COURSE: EUROPEAN LAW

EUROPEAN UNION’S LEGAL ORDER (III) – PRINCIPLES

Supremacy, Direct Effect

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THE LEGAL ACTS OF THE UNION

Article 288 of the Treaty on the Functioning of the European Union

“
To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force”.

PART 1: THE Principle of Supremacy
The supremacy (or primacy) of EU law is a principle, by which the law of the EU member states, that conflicts with legal acts of the European Union, must be ignored by national courts so that the EU law can take effect.

Although this is not explicitly stipulated in the founding treaties, in its interpretative rulings, the European Court of Justice has clarified the relationship between the Union law and national law.

The legal doctrine emerged from the case law of the Court of the EU through a number of decisions, the first of which was the famous Costa vs E.N.E.L. case (ECJ 6/64). It was the landmark decision of the European Court of Justice which established the supremacy of EU law (then Community law) over the laws of its member states.'
Judgement of *Costa v. ENEL* of 15 July 1964 (Case 6/64) (a)

Mr. Costa was an Italian citizen opposed to nationalization of the energy sector. Because he had shares in a private corporation subsumed by the nationalized electricity company, E.N.E.L., he refused to pay his electricity bill in protest. In the subsequent suit brought to Italian courts by E.N.E.L., he argued that nationalization infringed EU law on the State distorting the market. The Italian government believed that this was not even an issue that could be complained about by a private individual, since it was a national law decision to make.

The Court of the EU disagreed with the Italian government. It ruled that EU law would not be effective if Mr. Costa could not challenge national law on the basis of its alleged incompatibility with EU law.
Judgement of *Costa v. ENEL* of 15 July 1964 (Case 6/64)  (b)

More specifically, the Court declared that:

“By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. [...]  

It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”
The principle of supremacy of the EU law over the national law is today a widely accepted fundamental principle. It is basically a rule to resolve conflicts between legislation of different sources, and more specifically between EU and national legal acts. According to this rule, when there is a conflict, the national courts must always resolve this conflict in favour of EU rules, regardless of their level or source. More importantly, EU law cannot be superseded even by national constitutions, as the Court of the EU has declared in its Judgment of Internationales Handelsgesellschaft of 17 December 1970 (C-11/70).
• Of course, EU law enjoys primacy not only over earlier national law, it also has a limiting effect on laws adopted subsequently.

• This means that the Member States could not amend or overwrite Union law by subsequent national legislative acts.

• EU law has priority over national law, irrespective of the level of the piece of national legislation in the country’s legal order.
- C-7/71, *Commission v. France* [1971] → the Court of Justice pointed out that the competences conferred upon the Community cannot be reserved by means of subsequent unilateral measures.


- C-399/11, *Melloni* [2013] → The EU Charter of Fundamental Rights supersedes national constitutions, as does all other EU law.
C-106/77, *Simmenthal* [1978]:

17. … “in accordance with the principle of 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 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.

18. Indeed any recognition that national legislative measures which encroach upon the field within which the community exercises its legislative power or which are otherwise incompatible with the provisions of community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the treaty and would thus imperil the very foundations of the Community”.
PRINCIPLE OF SUPREMACY

- Depending on the constitutional tradition of member states, different solutions have been developed to adapt questions of incompatibility between national law and EU law to one another.
- Union law is accepted as having supremacy over the law of member states, but not all member states share the ECJ's analysis of why EU law takes precedence over national law when there is a conflict.
- For example, in Solange II (22 October 1986) the German Constitutional Court held that so long as EU law had a level of protection of fundamental rights substantially in concurrence with the protections afforded by the German constitution they would no longer review specific Union acts in light of their own constitution.
The Treaty of Lisbon included the following declaration on primacy:

[Declaration no. 17] Declaration concerning primacy

“The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EU law is a cornerstone principle of Union law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) (1) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice”.

(1) “It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.
PART 2: THE Principle of Direct Effect
DIRECT APPLICABILITY  VS  DIRECT EFFECT

➢ Two fundamental concepts to understanding the impact of EU legislation on member states.

➢ Direct applicability - a provision of EU law is directly applicable where it immediately becomes part of the law of each member state. National parliaments cannot reject it, nor do they have to do anything to incorporate it.

