

# CONTENTS

<i>Acknowledgements</i> .....	v
<i>List of Abbreviations</i> .....	xiii

## Chapter 1

<b>Introduction</b> .....	1
1. What Is This Book About? .....	1
1.1. From Hamm to Luxembourg and Back .....	1
1.2. Research Question .....	2
1.3. Theories on the Relationship between EU and National Law .....	4
1.3.1. Supremacy of EU Law .....	4
1.3.2. National Constitutionalism .....	7
1.3.3. Constitutional Pluralism .....	8
1.3.4. A Conflict of Norms as a Prerequisite? .....	10
1.4. National Interpretative Rules and Methods .....	10
1.5. The Broader Legal Landscape Within Which the Research Is Situated .....	11
1.5.1. Direct Effect and State Liability .....	11
1.5.2. The Duty of Consistent Interpretation and Other Instruments of EU Law than Directives .....	12
1.5.3. Administrative Authorities .....	13
2. Why Is This Book of Added Value? .....	14
3. What Is the Approach of This Book? .....	15
3.1. The Scope of the Research: Which Member States, Legal Areas, and Courts? .....	15
3.2. How Does the Rest of This Book Proceed? .....	19

## Chapter 2

<b>The European Court of Justice's Composition of a Framework for the Duty of Consistent Interpretation</b> .....	21
1. Introduction .....	21
2. The Legal Basis for the Duty of Consistent Interpretation .....	22
2.1. Articles 288 TFEU and 4(3) TEU .....	22
2.2. The Full Effectiveness of EU Law .....	25
2.3. Supremacy of Directives as the Legal Basis under the Hierarchical Model .....	27

2.4. Conclusion: Articles 288 TFEU and 4(3) TEU (with the Inclusion of the Principle of Effectiveness) .....	29
3. The Temporal Scope of the Duty of Consistent Interpretation .....	29
4. What Does ‘So Far as Possible’ Require the National Courts to Do? .....	31
4.1. The Object of the Duty of Consistent Interpretation .....	34
4.2. Methodological Instructions on the Application of the Duty of Consistent Interpretation .....	36
4.2.1. The Interpretative Selection Rule .....	36
4.2.2. The Presumption of the Intention to Comply .....	37
4.2.3. A Reinforced Obligation when Interpreting Implementing Legislation? .....	41
4.2.4. Option under National Law Becomes an Obligation Qua EU Law ..	42
4.3. Prescribing Specific Outcomes? .....	43
4.3.1. A Specification of the Required Interpretation and a Prognosis of the Outcome .....	44
4.3.2. Requiring the Reconsideration of the National Court’s Analysis ...	47
4.3.3. <i>Verbatim</i> Transposition .....	48
4.4. The Duty of Consistent Interpretation as a Superior Methodological Standard. ....	50
5. The Limits to the Duty of Consistent Interpretation .....	51
5.1. Imposing an Obligation on an Individual as a Result of a Consistent Interpretation .....	54
5.1.1. Determining or Aggravating Criminal Liability .....	54
5.1.2. Obligations Imposed on Individuals Outside the Area of Criminal Law .....	58
5.2. No Requirement to Adopt a <i>Contra Legem</i> Interpretation .....	61
5.2.1. The Origins of the <i>Contra Legem</i> Limitation .....	61
5.2.2. The Meaning of <i>Contra Legem</i> .....	63
5.3. Other Limits: the <i>Klohn</i> , <i>Maks Pen</i> and <i>Pupino</i> Judgments .....	71
5.4. Fundamental Rights as a Separate Limitation? .....	74
5.5. Discretionary Dispensation Conferred and Controlled by EU Law. ....	78
6. Consistent Interpretation and Adequate Implementation .....	82
7. Conclusion .....	84

### Chapter 3

The German Superior Courts’ Perspective .....	91
1. Introduction .....	91
2. The Legal Basis for the Application of the Duty of Consistent Interpretation ...	92
2.1. An Incoherent Approach in the Beginning .....	93
2.2. ...Which Has Been Converging Towards the Position under EU Law. ....	93
3. The Scope for, and Limits to, a Consistent Interpretation from the Perspective of the German Superior Courts .....	96

3.1. The Traditional Approach to Interpretation.....	98
3.1.1. Conventional <i>Auslegung</i> .....	99
3.1.2. Conventional <i>Rechtsfortbildung</i> .....	102
3.1.3. <i>Verfassungskonforme Auslegung</i> and <i>Rechtsfortbildung</i> .....	104
3.2. The Adoption of a Consistent Interpretation by Means of an <i>Auslegung</i> ..	105
3.2.1. Negative Test Approach .....	105
3.2.2. The Intention to Implement the Directive .....	109
3.2.3. Transgressions of the National Interpretative Rules?.....	112
3.3. The Analogy with <i>Verfassungskonforme Auslegung</i> .....	117
3.4. Limits in the Context of <i>Auslegung</i> .....	122
3.4.1. Limits of the Judicial Function .....	122
3.4.2. Fundamental Rights .....	126
3.5. Priority of Consistent Interpretation and Some Exceptions to the Main Rule .....	133
3.6. The Adoption of a Consistent Interpretation by Means of a <i>Rechtsfortbildung</i> .....	136
3.6.1. The Basis for Proceeding to <i>Rechtsfortbildung</i> .....	138
3.6.2. The Establishment of a <i>Regelungslücke</i> .....	140
3.7. Limits in the Context of <i>Rechtsfortbildung</i> .....	149
3.8. The Intention to Implement the Directive as the Pivot of <i>Rechtsfortbildung</i> .....	153
4. An Afterthought: the Role Played by the Preliminary Ruling Procedure ...	159
5. Conclusion .....	161

