On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?

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Abstract: This article seeks to, first, clarify the meaning and scope of an array of ‘legal-effect labels’ which are often used interchangeably or in a loose way in the literature and, second, assess to what extent they can be applied to two kinds of very representative third pillar measures: Framework Decisions and Decisions, defined in Article 34(2) TEU. These ‘labels’ are ‘directly applicable’, ‘directly effective’, ‘self-executing’ and ‘supreme’. The main conclusion is that these are interconnected concepts, in that the way in which we define one of them may prejudge the scope and/or the role played by others. This is particularly so in the case of direct effect, expressly excluded in the Treaty definition of Framework Decisions and Decisions. Arguably, our definition of direct effect will determine whether these measures can develop other effects—especially those emanating from the principle of supremacy (should we accept the latter as applicable to the third pillar). Further, the article argues that even if we adopt a narrow reading of direct effect that would allow for a hypothetical application of the principle of primacy to these third pillar measures, there are powerful reasons to reject the judicial extension of the Simmenthal duty to this area within the current framework of the TEU.

Introduction

This article seeks to clarify the meaning of, and relationship between, four labels concerning the effects of legal measures—‘directly applicable’, ‘directly effective’, ‘self-executing’ and ‘supreme’—to find out whether or to what extent they can be applied to third pillar Framework Decisions and Decisions. The meaning and scope of these labels is often unclear or disputed. It is not the aim of this article to put an end to such disputes, but merely to draw attention to the fact that the way in which we define one of these labels prejudices the role played by the rest in the third pillar: especially significant is the definition of direct effect, given that it is explicitly banned for Framework Decisions and Decisions by Article 34(2) TEU.

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The article will start with a brief description of the range of third pillar measures, of which Framework Decisions and Decisions are part. An attempt at clarification of the labels ‘directly applicable’, ‘directly effective’, ‘self-executing’ and ‘supreme’ will follow. This section will also show the interconnections between these labels and, especially, how the scope attributed to direct effect will prejudice several questions, namely whether direct effect and supremacy necessarily come hand in hand, whether we have any use for a label such as ‘self-executing’ and whether supremacy has a hypothetical role to play in the third pillar. Finally, we shall see in the last section whether or which of these labels can be applied to Framework Decisions and Decisions. In matching these measures to their labels, it will become clear that the definition of ‘directly effective’ and related labels presupposes an underlying policy choice on the future of the third pillar.

I Background: The Range of Third Pillar Measures

According to Art 34(2) TEU, the Council may adopt Common Positions, Framework Decisions, Decisions and Conventions within the third pillar:

— Common Positions are instruments of unclear legal effects which define ‘the approach of the Union to a particular matter’.1
— Framework Decisions are comparable to Directives in some aspects; these legal instruments aim at ‘approximating the laws and regulations of the Member States’ and ‘shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods’.2 They ‘shall not entail direct effect’. It is in this latter feature that Framework Decisions differ from Directives—the definition of which, contained in Art 249 EC, does not contain an explicit exclusion of direct effect.
— Decisions can serve ‘any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States’ (which should be done by Framework Decisions). Like the latter, they are binding but direct effect is precluded.
— And finally, the legal effect of Conventions is not properly defined in Art 34(2) TEU. It may be nevertheless presumed that, as an established instrument of public international law, a Convention is binding and its legal effects are to be determined by national law.3

II The Legal Effects of Framework Decisions and Decisions

As mentioned above, Framework Decisions and Decisions cannot have direct effect. The extent of this prohibition is not a settled matter, since the concept of direct effect does not have a unanimous definition. The principal contention of this article is that, due to the prohibition contained in Article 34(2) TEU, the way in which we define direct

1 The European Court of Justice (ECJ) has recently clarified that these measures are generally not supposed to produce legal effects in relation to third parties; if they do, they are reviewable under Article 35 TEU: Case C-355/04, P Şegi, judgment of 27 February 2007, paras 52–56.
2 The Commission has stated that in order to assess whether national implementation of Framework Decisions has taken place correctly, it will apply the same criteria used in the case of Directives: Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, COM (2006) 770 final, 6 December 2006, at 4–5.
effect has greater consequences within the third pillar than it does within the first one. The stakes are simply higher: whatever falls within our reading of direct effect is out of bounds. It is for this reason that more clarity in the terminology used to describe the legal effects of third pillar measures would be doubtlessly beneficial.

In discussing this terminology, ‘directly effective’ will be placed alongside other ‘legal-effect labels’ such as ‘self-executing’ and ‘directly applicable’ which also need clarification, mainly because they have been used with different meanings both in public international and EC law.

Now that Framework Decisions and Decisions have been properly located within the context of the repertory of third pillar measures, a discussion of what the labels ‘directly applicable’, ‘directly effective’, ‘self-executing’ and ‘supreme’—in this order—will follow. This will be a general discussion of what these concepts mean in the abstract; in a later section they will be applied specifically to Framework Decisions and Decisions.

A Defining Questions and Labels

First, specifying what questions can be asked about the legal effects or features of an international law measure is helpful in order to clarify to which feature each of these labels refers.

