is the supremacy of the substantive provision of EU law (e.g. Article 4(6) of the Framework Decision on the European Arrest Warrant) *vis-à-vis* the hierarchically inferior rule of national law that justifies that the latter must be given a consistent interpretation. Similarly, the hierarchical model puts forward that State liability logically follows from the violation of higher-ranking EU law

24 Case 106/77 *Simmenthal* [1978] EU:C:1978:49, para 17.
25 Joined Cases C-10/97 to C-22/97 *IN.CO.GE. '90* [1998] EU:C:1998:498, para 21.
26 M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 31 European Law Journal 744, 750-53, 762.
27 Case C-106/89 *Marleasing* [1990] EU:C:1990:310, Opinion of AG Van Gerven, para 9. See further K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287, 293.

by national law.[28] In both cases the legal basis thus hinges on two assumptions. First, that the entire body of EU law is part of the national legal orders. Secondly, any EU law provision enjoys supremacy all of the time, and not merely when they have direct effect.

The described approach is difficult to reconcile with the idea of primacy as a conflict rule model, in particular as far as concerns the legal basis for the duty of consistent interpretation. A legal basis that is found in the supremacy of an EU law provision with which national law seems to be in conflict does not work here as it is not yet found that such a conflict of substantive norms exists (e.g. where national law provides for an exception to the principle that a European Arrest Warrant gives rise to the obligation to surrender, which the Framework Decision does not permit). After all, only if the conclusion is drawn that national law cannot be given a consistent interpretation, can it be said that the substantive EU and national rule conflict with each other.[29] In this regard Dougan observes that there is an apparent conflict between EU and national law in the context of the duty of consistent interpretation and that it is only after it is found that such an interpretation is not possible, that a 'live conflict' between the two can occur.[30] If, on the other hand, the legal basis is found in Articles 288 TFEU and 4(3) TEU, which is the position adopted in hitherto settled case law,[31] no incompatibility with the conflict rule model arises. In the *Pfeiffer* judgment, the full effectiveness of EU law was added to the legal basis.[32] Arguably, effectiveness is invoked here as referring to 'the effective protection of Community rights and, more generally, the effective enforcement of Community law in national courts'.[33] It then performs a function that is largely similar to the duty of sincere cooperation. In fact, there is broad support for the view that the principle of effectiveness of EU law is derived from Article 4(3) TEU.[34] It is submitted that

---

28 M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 117.

29 M Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino?' (2005) 30 European Law Review 862, 876; LFM Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) 7-8.

30 M Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 Common Market Law Review 1459, 1462.

31 Case 14/83 *Von Colson and Kamann* [1984] EU:C:1984:153, para 26. Confirmed in, for example, Case C-106/89 *Marleasing* [1990] EU:C:1990:395, para 8; Case C-91/92 *Faccini Dori* [1994] EU:C:1994:292, para 26 and Case C-212/04 *Adeneler* [2006] EU:C:2006:443, para 113.

32 Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] EU:C:2004:584, para 114.

33 See, for this description of effectiveness, T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 418.

34 J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2008) 31 Fordham International Law Journal 1483, 1489 and M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 138, 271. See also R Caranta, 'Judicial Protection against Member States: A New *Jus Commune* Takes Shape' (1995) 31 Common Market Law Review 703, 704, where it is provided that the requirement of effective judicial protection is derived from Article 4(3) TEU.

the addition of the effectiveness of EU law was first and foremost of added value in relation to Third Pillar framework decisions because there was no provision similar to Article 10 of the EC Treaty (the predecessor of Article 4(3) TEU). This materialised in the *Pupino* judgment, which introduced the duty of consistent interpretation for framework decisions, for which the Court, in addition to Article 34(2)(b) of the EU Treaty, relied on the principle of effectiveness, which justified the applicability of the duty of sincere cooperation in the Third Pillar.[35] In relation to State liability, the hierarchical model's explanation for such an obligation poses conceptual difficulties too. Under the conflict rule model, primacy only has the function of prescribing how the conflict between EU and national law should be resolved whereas State liability occurs *subsequently* and refers to the situation where the rule of EU law was already violated. Under the conflict rule model there are, however, no objections against basing State liability on the full effectiveness of EU law and Article 4(3) TEU, as was done in the *Brasserie du Pêcheur* judgment.[36]