## Chapter 4

<b>The Irish Superior Courts' Perspective</b> .....	167
1. Introduction.....	167
2. The Legal Basis for the Application of the Duty of Consistent Interpretation ..	171
3. The Scope for, and Limits to, a Consistent Interpretation from the <i>Perspective of the Irish Superior Courts</i> .....	174
3.1. The Traditional Approach to Interpretation.....	175
3.1.1. Conventional Approach under the Rules at Common Law ....	176
3.1.2. The Interpretation Act 2005 .....	179
3.2. A Shift to a Purposive Approach in Conformity with the Directive ...	182
3.2.1. A Structural Prioritisation or <i>Prima Facie</i> Supremacy of Consistent Interpretation? .....	186
3.2.2. Going Beyond the Traditional Limits to Interpretation as a Consequence of the Shift in Approach .....	188
3.2.3. The Duty of Consistent Interpretation as <i>Sine Qua Non</i> for the Adopted Interpretation? .....	191
3.3. Limits to the Application of the Duty of Consistent Interpretation....	196

3.3.1. <i>Contra Legem</i> as a Prohibition to Do Violence to the National Provision's Wording .....	197
3.3.2. A Broadening of the <i>Contra Legem</i> Limitation? .....	199
3.3.3. Divergences between the Directive's Objectives and the Positivised Intention of the Oireachtas .....	201
3.3.4. Protection of Fundamental Rights under the Constitution .....	205
3.4. Incidental Interferences with the Traditional Approach and a Trinity of Irish Legal Culture .....	210
4. An Afterthought: An Explanation for More and Less Favourable Attitudes Towards the Duty of Consistent Interpretation? .....	212
5. Conclusion .....	214
<b>Chapter 5</b>	
<b>The Dutch Superior Courts' Perspective .....</b>	<b>221</b>
1. Introduction .....	221
2. The Legal Basis for the Application of the Duty of Consistent Interpretation ..	224
3. The Scope for, and Limits to, a Consistent Interpretation from the Perspective of the Dutch Superior Courts .....	227
3.1. The Traditional Approach to Interpretation. ....	228
3.1.1. A Considerable Degree of Interpretative Autonomy .....	228
3.1.2. Some Specific Remarks Regarding Public Law .....	233
3.1.3. The Role Played by the Principle of Separation of Powers between the Legislature and the Judiciary .....	235
3.2. The Reserved Approach <i>À La Pink Floyd</i> .....	236
3.3. The Role Played by the Presumption to Comply in Relation to Grammatical and Historical Interpretation .....	237
3.3.1. Applying the Presumption (1): A Structural Prioritisation of the Implementing Objective and Grammatical Interpretation as an Outer Limit. ....	238
3.3.2. Applying the Presumption (2): A Decline of the Significance of Grammatical Interpretation? .....	242
3.4. Transgressions of National Interpretative Rules? .....	246
3.4.1. The Intention to Implement the Directive .....	246
3.4.2. Consistent Interpretation of Non-Implementing Legislation ...	251
3.5. Limits to the Application of the Duty of Consistent Interpretation .....	254
3.5.1. The Prominence of the Limits of Grammatical Interpretation ..	255
3.5.2. The Principle of Legal Certainty .....	259
3.6. Generous Interpretative Rules but also New Limits .....	267
4. An Afterthought: The Importance of Well-Reasoned Judgments .....	269
5. Conclusion .....	271

## Chapter 6

Conclusion.....	277
1. Introduction.....	277
2. Synthesis of What ‘So Far as Possible’ Requires (and What It Does Not) ...	278
2.1. The Resolved Issues .....	279
2.1.1. Legal Basis.....	279
2.1.2. Temporal Scope.....	281
2.1.3. Object .....	281
2.2. Drawing in the Sketched Lines .....	282
2.2.1. The Interpretative Selection Rule .....	282
2.2.2. The Presumption of the Intention to Comply .....	283
2.2.3. A Reinforced Obligation when Interpreting Implementing Legislation? .....	287
2.2.4. Option under National Law Becomes an Obligation Qua EU Law .....	288
2.2.5. <i>Verbatim</i> Transposition.....	289
2.2.6. Determining or Aggravating Criminal Liability and Legitimate Expectations Outside the Area of Criminal Law ....	290
2.2.7. <i>Res Judicata</i> as a Separate Limitation to the Duty of Consistent Interpretation? .....	292
2.2.8. No Requirement to Adopt a <i>Contra Legem</i> Interpretation .....	293
2.3. The National Courts’ Own Further Interpretation.....	295
2.4. Looking Ahead .....	300
3. The Fit between Consistent Interpretation and Theories on the Relationship between EU and National Law .....	302
3.1. A Conflict of Interpretative Rules.....	303
3.2. Supremacy of EU Law .....	305
3.2.1. Supremacy (1): Interpretation in Conformity with Supreme Directives? .....	305
3.2.2. Supremacy (2): Articles 288 TFEU and 4(3) TEU as a Supreme Interpretative Rule.....	306
3.3. National Constitutionalism .....	310
3.4. Constitutional Pluralism .....	314
3.5. Balance .....	316
3.6. Reflections on the Perennial Question of the Relationship between EU and National Law.....	318
4. Adaptations and the Day-To-Day Application of the Duty of Consistent Interpretation.....	321
<i>Samenvatting</i> .....	325
<i>List of Cases</i> .....	343
<i>Curriculum Vitae</i> .....	355