There are four such questions: (1) whether the international measure is, and how it becomes, ‘law of the land’. This is a purely formal question which concerns the validity of the measure within the national legal order; its answer depends, traditionally, on national rules; (2) whether the national courts can take cognisance of such rule, generally speaking. The answer to this question seems to be quite straightforward, once the law of international law has become ‘law of the land’; (3) whether the norm can be invoked by an individual as a standard of review of a national measure; (4) whether the norm can be invoked by an individual with the result that the court applies this norm as the rule which governs the substance of the matter before it.

B Direct Applicability

‘Directly applicable’, our first label, is one of those expressions whose contents have radically changed when exported from public international law to Community law. In the former, the ‘direct applicability’ of a measure concerns its capacity to be applied directly by a court due to its sufficient clarity and precision: it is therefore an answer to questions (3) and (4) above, concerned with the application of a rule to a particular case, and it purely depends on the substance of the measure. In this public international law sense, ‘directly applicable’ is synonymous with ‘self-executing’, and independent from the answer to the first question—how international law becomes the law of the land, depending on whether the state is monist or dualist. Since ‘direct applicability’ depends on the substance of the measure, this will remain a feature of the measure whether the state is monist or dualist. A dualist legal system will merely prevent a directly applicable measure from being directly applied.

When imported into Community law, though, this label was ‘emptied’ of its public international law meaning.

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Several commentators have used the expression ‘directly applicable’ as a synonym for ‘directly effective’. I will, however, distinguish between these two concepts. Direct applicability, as used in Article 249 EC, designates a special feature of EC Regulations: the Treaty uses this label to clarify that Member States cannot decide anymore how or whether these measures become law of the land: they shall do so in their original form. The monist/dualist choice is out of question: ‘direct applicability’ is therefore used in the EC Treaty as an answer to the first question (how does a measure penetrate a legal order?) Better still, the Treaty makes it clear that this question is no longer for the Member States to answer.7

This cannot mean that all regulations have direct effect, regardless of whether they fulfil the Van Gend en Loos criteria8—since we know that that is not the case.9 It simply means that regulations, in their original form, are automatically law of the land in the Member States and do not need any sort of incorporation to be so. This feature is understandably absent from the description of Directives given in the same article of the EC Treaty. Direct applicability—when used in this ‘EC law sense’—relates to the form of the legal instrument and not to its substance, and is something different from direct effect. This distinction between direct applicability and direct effect has been backed by the European Court of Justice (ECJ) in its case-law.10

C Direct Effect

There is an ongoing disagreement on the exact definition of direct effect, the cornerstone of this analysis. The loose use of the concept made by the ECJ has not helped settle the matter.11 For the purposes of this article, we will roughly distinguish between a wider interpretation (direct effect is the mere capacity of a norm to be invoked by an individual before a national court to his or her advantage) and a narrow one (direct effect is the capacity of a norm to confer rights on individuals—rights which can enforced in the national courts. This can equally be described as the capacity of the norm to govern an individual’s legal position).12

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8 The provision must be sufficiently clear, it must be unconditional, and it must confer a specific right on the individual. Case 26/62, Van Gend & Loos [1963] ECR 1.
9 See for example Case C-403/98, Monte Arcosu [2001] ECR I-103.
10 Case 9/70, Grad v Finanzamt Traunstein [1970] ECR 825; Case 41/74, van Duyn v Home Office [1974] ECR 1337. Further proof of this distinction is that even directly effective Directives have to be implemented (ie they are not directly applicable): Case 104/86, Commission v Italy [1988] ECR 1799, para 12; Case 102/79, Commission v Belgium [1980] ECR 1473, para 12.
11 The ECJ has equally described direct effect as creating enforceable rights (Case 12/81, Garland v British Rail [1982] ECR 359; C-236/92, Comitato di coordinamento per la difesa della Cava and others [1994] ECR I-483) and as the capacity to be relied upon before the courts (Case 8/81, Becker v Finanyamt Münster-Innenstadt [1982] ECR 53).
12 For a general overview of the discussion, Prechal, op cit n 6 supra, at 231–241.
In the first case, direct effect concerns both questions (3) and (4): the important feature is that the measure can be relied upon by the individual, independently of whether the rule deploys an exclusionary or a substitutionary effect—ie whether the measure will merely be used as a standard of legality and thus preclude the application of a conflicting measure of national law or whether it will be governing the substance of the matter. On the contrary, the narrow conception of direct effect relates only to question (4). For the supporters of this narrow conception, the exclusionary effect of an EC measure—precluding the application of another, contrary measure—is not strictly speaking direct effect, but a consequence of the fact that the EC measure is binding and supreme.13

The consequences of choosing one notion over the other within the first pillar have arguably been overplayed. To use a well-known example: our conception of direct effect will determine whether we believe that Directive 83/189 could be invoked and could develop an exclusionary effect14 in cases like CIA Security15 and Unilever16 because it is not proper direct effect that we are talking about, but the consequences of the principle of supremacy (thus creating no conflict with the prohibition on the horizontal direct effect of directives),17 or whether we believe these cases to be instances of direct effect that can be signalled out as exceptions to the mentioned prohibition. The result, in both cases, is the same: the individual will be able to invoke a directive in order to preclude the application of a conflicting national measure. The exclusionary effect is a fact. Considering this a logical conclusion from one general rule (invocability as a consequence of the fact that the directive has become binding and is part of the law of the land once the deadline for implementation has passed, coupled with the principle of supremacy) or an exception to another general rule (directives can have no horizontal direct effect) does not change the result.