With regard to the legal basis for the duty of consistent interpretation and State liability, the *Popławski II* judgment clearly supports the hierarchical model's approach. It explicitly states that both remedies are required as a matter of the primacy of EU law (but note that, first, while the Court uses the term primacy, supremacy might have been a more appropriate term here if an understanding of primacy is adopted that corresponds to the above and, secondly, in relation to consistent interpretation, there is an inconsistency in the judgment as the binding nature of framework decisions was also mentioned further on in the judgment, which seems to be a reference to Article 34(2)(b) of the EU Treaty as the legal basis). I already pointed out that the viability of this approach hinges on two assumptions: the whole body of EU law is integrated into the national legal orders and enjoys supremacy. The first point has never really been problematic in relation to the Treaties (or regulations). It naturally follows from their characteristics that they are integrated into the national legal orders and national courts are bound to apply them.[37] Framework decisions and directives are addressed to the Member States, always require transposition into national law, and it is only then that they acquire their full effect. However, the *Francovich* judgment clarified that directives are an integral part of the national legal orders, too.[38] It would be logical to assume that the same applies for

35 Case C-105/03 *Pupino* [2005] EU:C:2005:386, paras 33-4 and 39-42. The binding character of framework decisions and the full effectiveness of EU law were referred to in a recent judgment: Case C-492/18 *PPU* [2019] EU:C:2019:108, para 67. See also Case C-554/14 *Ognyanov* [2016] EU:C:2016:835, paras 58-59.

36 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] EU:C:1996:79, para 39.

37 See, for example, Case 14/68 *Walt Wilhelm* [1969] EU:C:1969:4.

38 Joined Cases C-6/90 and C-9/90 *Francovich* [1969] EU:C:1969:4, paras 31, 34.

framework decisions. Secondly, as regards (hierarchical) supremacy, in the *Costa* v *ENEL* judgment, it was of course found that EU law cannot be overridden by domestic legal provisions.[39] There is support in legal scholarship for the view that the same considerations that underpinned the Court's decision in *Costa* v *ENEL,* equally apply to the Third Pillar and, hence, to framework decisions.[40] Be that as it may, what is then being transposed? It is submitted that, while *Costa* v *ENEL* confirms the primacy of EU law (i.e. the conflict rule), it is not sufficient to justify hierarchical supremacy. The Court did not pronounce the invalidity of the Italian rule, but it interpreted the Treaty and left it to the national court to draw the consequences from this interpretation for national law. Apart from the *Simmenthal* judgment (see subparagraph 4.1), the only clear support for hierarchical supremacy is found in the *Popławski II* judgment itself when the Court explains its vision on the legal basis for the duty of consistent interpretation and State liability. There is thus not a compelling line of precedent in the Court's case law to support the assumption that EU law by its very nature always enjoys supremacy. If I am correct, the *Popławski II* judgment refers to the imperative of the full effectiveness of EU law to support the primacy/supremacy of EU law. Interestingly, it has been observed that effectiveness provided the main foundation for the ruling in *Costa* v *ENEL*.[41] Article 4(3) TEU has also been mentioned in this regard,[42] which is not surprising on account of the proximity of the two, but it is logical that it was not mentioned in the *Popławski II* judgment as Article 4(3) TEU, more specifically its predecessor Article 10 of the EC Treaty, did not apply to framework decisions. The hierarchical model elevates supremacy – instead of the full effectiveness of EU law – to the *leitmotiv* of EU law, requiring that key principles such as consistent interpretation and State liability ultimately trace back to it. On this view, the rationale for these principles cannot be 'simple' articles in the Treaties or the idea of effectiveness, as supremacy would then no longer be the 'grand structural principle of integration'.