➢ Direct effect - a provision of EU law has direct effect where it creates individual rights enforceable in national courts.
**PRINCIPLE OF DIRECT EFFECT**

- The principle of direct effect of EU law enables individuals to immediately invoke a European provision before a national or European court.

- This principle only relates to certain European acts. Furthermore, it is subject to several conditions.

- The direct effect of European law is a fundamental principle of European law.

- It was enshrined by the Court of Justice of the European Union (CJEU). It enables individuals to immediately invoke European law before courts, independent of whether national law test exist.

- The direct effect principle therefore ensures the application and effectiveness of European law in EU countries. However, the CJEU defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and an EU country or be extended to relations between individuals.
Judgement of Van Gend en Loos of 5 February 1963 (Case 26/62). (a)

The case arose from the reclassification of a chemical, by the Benelux countries, into a customs category entailing higher customs charges. Preliminary questions were asked by the Dutch Tariefcommissie in a dispute between Van Gend en Loos and the Dutch Tax Authority (Nederlandse Administratie der Belastingen). The European Court of Justice held that this breached a provision of the treaty requiring member states to progressively reduce customs duties between themselves, and continued to rule that the breach was actionable by individuals before national courts and not just by the member states of the Community themselves.

“The first question of the Tariefcommissie is whether article 12 of the treaty has direct application in national law in the sense that nationals of member states may on the basis of this article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens”. [...]
Judgement of Van Gend en Loos of 5 February 1963 (Case 26/62). (b)

“In addition the task assigned to the court of justice under article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community. […]

The wording of article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects. […]

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.”
The direct effect of European law has been enshrined by the Court of Justice in the judgement of *Van Gend en Loos* of 5 February 1963 (Case 26/62).

In this judgement, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. **Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts.** However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system.

In this case, the CJEU identified **3 situations necessary to establish the direct effect of primary EU law**. These are that:

1) the provision must be **sufficiently clear and precisely** stated;
2) it must be **unconditional** and not dependent on any other legal provision;
3) it must confer a **specific right upon which an individual** can base a claim.

If these conditions are met, the provisions of the treaties can be given the same legal effect as regulations under Article 288 of the Treaty on the Functioning of the European Union (TFEU).
There are 2 MAIN FORMS OF DIRECT EFFECT:

→ **VERTICAL** - creates individual rights against Governments

→ **HORIZONTAL** - creates individual rights against other individuals, governments and private organisations

According to the type of act concerned, the Court of Justice has accepted either a **FULL DIRECT EFFECT** (i.e. a horizontal direct effect and a vertical direct effect) or a **PARTIAL DIRECT EFFECT** (confined to the vertical direct effect).
PRINCIPLE OF DIRECT EFFECT

Direct effect can apply both **horizontally** and **vertically**, with the distinction based on against whom the right is being enforced, and the nature of the right itself.

**Vertical Direct Effect (VDE)**

State (D)  

LEGAL ACTION  

Individual/Business (C)

**Horizontal Direct Effect (HDE)**

Individual/Business (D) ↔ Individual/Business (C)  

LEGAL ACTION
By virtue of the doctrine of the supremacy of EU law, provisions of EU law with direct effect take precedence over domestic laws (Costa v. ENEL, Case 6/64).

For example, EU labour law rules take precedence over national labour law rules.
- Taken together, the principles of direct effect and supremacy mean that Treaty provisions may be used to make claims before domestic courts and override domestic law.

- Probably one well-known example is *Defrenne v. Sabena* (C-43/75), where the CJEU decided that: The principle that women and men should receive equal pay, which is laid down by Article 141 EC [now 157 TFEU], may be relied on before the national courts. These courts have a duty to ensure the protection of the rights, which that provision vests in individuals.

- In the *Viking* case (C-438/05), ex Article 43 (now Article 49 TFEU) is interpreted as capable of conferring rights on a private undertaking that may be relied on against a trade union or an association of trade unions.

- In the *Laval* Case (C-341/05), ex Article 49 (now Article 56 TFEU) was held to have direct effect, so that Member States must amend national laws that restrict any freedom incompatible with the Treaty’s principles.
The CJEU held that the doctrine of vertical direct effect applied also to the substantial body of EU legal measures in the form of directives (Van Duyn v. Home Office, C-41/74).