It does seem more intuitive, however, to consider these cases as the application of a general rule rather than continuous exceptions to another one. The fact that continuous

13 It is generally Directives that deploy exclusionary effects: this can only be the case once the deadline for their implementation has passed because they become binding at that point. ‘Binding’ here means that, by the time the transposition period is over, the national implementing measures should be in place; this cannot be demanded before. Of course, Directives are binding in a more loose sense on states even before the deadline for implementation has passed (Case C-129/96, Inter-Environnement Wallonie [1997] ECR I 7411, para 41: ‘a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification’). These early legal effects only mean that, before the deadline has passed, states cannot adopt measures which will seriously compromise the achievement of the objective of the Directive (an obligation based on Articles 10 and 249 EC: Inter-Environnement Wallonie, ibid, at para 45). Before the deadline for implementation has passed, however, it is not possible for a Directive to deploy exclusionary effect: in Mangold, the Court had to shift away from a Directive in this situation and resort to a general principle of Community law (non-discrimination on grounds of age) in order to instruct the national court to discharge the Simmenthal duty to disapply a conflicting national rule: Case C-144/04, Mangold [2005] ECR I-9981.


exceptions cannot be accounted for by a general rule is generally an indication of the fact that a new, more satisfactory one should be found.

In any case, the practical consequences of choosing one conception of direct effect over the other are not terribly important—as long as we remain within the first pillar of the EU. As soon as we consider the legal effects of the measures adopted within the third one, the consequences of the adopted choice are far greater. This is, it is submitted, one the very few occasions on which the choice of scope of direct effect changes the outlook of the field totally. We shall return to this later.

D Self-executing

Our third label is not one traditionally used by the ECJ or the literature in this field. Once the scope of this label has been discussed, the case for using this public international law label within the context of EU law will be argued.

‘Self-executing’ is synonymous to ‘directly applicable’ as understood within public international law. As opposed to the EC meaning of direct applicability, this characteristic refers to the substance of the legal instrument: whether the measure in question needs further legislative development to be properly enforced or applied, or whether its contents are detailed enough to make any further legislative implementation unnecessary.

This feature may be explained in terms of judicial application: the norm is legally perfect enough to be applied by a national court (something equivalent to justiciability) but also in terms of efficacy: the norm is legally perfect enough to achieve its aim. As mentioned above, this is independent from how the measure penetrates the national legal system: a self-executing measure is such because of its substance, and the fact that it may have to face incorporation in a dualist state does not change its character. This would merely mean that the measure would not be applied by the courts, or that it would not achieve its aim directly; whether the measure is clear and detailed enough to be self-executing is a different matter.

As regards the relationship between ‘self-executing’ and ‘directly effective’, note that a measure will be self-executing independently of whether it confers rights on individuals, although most of them probably do: accordingly, if we adopt a narrow reading of direct effect—ie conferral of rights on individuals—the self-executing character of a measure in terms of judicial application is a pre-condition for, but something different from, its direct effect. Alternatively, if we adopt a wide reading of direct effect—ie invocability before national courts—the self-executing character of a measure for the purposes of judicial application means exactly the same as its direct effect.

‘Self-executing’, then, is a specially useful label if we adopt a narrow reading of ‘directly effective’, in that it allows us to define a feature which is not encompassed by the latter: the fact that such measure is detailed enough to be applied by the courts, without necessarily conferring enforceable rights on individuals. On the other hand, if we adopt a wider reading of ‘directly effective’, the label ‘self-executing’—in terms of judicial application—is almost totally pre-empted because both labels cover almost the

18 Apart from the problem of the horizontal direct effect of Directives, other areas where the disagreement between both conceptions of direct effect has flourished are the direct effect of the WTO agreements and the effects of certain EC law provisions such as those concerning the protection of the environment: P. Craig and G. de Burca, *EU Law. Texts, Cases and Materials* (Oxford University Press, 3rd edn, 2003), 181.

19 Winter, *op cit n 5 supra*, at 428.
same area of the spectrum, with the exception of those occasions in which a court may apply a rule out of its own accord, given that even the wider reading of direct effect requires an individual’s reliance on the rule. On the other hand, there is always use for the label ‘self-executing’ in terms of efficiency of a rule—meaning that it is detailed enough to achieve its objective without further implementation—independently of the scope we accord to the concept of direct effect.

In general, then, it is submitted that the term ‘self-executing’, in its two different variants—as regards judicial application, on the one hand, and efficiency, on the other—can be a useful label in EU law. This is especially the case if we adopt a narrow reading of direct effect, because the label ‘self-executing’ covers a vast area of the spectrum that is not covered by the narrow conception of ‘directly effective’ (rules which are detailed enough to be applied by the courts, but do not confer rights on individuals). This label can help us analyse exhaustively the legal effects of Framework Decisions and Decisions in particular situations. At the same time, and although they are synonyms, it is better to import this term rather than ‘directly applicable’ from public international law (relating to substance) to avoid confusion between the latter and the ‘directly applicable’ Community label (relating to validity).