But even if I am incorrect with regard to the above, there are more practical reasons pleading against the hierarchical model's approach to the legal basis for the duty of consistent interpretation and State liability that require consideration. Is it a more convincing approach? After all, what was wrong with the traditional legal basis? For the conventional legal basis, Article 34(2)(b) of the EU Treaty is of primary importance. This conceptualises the judiciary's endeav-

39 Case 6/64 *Costa* v *ENEL* [1964] EU:C:1964:66.

40 K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287, 289-90.

41 B De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in G De Búrca and PP Craig (eds), *The Evolution of EU Law* (Oxford University Press 2011) 329.

42 M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 77-78.

ourers as 'an extension of the implementation obligation',[43] and I believe that this is a convincing position. Importantly, the conventional legal basis is also widely accepted by the national courts.[44] I am not sure whether the hierarchical outlook on the relationship between EU and national law, which underlies the legal basis for consistent interpretation if it is based on the integrated nature, and supremacy, of the entire body of EU law, will be met with enthusiasm in all the Member States. For example, in German legal scholarship it is not uncontested that directives (and the same applies *a fortiori* for framework decisions) have legal effect and must be given precedence outside the context of direct effect.[45] Additionally, some of the specific methodological instructions developed by the Court make more sense if the obligation is viewed as being connected to the implementation obligation, e.g. where national courts interpret implementing legislation, they must presume that the legislature intended to comply with the directive (for which the Court explicitly referred to what is now Article 288 TFEU).[46] Also, a novelty of the *Popławski II* judgment is that it states an obligation for administrative authorities to interpret national law in conformity with EU law.[47] The judgment makes no reference in that regard to Article 34(2)(b) of the EU Treaty, even though that provision directly addresses administrative authorities as organs of the Member State.

The effectiveness principle and/or Article 4(3) TEU are essential for the establishment of State liability. The former was mentioned in the *Popławski II* judgment, but was invoked by the Court to support the primacy (but, if the understanding of primacy adhered to in this contribution is followed, supremacy might perhaps have been a more appropriate denomination) of EU law, not the remedy of State liability. Also here the departure from settled case law, and the difficulties on account of the perceived effect of EU law in the national legal orders, are mentioned.

---

43 See, in relation to Article 288 TFEU, C-W Canaris, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre' in H Koziol and P Rummel (eds), *Im Dienste der Gerechtigkeit* (Springer Verlag 2002) 56 and M Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect' (2006) 43 Common Market Law Review 1251, 1261. See also W Brechmann, *Die richtlinienkonforme Auslegung* (CH Beck'sche Verlagsbuchhandlung 1994) 256-57.

44 See, for a detailed discussion on this point, S Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (Intersentia 2019) 92-96, 171-74, 224-27.

45 W Brechmann, *Die richtlinienkonforme Auslegung* (CH Beck'sche Verlagsbuchhandlung 1994) 191-94, 247-49, 251-52, 255-56 and HD Jarass, 'Richtlinienkonforme bzw. EG-rechtskonforme Auslegung nationalen Rechts' in HD Jarass, LF Neumann and A Pastowski, *Umweltschutz und Europäische Gemeinschaften : rechts- und sozialwissenschaftliche Probleme der umweltpolitischen Integration* (Springer 1992) 217-18.

46 Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] EU:C:2004:584, para 112.

47 It had already been argued that such an obligation existed: see MJM Verhoeven, *The Costanzo Obligation*(Intersentia 2011) 31.

