

## EU Constitutional Law: IX. The supremacy and direct effect of EU law

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# IX. The supremacy and direct effect of EU law

How does EU law relate to MS law? Who controls the MS compliance with their obligations under EU law?

1. Supremacy of EU law

2. Direct effect

# 1. Supremacy

The EU is a Union based on the rule of law. Not only the EU institutions but also the Member States and individuals are subject to EU law. In practice, this means, in the words of the ECJ (case 6/64 *Costa v. ENEL* [1964] ECR 1141) 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.’

# Supremacy (cont.)

The Court continued in Case 6/64 *Costa v. ENEL* [1964] ECR 1141:

‘By creating a Community [EU] of unlimited duration, having its own institutions, its own personality, its own legal capacity (...), the Member States have limited their sovereign rights 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 [EU] law and without the legal basis of the Community [EU] itself being called into question.’

# Supremacy (cont.)

Reasoning for supremacy of EU law: Case 11/70  
*Internationale Handelsgesellschaft* [1970] ECR  
1125:

- EU law needs to have uniform and effective application.
- EU law is an ‘independent source of law’, the character of which would be deprived if it could be ‘overridden by national law’.
- ‘Therefore the validity of a EU measure (...) cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its national constitutional structure.’

# Effect of supremacy

- 'Inapplicability' of national law which does not comply to EU law (e.g. Case 106/77 *Simmenthal II* [1978] ECR 629),
- but note: MS law is not void!
- Obligation by MS courts to:
  - interpret all forms of national law, including constitutional law, in conformity with EU law
  - Note: not only the national law created for the implementation of the EU law needs to be interpreted in conformity with EU law but all MS law (e.g. in the area of taxation which is MS competence, MS must none the less exercise that competence consistently with Community law, e.g. Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, para 37; C-446/03 *Marks & Spencer plc v Her Majesty's Inspector of Taxes* [2005] ECR I-10837, para 29)

## 2. Direct effect

We need to distinguish between:

- a) Direct effect of primary Treaty law.
- b) Direct effect of secondary law:
  - Regulations
  - Directives
  - Decisions

## (a) Direct effect of primary law

ECJ 26/62 *Van Gend en Loos* [1963] ECR 1, paras 10, 12, 13:

- ‘Independently of the legislation of Member States, Community [EU] 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 (...).’
- ‘The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation.’ The nature of this obligation makes it produce ‘direct effects in the legal relationship between Member States and their subjects’. ‘The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.’



# Direct effect of primary law

- Conditions (for direct effect of primary law, see *Case 57/65 Lütticke* [1966] ECR 27):
  - Applicability of the Treaty norm is unconditional.
  - Its applicability does not require positive action by Member States or EU institutions.
  - Effect: norm is capable of having direct effect in the legal relations between an individual and the Member State (or the EU) = **vertical direct effect**.
- *Case 43/75 Defrenne II* [1976] ECR 455 showed that the direct effect can also be **horizontal** between private parties (here in a case of the application of Article 157 TFEU).

## (b) Direct effect of secondary law

For an analysis of the direct effect of secondary law, we need to distinguish between the different types of act provided for by Article 288 TFEU:

- Regulations / règlements / Verordnungen
- Directives / directives / Richtlinien
- Decisions / décisions / Entscheidungen

# Direct effect of regulations

- Article 288 TFEU defines the direct effect of regulations:
  - A regulation is ‘directly applicable in all Member States’.
  - It does not need to be transposed into national law to enter into effect (but MS law can be necessary to implement a regulation).
  - A regulation creates rights and obligations for individuals and for the Member State on its entry into force.
  - It therefore has
    - **vertical** and
    - **horizontal** direct effect.

# Direct effect of decisions

- Article 288 TFEU also defines the direct effect of decisions:
  - A decision is binding in its entirety.
  - A decision specifying those to whom is addressed is binding only on them. This guarantees the direct effect of a decision upon a limited group of addressees.
  - If a decision is directed at a Member State (obliging a Member State to grant a right to an individual), the decision may, after the deadline for implementation has expired, have direct vertical effect. (See Case 9/70 *Leberpfennig* [1970] ECR 825).