This understanding of self-executing measures in a judicial context corresponds loosely to the theory of self-executing treaties in the USA, first handed down by Chief Justice Marshall. It differs from the European conception of self-executing treaties, which places its emphasis on whether a treaty can create direct rights and obligations for individuals. Most treaties qualified as self-executing by the American doctrine will in fact give rise to individual rights in practice, but that need not necessarily be the case.

In EC law, ‘self-executing’ can be understood as a non-rigid benchmark. The fact that a measure is self-executing means that it is clear and detailed enough for the particular purpose at stake. Thus in the context of judicial application, if we wish to use a Community measure as a standard of legality against a national rule, it may only be necessary to be able to construe the EC measure as imposing an obligation on the state. The measure may not need to be very detailed in the way this obligation is to be discharged, for instance, but it is enough to be able to extract a clear obligation from it. On the other hand, if we want the Community rule to substitute the national one, the standard of clarity is understandably higher. As mentioned before, the term may also be used in a non-judicial context, to convey that the measure is detailed enough to achieve its aim and hence needs no further development before doing so: in that case, the standard of required legal perfection will be determined by the objective of the measure.

This account of the distinction between the concepts of ‘directly effective’, ‘directly applicable’ and ‘self-executing’ is loosely based on Winter’s now classical account. His critics have argued that this account is flawed because he seemingly considers direct applicability dependent on the contents or substance of the measure. Since he later claims to distinguish direct applicability from direct effect on the basis of the distinction

20 Supreme Court (US), Foster and Elam v Neilson, US SC 1829, 2 Peters (US) 253.
21 And which can be traced back to the ruling of the Permanent Court of International Justice in the Danzig Railway case (1928) Publication of the PCJJ, Series B, 15.
22 The distinction between both conceptions was pointed out by Winter, op cit n 5 supra, at 428–429.
23 Case C-431/92, Commission v Germany (Grosskrotzenburg) [1995] ECR I-2189.
24 Winter, op cit n 5 supra.
between formal validity within the legal order and legal results, the fact that he makes direct applicability dependent on the content of the measure seems to be contradictory.\footnote{P. Eleftheriadis, ‘The Direct Effect of Community Law: Conceptual Issues’ (1996) 16 YBEL 205, at 215–216.} I believe this critique to be misguided. The label ‘directly applicable’, as used in public international law, is dependent on the substance of the measure; the label ‘directly applicable’, in its EC sense, is dependent on the validity of the measure within the national legal system. The use of the same wording in both instances is misleading, but we should not forget that a primordial change of meaning has taken place. Winter could have made this clearer, but his account was not contradictory.

\section*{E Primacy}

We finally come to our last label, ‘supreme’. Much has been written about primacy; for the purposes of our discussion, we will just give a brief account of this long-standing principle of Community law.\footnote{For an overview of the concept and its evolution, see B. de Witte, ‘Direct Effect, Supremacy and the Nature of the Legal Order’, in P. Craig and G. de Burca, The Evolution of EU Law (Oxford University Press, 1999), 189–215.}

Whenever there is interaction between different legal systems, a rule of conflict is needed. The ECJ defined this rule in the landmark case of \textit{Costa v ENEL} and \textit{Simmenthal}:\footnote{Case 6/64, \textit{Costa v ENEL} [1964] ECR 585; Case 106/77, \textit{Amministrazione delle Finanze dello Stato v Simmenthal} [1978] ECR 629.} when faced with a conflict between a national rule and any Community rule, national courts must disapply the first one in favour of the latter. The Court further clarified in \textit{Internationale Handelsgesellschaft} that this rule also applies when it is the national constitution that conflicts with EC law.\footnote{Case 11/70, \textit{Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel} [1970] ECR 1125.} This label, then, concerns form rather than substance: any Community law, regardless of its rank or content is superior to (at least in the Court’s definition of primacy) any national rule, equally regardless of its rank or content. Primacy has long been accepted as one of the defining features of the Community legal order and, perhaps until recently, as one of the most important differences between the EC and the intergovernmental pillars.

Primacy and direct effect have been inextricably linked in the case-law of the ECJ: all the benchmark decisions cited above involved directly effective provisions. In fact, the Court has never explicitly said that the duty to disapply conflicting national norms, the strongest manifestation of primacy, applies also in the absence of direct effect.\footnote{Claes, \textit{op cit} n 4 supra, at 115; L. F. M. Besselink, ‘Curing a “Childhood Sickness”? On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights. The Netherlands Council of State Judgment in the Metten Case’ (1996) 3 MJ 165, at 171.}

Some commentators interpret this to mean that there can be no duty to disapply (the ‘\textit{Simmenthal} duty’) in the absence of direct effect; in such situations, supremacy can nevertheless have other, weaker, manifestations—such as conform interpretation.\footnote{Claes, \textit{op cit} n 4 supra.} This means that the duty to disapply a national measure, be it with a view to applying an EC measure in its place or not, comes always coupled with direct effect; in turn, this means that the exclusionary effect \textit{is} direct effect. This seems an unhappy conclusion for the advocates of the narrow reading of direct effect, who draw a distinction between
the substitutionary effect (where there is primacy and direct effect) and the exclusionary effect (where there is only primacy and no direct effect, strictly speaking). Interpreting the Court’s case-law as saying that there is no duty of disapplication—of whatever type—of national law without direct effect means accepting that the exclusionary effect is a consequence of direct effect too—not only of primacy—and that, therefore, direct effect is wider than they would have us believe.