4.3. The conditions for disapplying incompatible national law

According to the hierarchical model it is self-evident that, if it is found that a provision of national law is incompatible with EU law, the former must be disapplied. This does not require direct effect, but is simply viewed as the natural state of affairs if, within the same legal order, the lower-ranking norm is incompatible with the higher-ranking norm. Direct effect is simply viewed as being superfluous,[48] or it is given a more limited meaning: it is then viewed as referring to the situation where EU law itself grants rights to individuals, which can only exist in the national legal order *qua* the intervening provision of EU law.[49] This technique would have worked well in the proceedings before the referring court as it appeared that the result prescribed by Article 4(6) of the Framework Decision could be achieved by simply disapplying Article 6(2) and (5) of the Law on surrender. The drawn distinction applies just as much in the area of framework decisions as other parts of EU law.[50]

Alternatively, in relation to directives, direct effect can be understood as deriving from the binding effect conferred upon them by Article 288 TFEU in combination with the principle of effectiveness and/or Article 4(3) TEU. Case law provides the most support for this approach.[51] It then follows in particular from the scope of Article 288 TFEU, which is only addressed to the Member States, that the direct effect of directives cannot be invoked against individuals. In the context of framework decisions, it follows from Article 34(2)(b) of the EU Treaty that they do not have direct effect. The same applies, of course, for the hierarchical model of supremacy. However, the conflict rule model of primacy does not add to this the assertion that direct effect should be interpreted as only referring to the creation of new rights. Instead, direct effect can be defined as 'the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case *or as a standard for legal review* [emphasis added; SWH]'.[52]

In order to support the position that it follows from the principle of supremacy as such that all provisions of EU law must be applied by national courts or, according to the more moderate version, only when they are used to disapply

48 M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 European Law Journal 744, 746.

49 K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287, 289-91.

50 ibid.

51 See, for example, Case 41/74 *Van Duyn* [1974] EU:C:1974:133, para 12; Case 148/78 *Ratti* [1979] EU:C:1979:110, paras 20-21 and Case 190/87 *Moormann* [1988] EU:C:1988:424, paras 22, 24.

52 S Prechal, 'Direct Effect, Primacy, and the Nature of the Legal Order' in C Barnard (ed), *The Fundamentals of EU Law Revisited* (Oxford University Press 2007) 37-38.

conflicting national provisions, the hierarchical model again relies on the two assumptions that the whole body of EU law is integrated into the national legal orders and enjoys supremacy. It was seen above that there is some support in the *Francovich* judgment for the first assumption but that it is more difficult to substantiate the second assumption. In any event, the *Popławski II* judgment did not follow this route. It thereby deviated from the Opinion of Advocate General Sánchez-Bordona who, following the lead of Advocate General Bot in *Popławski I,* contended that, even if the concerned EU law provision does not have direct effect, the principle of primacy (only) requires national courts to disapply conflicting national provisions (with the risk of stating the obvious, I again point out that his use of the term primacy departs from the meaning of primacy proposed in this contribution).[53] Advocate General Sánchez-Bordona also referred to the recent *Link Logistik N&N* judgment,[54] concerning the effects of directives. In that judgment the Court initially found that the relevant provision contained in the directive did not have direct effect, which was, however, followed by the consideration that if a consistent interpretation is not possible '(...) the national court must fully apply EU law and protect the rights which EU law confers on individuals, disapplying if necessary any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law'.[55] However, the point was neither given specific consideration nor motivated by the Court. This gives rise to the question whether it really intended to depart from settled case law and to relinquish the requirement of direct effect for disapplying incompatible national law.[56] In any event, the *Popławski II* judgment explicitly provides that the requirement of direct effect is not relinquished. The Court points out that the binding nature of Article 34(2)(b) of the EU Treaty exists only in relation to the Member States to which it is addressed. This consideration clearly contradicts the hierarchical model's vision on the position of EU law in the national legal orders. As regards the argument that supremacy would merely have had the function of disapplying national provisions, it is noted that this resembles the distinction between invocability of exclusion and substitution.[57] It is noted that this distinction has been criticised for being artificial as it will often depend on the type and purpose of the proceedings and the formulation of national law how the EU law provisions need to be deployed to secure the result prescribed by them.[58]

---

53 Case C-573/17 *Popławski II* [2018] EU:C:2018:957, Opinion of AG Sánchez-Bordona, para 125. See also Case C-579/15 *Popławski I* [2017] EU:C:2017:116, Opinion of AG Bot, para 88.