Where rights conferred by a directive are violated by the State or by emanations of the State, a citizen can exercise vertical direct effect.

It concerns the relationship between EU law and national law, and the State’s obligation to ensure its legislation is compatible with EU law.

Citizens can apply it in claims against the State (or against an emanation of the State) as defined in Foster v. British Gas (C-18/89). Following this case, the criteria laid down to define the emanations of the State could include privatised industries or services that formerly provided public services. Employees in these industries and services may rely directly on provisions in EU directives, so that a large proportion of the national workforce can directly enforce rights contained in the directives.
HORIZONTAL DIRECT EFFECT

- Horizontal direct effect is a legal doctrine developed by the CJEU whereby individuals can rely on the direct effect of provisions in the treaties, which confer individual rights, in order to make claims against other private individuals before national courts.

- Certain provisions of the treaties and legislative acts such as regulations are capable of being directly enforced horizontally.

- The CJEU held that the doctrine of direct effect did apply to directives. However, directives had only vertical direct effect. Therefore, individuals could claim only the rights conferred by directives against the State or emanations of the State. This, more limited, version of the doctrine prevented individuals claiming rights under the directive as against other private players.
The Treaty Articles can have both Horizontal (C-43/75 Defrenne) and Vertical (C-26/62 Van Gend en Loos; C-57/65 Lütticke) Direct Effect provided provision is clear, precise, and unconditional.

Direct effect is applicable when the particular provision relied on fulfils the Van Gend en Loos criteria.

The Court of Justice rejected the direct effect where the countries have a margin of discretion, however minimal, regarding the implementation of the provision in question.
Direct effect and secondary legislation

→ The *principle of direct effect* also relates to acts from secondary legislation, that is those adopted by institutions on the basis of the founding Treaties.

→ However, the *application of direct effect depends on the type of act.*
Regulations → A) They have general application. A Regulation shall be binding in its entirety and directly applicable in all Member States (see Art. 288 of TFEU). B) They produce both vertical and horizontal direct effect. The Court of Justice clarifies in the judgement of Politi of 14 December 1971 (C-43/71) that this is a complete direct effect.

Directives → A) Not Directly applicable and less precisely worded than regulations. Binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (see Art. 288 of TFEU). B) A directive has direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the directive by the deadline (Judgement of 4 December 1974, Van Duyn, C-41/74). C) They can have Vertical Direct Effect only, meaning that they impose obligations on the state and not individuals. The CJEU’s decision to extend the principle of direct effect to directives was crucial in order to protect the rights of individuals. EU countries are obliged to implement directives but directives may not be cited by an EU country against an individual (Judgement of 5 April 1979, Ratti, C-148/78).

Decisions → A) They may have direct effect when they refer to an EU country as the addressee. B) The Court of Justice therefore recognises only a vertical direct effect (Judgement of 10 November 1992, Hansa Fleisch, C-156/91)
PART 3: Interpretation of National Law in line with EU Law
To prevent conflict between EU law and national law, all state bodies that specifically implement or rule on the law must initially draw on the interpretation of national law in line with EU law.

It is meant to ensure that the objectives of EU law are enforced in all Member States.

When → a) the principle of direct effect cannot be invoked b) the provisions are not sufficiently unconditional, clear and precise c) after the lapse of time granted to Member States for the transposition of Directives.

The doctrine of “indirect effect” requires national courts, as organs of the Member State responsible for the fulfilment of EU obligations, to interpret domestic law consistently with Directives.

This doctrine achieves indirectly, through the technique of judicial interpretation of domestic law, the result obtainable through the doctrine of direct effect of Directives.
INTERPRETATION OF NATIONAL LAW IN LINE WITH EU LAW

➢ Indirect effect can be seen both as an addition to, and as the corollary of, the doctrine of direct effect.

➢ In the case of provisions of Directives having direct effect, national courts must disregard domestic law where there is a conflict between the Directive and domestic law.

➢ In the case of a Directive lacking direct effect, the national courts must make every effort to interpret domestic law consistently with the Directive.

➢ C-106/89, *Marleasing* [1991] → National law must be interpreted and applied, insofar as possible, so as to avoid a conflict with an EU rule.
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