On the other hand, one may argue that it is not possible to draw satisfactory conclusions from the Court’s case-law because it has avoided until now to give a clear answer to the key issue here: whether using an EC norm as a standard of legality against national rules (the exclusionary effect) is necessarily linked to direct effect. The Court has never said that the duty to disapply applies in absence of direct effect, but it has also never expressly said that it does not; its case-law in the matter is unreliable.

To summarise: it is possible to support the opinion that the most important manifestation of primacy, the duty to disapply or ‘Simmenthal duty’, is a feature of directly effective measures only: from this point of view, direct effect and primacy appear inextricably linked. It is also possible, on the other hand, to deny a necessary link between these two concepts, with the result that the Simmenthal duty can apply independently of whether a measure is directly effective. This disagreement is more apparent than real, and a consequence of the disagreement on the scope of direct effect, not of primacy itself: a wide concept of direct effect is presupposed in the first case, a narrow one in the second. The crucial difference is whether we believe that direct effect covers the so-called exclusionary effect: if yes, then the Simmenthal duty and direct effect are always coupled. If not, there is an area of the spectrum that is covered by the Simmenthal duty but that is not covered by direct effect; an area where the most important manifestation of primacy appears independently of direct effect.

Again, it can also be said that whether we believe in practice that the exclusionary effect of a Directive—for example—is a consequence of direct effect plus supremacy or whether we believe it to be a consequence of the fact that the Directive has become binding, can be constructed to impose an obligation on the state and is supreme (without the measure having direct effect as understood in the narrow sense) makes, in practice, little difference. The scope of primacy itself is not contested within the first pillar: what is contested is whether primacy, in its manifestation as the duty to disapply conflicting rules, and direct effect appear always together, which happens if direct effect is given a wide reading, or whether primacy can appear without direct effect, which happens if direct effect is given a narrow reading.

31 The perfect occasion came with C-287/98, Linster [2000] ECR I-6917. AG Léger did not dodge the question and concluded that EC measures could deploy an exclusionary effect in absence of direct effect (paras 81–82). The ECJ did not address the AG’s arguments, although it did conclude that the measure should be allowed to deploy an exclusionary effect without examining the question of whether it was directly effective.

32 In several cases the Court seems to agree implicitly with the idea of exclusionary effect in absence of direct effect: C-287/98, Linster [2000] ECR I-6917; C-365/98, Brinkmann [2000] ECR I-4619; C-457/02, Niselli [2004] ECR I-10853. There are also instances where the Court can be said to have implicitly rejected the distinction: Joined Cases C-397/01 to C-403/01, Pfeiffer and Others v Deutsches Rotes Kreuz [2004] ECR I-8835; Joined Cases C-387/02, C-391/02, and C-403/02, Berlusconi and Others [2005] ECR I-3565. For an extensive analysis of the case-law of the Court on this matter, see Arnell, op cit n 6 supra, at 239–252.
F Matching Framework Decisions and Decisions to their Labels

Now that all labels have been discussed, in what terms—if at all—is it possible to apply them to Framework Decisions and Decisions?

a) Direct Applicability of Framework Decisions and Decisions?

As defined above, ‘direct applicability’ is a feature of some Community rules: in the instances where this label is applied, the Member States have no say in how the measure in question penetrates the legal order; it does so in its original form. Article 34(2) TEU makes no mention of direct applicability: this should lead us to believe that the Union has no claim as to how these measures penetrate the legal order. In theory, then, there is no corresponding obligation on the part of the Member States to consider any of these measures as law of the land directly after their adoption and in their original form. The way and the shape in which they penetrate the national legal system may differ among the Member States, depending on their national rules on the matter.33

b) Direct Effect of Framework Decisions and Decisions?

Article 34(2) TEU expressly excludes direct effect for both types of measures. The question, then, is which meaning of direct effect we should adopt. If the narrow one, Article 34(2) only excludes the possibility that Framework Decisions and Decisions may confer enforceable rights on individuals. It would still be possible, though, to argue that these measures can be invoked before the national courts—as long as it is not in order to enforce a right contained in them: they could be used as a standard of review of national measures, to exclude the application of a conflicting national rule (according to the principle of supremacy); or the individual could just urge the court to take these measures into account when interpreting national law.

If we adopt the wider meaning of direct effect, however, the legal effects of these third pillar measures are dramatically curtailed: they cannot be invoked before a national court—with the exception of the case where an individual urges the court to interpret national law in the light of a Framework Decision or a Decision.34 It is submitted that this choice is not neutral: the choice of the more narrow scope may allow these measures to develop other effects linked to primacy (if primacy is accepted as a potential feature of third pillar measures), since the invocability of these measures would remain intact, as long as it is only with an exclusory effect and not with a view to enforcing new ‘Union rights’. On the contrary, if we adopt the wider meaning of direct effect, the prohibition of Article 34(2) has a wider scope and encompasses any