54 Case C-573/17 *Popławski II* [2018] EU:C:2018:957, Opinion of AG Sánchez-Bordona, para 117.

55 Case C-384/17 *Link Logistik N&N* [2018] EU:C:2018:810, para 61.

56 See also the case note by Verhoeven in *Administratiefrechtelijke Beslissingen* 2019/73.

57 See also Case C-579/15 *Popławski I* [2017] EU:C:2017:116, Opinion of AG Bot, para 88.

58 S Prechal, *Directives in EC Law* (Oxford University Press 2005) 237.

Finally, it could of course be argued that, as regards direct effect, the difference between the conflict rule and hierarchical model (i.e. primacy and supremacy respectively) concerns merely the origins of direct effect, i.e. Article 288 TFEU in combination with effectiveness and/or Article 4(3) TEU, and supremacy of EU law, respectively. As regards the relationships in which direct effect can be invoked, they are both equally bound by the scope of Articles 288 TFEU and 34(2)(b) of the EU Treaty. The claim made by the hierarchical model is then far more modest (the higher-ranking EU law norm cannot be applied at all against the lower-ranking norm of national law in the context of framework decisions, and only against the Member State as far as concerns directives). While this may be so, it is submitted that, if this position is adopted, the effects of framework decisions and directives are more controlled by Article 34(2)(b) of the EU Treaty and Article 288 TFEU than anything else.

5. Conclusion

On the one hand, the Court's *Popławski II* judgment adheres to a view that corresponds with hierarchical supremacy, by highlighting the pre-eminence of all EU law over national law, and by conceptualising consistent interpretation and State liability as a logical consequence of the hierarchical relationship that is held to exist between superior EU law and inferior national law. On the other hand, it is only a half-hearted embrace of hierarchical supremacy since the possibility to disapply conflicting national law solely on the basis of supremacy – i.e. without having recourse to direct effect – is rejected. It can be asked why the Court opted for an approach which, in my view, is not entirely consistent from a theoretical point of view. The answer to this question is speculative, but the judgment could perhaps be viewed as a compromise between judges that adhere to views corresponding to hierarchical supremacy and those that do not.[59] It is pointed out that, on account of his work in an academic capacity, President Lenaerts appears to belong to the former group and he was also presiding the Grand Chamber that delivered the *Popławski II* judgment.[60] Perhaps it was the limitation recognised in the judgment of *Popławski II* on how EU law can manifest itself in the present proceedings that gave rise to the desire to demonstrate that the proclaimed pre-eminence of EU law is not an empty promise but reveals itself through consistent interpretation and State liability.

59 See also M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931, 963, discussing the Court's inconsistency with regard to its vision on the relationship between direct effect and primacy.

60 See K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287, to which I have already referred on a number of occasions.

It was seen that, in the context of the hierarchical model, the legal basis for these two remedies (and the same applies for direct effect), hinges on the model's dual assumption that the whole body of EU law is integrated into the national legal orders and enjoys (hierarchical) supremacy (always, so also for example when it does not have direct effect). I argued that the latter part of the assumption is not unproblematic. Moreover, what is the added value of the proclaimed legal basis? For consistent interpretation, Article 34(2)(b) of the EU Treaty and the principle of effectiveness already provide a convincing legal basis. The same holds true for State liability as far as concerns effectiveness and/or Article 4(3) TEU. It was also pointed out that it is far from certain that the vision on which the hierarchical model hinges will be met with enthusiasm in all the Member States. Finally, the legal basis which relies on supremacy is less compatible with some of the methodological instructions on the duty of consistent interpretation. Turning to direct effect, the Court did not follow the hierarchical supremacy model, which would have entailed the possibility of exclusionary direct effect. Hence, the modalities of direct effect of framework decisions and directives are rather controlled by Article 34(2)(b) of the EU Treaty and Article 288 TFEU, respectively, than the idea of hierarchical supremacy. On balance, the hierarchical model appears to be superfluous under the approach adopted in the *Popławski II* judgment and the more modest conflict rule model of primacy seems to be a better fit. It places less expectations on what the principle is responsible for and simply provides that where a conflict between EU and national law is identified, it must be resolved in favour of the former, causing the latter to be disapplied. It relies on the ordinary application of the Treaties to determine when it can be said that such a conflict does, and when it does not (or at least not yet), exist. Rejecting the possibility to disapply national law solely on the basis of a hierarchical notion of supremacy will surely negatively affect the Dutch court's scope to adopt a solution that is in conformity with EU law. However, from the perspective of legal doctrine, make-shift solutions too often pose a threat to the intelligibility and predictability of the law and the judgment is to be welcomed for resisting the temptation of offering the Dutch judge a quick fix.

The above analysis does not mean that primacy can never play a role outside the context where EU law is relied upon by means of direct effect. I discuss this in detail in *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts*.[61] It falls outside the scope of this contribution to repeat that argument in detail here. Nevertheless, it is perhaps useful to point out that, when primacy plays a role in relation to consistent interpretation, the use of primacy

[61] S Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (Intersentia 2019).

does not differ significantly from the meaning which that principle has under the conflict rule model discussed above. While consistent interpretation normally mediates the apparently conflicting positions under EU and national (substantive) law in a peaceful way – using the discretion which the duty of consistent interpretation and national interpretative rules permit – my extensive analysis of the case law shows that, sometimes, this is not sufficient and a conflict of interpretative norms (instead of substantive norms) arises which can be resolved by giving priority to the interpretative rule of consistent interpretation. Also, for legal systems that normally have a flexible framework of interpretative rules, a fixed priority of arguments that favour a consistent interpretation, also indicates that the application of the duty of consistent interpretation has the capacity to set aside parts of the traditional domestic approach to interpretation. Therefore, *sometimes* the interaction between EU and national law in the context of the duty of consistent interpretation is most adequately described by primacy of EU law. But this neither significantly alters the meaning of primacy as a conflict rule nor does it mean that Articles 288 TFEU and 4(3) TEU (with the inclusion of effectiveness) are no longer the legal basis for the obligation of consistent interpretation as such. The conceptual 'difficulty' only arises from the fact that primacy is used in another context than direct effect, the setting in which use of that principle is probably most familiar for the majority of EU lawyers.

Postscript

The reader may by now be interested to learn what happened when the case returned to the referring Dutch court. In the follow-up judgment,[62] the District Court Amsterdam considered that the request for surrender must be adjudicated on the basis of the legal instruments applicable before 5 December 2011. Hence, the burdensome requirement of there being a legal basis in a convention applied. There is an agreement between Poland and the Netherlands, but this requires a request from the Polish authorities to transfer the sentence to the Netherlands whereas the former's position is that the Netherlands must – without more – execute the sentence themselves if they refuse surrender on the basis of the European arrest warrant. Therefore, the District Court Amsterdam follows the route suggested to it by the Court whereby the requirement of a legal basis in a convention, stated in Article 6(3) of the Law on surrender, is interpreted to include a provision such as Article 4(6) of the Framework Decision. Since the latter does not state any further requirements to transfer the sentence, it is concluded that such an interpretation should ensure that the sentence is executed in the Netherlands. Hence, the surrender of

62 District Court Amsterdam 26 September 2019, ECLI:NL:RBAMS:2019:7104.

Mr Popławski to Poland is refused. Is it absolutely certain that the Netherlands will indeed execute the sentence? It was already explained that this is a decision which lies within the competence of the Dutch Minister of Security and Justice (as well as the public prosecutor). The District Court Amsterdam observes that, taking into account the *PopławskiII* judgment, it expects these organs to comply fully with their duty to interpret the law in conformity with the Framework Decision. Of course. And I see no room for them to do otherwise as the District Court Amsterdam's judgment was not appealed. Then again, in reality things often turn out to be more difficult than our law books have us believe.