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34 Since national courts are under the duty of conform interpretation within the third pillar as well: Case C-105/03, Pupino [2005] ECR I-5285. The ECJ stated in this case that the duty of conform interpretation applies in the third pillar. We may safely infer from this that it must always be possible for an individual to invoke an EU measure before a national court in order to make the latter aware of its duty of conform interpretation and perform it, regardless of the scope we attribute to the prohibition of direct effect. For a more general overview of the case, M. Fletcher, ‘Extending “Indirect Effect” to the Third Pillar: The Significance of Pupino’ (2005) 30 ELRev 862; J. Spencer, ‘Child Witnesses and the European Union’ (2005) 64 CLJ 569; E. Spaventa, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in Pupino’ (2007) 3 Eur Constitutional LRev 5; E. Spaventa, ‘Remembrance of Principles Lost: On Fundamental Rights, the Third Pillar and the Scope of Union Law’ (2006) 25 YEL 153. For further discussion, see also 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), 35.
situation in which a Framework Decision or Decision may be invoked before national courts. This leaves no room for the principle of primacy to develop any effects: so even if we accepted primacy as a potential feature of third pillar law, there would be no occasion for it to be applied. Accordingly, an important policy choice underlies the definition of direct effect within the third pillar.35

Until now, it has been assumed that our choice of scope of direct effect within the first pillar would determine the scope of direct effect within the third one. This is, of course, debatable. Some may suggest to define direct effect within the third pillar as a new concept, independently of its meaning within the first one. This would acknowledge the fact that wider policy issues seem to underlie the definition of the concept within the intergovernmental area, as opposed to the less problematic Community pillar. Consistency within the pillars seems, nevertheless, to advise against this; even more so when there is no settlement on the definition of the concept within the first pillar—a more general discussion will not upset long-standing and unproblematic choices.

Coming down to specific arguments which may favour a particular definition of direct effect, it is necessary to note that the ECJ is competent to give preliminary rulings on the validity and interpretation of Framework Decisions and Decisions, with some limitations. This seems to entail that these measures can be invoked before national courts; otherwise, there would be no use for a preliminary ruling mechanism.36 The spirit of the Treaty, then, seems to favour a restrictive reading of the prohibition on direct effect (ie a narrow reading of direct effect itself): if invocability is presupposed, then direct effect—within the meaning of Article 34(2) TEU—can only mean the conferral of enforceable rights. Further, Claes has argued that the exclusion of direct effect in Article 34(2) amounts to an exception in EU law, and should therefore be interpreted narrowly.37

c) Self-executing Framework Decisions and Decisions?
The question of whether Framework Decisions can be self-executing prompts two reflections: on the one hand, and as regards efficiency or achievement of the measure’s aims, the definition given by the Treaty seems to answer this question—implicitly—in the negative. These measures are supposed to be roughly equivalent to directives, in that they indicate a goal but leave to the Member States the election of means to achieve it. This type of framework legal instrument seems to exclude the necessary detail a self-executing measure needs, at least in terms of achievement of the measure’s aim without further legislative implementation.

On the other hand, we can consider the concept from the perspective of judicial application: if the benchmark is that the norm could be applied by the courts to regulate the substance of a dispute before them, then this seems to be ruled out by the same reasons exposed above—the very nature of Framework Decisions. And even if such a Framework Decision came to being, it would not be applied by the courts in this manner as a result on the prohibition on direct effect. It is not that unlikely, however, to think that a Framework Decision which imposes a clear obligation on the state is self-executing enough, in theory, to be applied by a national court as a standard of

35 To a similar conclusion comes Prechal, ibid, at 44–47.
36 Lenaerts and Van Nuffel, op cit n 6 supra, at 807; Claes, op cit n 4 supra, at 95.
37 Claes, op cit n 4 supra. It is, of course, arguable that direct effect is no general rule in EU law but, rather, only in Community law.
legality. Of course, for this to happen in practice, we would have to presuppose the following: (a) that we believe the use of a Union measure as a standard of legality against a national rule is not encompassed by the concept of direct effect and therefore prohibited; and (b) that we believe that the principle of supremacy applies within the third pillar, given that otherwise it is not possible to justify the use of a Union measure as a standard of legality.

It is easy to imagine, however, Decisions being self-executing. They are binding in their totality and there is no formal limit to how detailed they may be; it is possible, at least in theory, to pass Decisions which are detailed enough to achieve their objectives without further implementation. This can be significant because, hypothetically, it is possible to envisage national police acting directly under a self-executing decision—i.e. without any sort of national rule between the EU Decision and the police action. How this would accord with the limited jurisdiction of the Court in such situations is debatable—but, arguably, problematic. There is equally no theoretical obstacle to the creation of self-executing Decisions in terms of their theoretical application by the courts, be it as a standard of legality or as a rule to govern the substance of the matter. This relates only, of course, to the substance of the Decision and the fact that it could be applied by a Court; in reality, the prohibition of direct effect would, again, prevent this.

d) Supreme Framework Decisions and Decisions?

As mentioned above, few people would have argued that primacy was a feature of the law adopted within the intergovernmental pillars a few years ago. The failed Constitutional Treaty, as a manifestation of political readiness, may have had some effect on a slow trend which seems to favour the import of EC law principles into, at least, the third pillar.

The main cause of this trend may, however, be the ECJ itself: Pupino heralded the application of the duty of conform interpretation to the third pillar—thereby surprising and, to some extent, confusing commentators as to the possible extension of the rest of the EC law principles. Especially notable is the fact that, even if the Court has never explicitly referred to the principle of primacy when justifying the duty of conform interpretation, it has done so in previous cases. For example, in the case of Commission v France, the Court held that the principle of primacy applied to the interpretation of the third pillar treaty provisions. This was done in order to ensure that the national authorities were able to apply the provisions in a way that was consistent with the objectives of the treaty.

For the use that Decisions are given in practice, see Peers, op. cit n 3 supra, at 36. For an example of fairly detailed instructions given to national authorities in third pillar Decisions, see for example the Council Decision 2005/876/JHA of 21 November 2005 on exchange of information extracted from the criminal record, or Council Decision 2005/671/JHA of 20 September 2005 on exchange of information and co-operation concerning terrorist offences.

According to Article 35(5) TEU, the Court ‘shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’. Thus the Court would have jurisdiction to review the third pillar decision, but not its national enforcement. On the one hand, this may pose no problem, since the Court, in theory, never reviews national action. On the other hand, it is arguable that the Court may adopt a more-cautious-than-normal approach in reviewing the third pillar decision if there is no national law between the EU measure and the action of a national law-enforcement body. Depending on how a preliminary question is framed by the national court, the ECJ may feel it should decline to answer, or may not be able to give a very useful reply (so as not to overstep the boundary of Article 35(5) TEU).

At least as regards application of the Decision as the rule which governs the matter; whether we think that the Decision could be applied as a standard of legality in practice depends on our conception of direct effect.
interpretation in the first pillar, both are generally considered to be linked.\textsuperscript{41} The judgment itself does not mention the status of the principle of primacy within the third pillar.\textsuperscript{42}

It has been already argued that the principle of primacy applies to the whole of EU law, irrespective of the pillar separation.\textsuperscript{43} For those who argue this position the narrow definition of direct effect is primordial—without it, there would be no room for the effects of primacy: if no third pillar measure can be invoked before a national court (wide meaning of direct effect) then there will be no occasion for primacy to play a role in solving an inconsistency between a EU and a national measure. If, on the contrary, what Article 34 TEU makes impossible is the use of a EU measure as the rule governing the legal position of an individual, there may still be occasions where the third pillar measure is allowed to deploy an exclusionary effect, precluding the application of an inconsistent national rule. This effect would be dependent upon two factors: the binding force of the measure upon the Member State and its primacy over national law.

That the third pillar measure in question would have to be binding can be transposed from what happens at the moment within the first pillar: the main factor taken into account in cases where Directives are allowed to have an exclusionary effect is that they are binding on the Member State. This happens once the implementation period is over: before that, Member States are not supposed to adopt measures which can jeopardise the Directive’s aim, but that is presented as a mere consequence of the duty of loyal cooperation.\textsuperscript{44} The requirement of binding force in order for a measure to be used as a standard of review of national law is clearly present in Framework Decisions and Decisions.\textsuperscript{45} But do Framework Decisions and Decisions have primacy over national law, in the sense of being able to operate as a standard of review of national law? According to Lenaerts and Corthaut, they do; these authors argue that all arguments used by the ECJ in \textit{Costa v ENEL} can be transposed today to the EU legal order,\textsuperscript{46} making it logical for the principle of primacy to apply not only to the third, but also to the second pillar. It would follow that national courts are under the obligation to disapply national law that conflicts with a measure of EU law.

The aim of this article is not to determine whether the \textit{Simmenthal} duty should apply in the third pillar. A few brief remarks are however in order. Contrary to the view brilliantly defended by Lenaerts and Corthaut, a case can be made that, despite the

\textsuperscript{41} AG van Gerven in Case C-106/89, \textit{Marleasing SA v La Comercial Internacional de Alimentacion SA} [1990] I-4135. The duty of conform interpretation can be seen as a ‘weaker’ manifestation of primacy (weaker than the duty to disapply). For an extensive argumentation see Claes, \textit{op cit n 4 supra}, at 115–117.

\textsuperscript{42} For the literature on \textit{Pupino} and its significance, see n 34 \textit{supra}.

\textsuperscript{43} Lenaerts and Corthaut, \textit{op cit n 17 supra}. Similarly, Spaventa seems to assume that supremacy applies, at least, to general principles of law concerning fundamental rights in the third pillar: she therefore argues that they can be used as a standard of legality against which national rules of implementation of EU law can be measured: Spaventa (2007), \textit{op cit n 34 supra}; Spaventa (2006), \textit{op cit n 34 supra}. For further discussion, see also Prechal, \textit{op cit n 34 supra}, at 606–607.

\textsuperscript{44} See n 13 \textit{supra}.

\textsuperscript{45} As to the rest of third pillar instruments, Common Positions require Member States’ compliance only as a result of the duty of loyal cooperation: Case C-355/04, \textit{P Segi}, judgment of 27 February 2007, para 52; they are therefore only binding in the same loose sense that Directives are binding before the deadline for implementation has passed. The case of Conventions is not clear since their legal effects are not properly defined in the TEU, although it is arguable that they are binding on the Member States once they are incorporated into national law.

\textsuperscript{46} Lenaerts and Corthaut, \textit{op cit n 17 supra}.
clear trend of approximation within the pillars, the third pillar is not yet ripe for the full
fledged application of the principle of supremacy, in the sense this concept has in
Community law. It is submitted that the arguments used by the ECJ in Costa v ENEL
are not wholly transposable to the realm of the third pillar. Suffice it here to say that the
legal system of the EU, while being a new legal order of sorts, still lacks the degree of
integration of the EC legal system: hence the lack of a comprehensive system of judicial
review, of an infringement procedure to deal with disobedient states and, last but not
least, of direct effect.

The lack of a comprehensive system of judicial review is especially significant, given
that it can lead to a breach of uniformity in the application of EU law. This breach of
uniformity—and thus of equality—would be the more worrying if the measures at stake
had full-blown primacy over national law.

Moreover, it is doubtful whether national constitutional courts would agree with an
extension of the Simmenthal duty to the third pillar under the current institutional
structure. In the Maastricht case, the German Constitutional Court, for instance, used
the different nature of the pillars, in general, and the lack of primacy, specifically, to
justify the constitutionality of a restricted judicial control at European level. An
extension of primacy to the third pillar and the blurring of the distinction between first
and third pillars could, understandably, reawaken old concerns, if it does not come
hand in hand with necessary changes in the pattern of judicial control in the intergov-
ernmental areas.

Consequently, it can be argued that the sort of primacy to be found at the moment
in the third pillar can, and should only be, the ‘weaker’ public international law concept
of primacy, or the application of the principle of pacta sunt servanda. This means that
Member States incur ex post-facto international responsibility when they give prece-
dence to national over international legislation, but there is no equivalent of the
Simmenthal duty: national courts do not have a duty to disapply national law in favour
of international law. Accordingly, the ECJ points out in cases like Advocaten and Segi
that Member States are bound by Article 6 TEU when implementing third pillar
measures (pacta sunt servanda); but it does not state that national courts have a duty to
disapply the national rule in case of insurmountable conflict (Simmenthal duty).

Finally, future developments may turn this discussion into a moot point. Both the
recent case-law on the criminal competence of the Community and the Commission’s
proposal to transfer all third pillar matters into the Community pillar have recently

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47 BVerfG Decision of 12 October 2003 (cases 2 BvR 2134/92 and 2159/92), 89 BVerfGE 155; 1994 1 CMLR 57 [14]-[17]-[22].
48 The duty of conform interpretation within the third pillar can be easily reconciled with this looser
conception of primacy.
49 Case C-303/05, Advocaten voor de Wereld, judgment of 3 May 2007, para 45; Case C-355/04, P Segi,
judgment of 27 February 2007, para 51.
50 Case C-176/03, Commission v Council [2005] ECR I-7879, where the Court stated that although ‘[a]s a
general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s
competence’, this does not prevent the Community legislature from taking measures which relate to the
criminal law of the Member States and which it considers necessary in order to ensure that the EC rules
on environmental protection are effective. Accordingly, a criminal law measure may be adopted within the
first or third pillar, depending on its main or predominant purpose. See also AG Mazák’s Opinion in
pending Case C-440/05, Commission v Council (ship-source pollution), delivered on 28 June 2007.
51 Communication from the Commission to the European Council, A Citizens’ Agenda: Delivering Results
331 final.
hinted at a possible gradual blurring of the distinction between first and third pillar—not by extending the principles of EC law to the third pillar, but by transferring areas of competence currently exercised under the third pillar to the first one. Recently, however, the European Council agreed to issue a mandate to draft a new Reform Treaty, which should in theory do away with the distinction between these two areas. Although the details remain to be seen, it is to be expected that the general principles of EC law will be explicitly extended to the third pillar. If this is the case, the extension of the Simmenthal duty will come coupled with a full extension of the Community method, and the problems discussed above will not arise. In any case, the Court is now most likely to await the result of the reform process and not extend the EC principle of primacy to the third pillar out of its own accord.

Concluding Remarks

This is a modest piece: it only seeks to, first, clarify the meaning and scope of some of the labels that can be applied to EU measures and, second, discuss whether these labels can be safely applied to the two most commonly used types of measures in the third pillar: Framework Decisions and Decisions. This is possible with some of them (‘self-executing’), impossible with others (‘directly effective’) and controversial as regards one (‘supreme’). The discussion aims to show that these labels are interconnected and hence the way in which we define one of them determines the role to be played by the rest. This is especially clear in the case of the definition of direct effect—its scope determines the scope of the prohibition contained in Article 34(2) TEU and is also primordial in determining the role left to the principle of primacy. The article further argues that, even if direct effect is interpreted in a narrow way, thus allowing for a hypothetical application of primacy in the third pillar, there are powerful reasons to reject the judicial extension of the Simmenthal duty to this area within the current framework of the TEU.

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53 It could be argued that the Court already chose to avoid the primacy question in Advocaten, where it could have addressed the worries on primacy and the third pillar voiced by the Polish and Czech constitutional courts. Case C-303/05, Advocaten voor de Wereld, judgment of 3 May 2007. On this issue, see A. Hinarejos, ‘Recent Human Rights Developments in the EU Courts: the Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists’ (2007) 7 Human Rights Law Review 793–811, at 795–802.
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