# Direct effect of directives

- According to Article 288 TFEU:

‘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.’

“La directive lie tout État membre destinataire quant au résultat à atteindre, tout en laissant aux instances nationales la compétence quant à la forme et aux moyens.”

„Die Richtlinie ist für jeden Mitgliedstaat, an den sie gerichtet wird, hinsichtlich des zu erreichenden Ziels verbindlich, überläßt jedoch den innerstaatlichen Stellen die Wahl der Form und der Mittel.”

# Direct effect of directives

- The life of a directive therefore has distinct phases:
  1. From decision-making to the end of the implementation phase (the moment when the Member State must formally choose the form of and methods for implementation).
  2. After the end of the implementation phase.
- Does this exclude (according to the criteria for direct effect of primary law) the direct effect of directives?
- Can directives have horizontal or vertical direct effects?

# Direct effect of directives

In the case of directives, differentiation is necessary with respect to:

- Direct effect prior to and after expiry of the implementation deadline.
- Vertical direct effect (relation between the Member State and the individual).
- Horizontal effect (direct and indirect).

# Direct effect of directives

- ECJ Case 41/74 *Van Duyn* [1974] ECR 1337:  
'It would be incompatible with the binding effect attributed to a directive (...) to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.'
- The ECJ therefore states that denying vertical direct effect after the expiry of the implementation deadline would be counter to the *estoppel* and *venire contra factum proprium* principles:



# Direct effect of directives

The argument went as follows:

- “a MS which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.” Case 148/78 *Ratti* [1979] ECR 1629 para 22.
- The ECJ has to “prevent the State from taking advantage of its own failure to comply with Community [EU] law” Case 152/84 *Marshall I* [1986] ECR 723 para 49.

# Direct effect of directives

- Therefore: the direct effect of a directive after the end of the implementation period may be invoked by an individual before a national court if ‘the nature, general scheme and wording of the provision in question are capable of having direct effects (...)’ (*Van Duyn*).
- This is the case if the provisions in the directive appear to be ‘unconditional and sufficiently precise’ (see case 8/81 *Becker* [1982] ECR 53).
- In *Becker* [1982], the ECJ further held that parts of directives may also be directly effective (para. 29) since the individual may rely on those provisions which are individually unconditional.

# Direct effect of directives

Does a directive have vertical direct effect prior to the end of the implementation period?

- Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411:

- ‘A directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.’ (para. 41)
- Therefore, during the period of transposition, the Member State and its administration are barred from taking measures contrary to the aim of the directive if those measures might seriously compromise the ability of the Member State to achieve the result prescribed. (para. 45)

# Direct effect of directives

Does a directive have a horizontal effect?

- The first steps towards horizontal direct effect have been taken by the ECJ in expanding the definition of the State. See, for example, Case 152/84 *Marshall* [1986] ECR 723 (paragraph 49):

‘where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community [EU] law.’

# Direct effect of directives

- Indirect horizontal effect

- is also an effect of the requirement to interpret national law implementing EU law in a way that is consistent with it, even if the dispute in a national court is between private parties.
- See, for example, Case C-106/89 *Marleasing* [1990] ECR I-4135, according to which the question of whether the contract of incorporation of a Spanish company is void must be decided by a Spanish court on the basis of the interpretation of Spanish company law in accordance with EU company law directives.

# Direct effect of directives

- In Case C-91/92 *Faccini Dori* [1994] ECR I-3325,
  - the ECJ denied the direct horizontal effect of a directive.
  - The reason for direct effect is the *estoppel* principle and the principle of sincere cooperation in what is now Article 4(3) TEU, but these arguments do not hold in the application vis-à-vis a private party.

# Direct effect of directives

- However, directives may have some indirect horizontal effect for private parties.
  - See: C-441/93 *Pafitis* [1996] ECR I-1347, C-194/94 *CIA Security International* [1996] ECR I-2201, C-443/98 *Unilever* [2000] ECR I-7535 and C-159/00 *Sapod Audic* of 6 June 2002.
  - In these Cases, the public authorities have an obligation to act under the directive which has an effect on the legal situation between private individuals (triangular situations).

# Direct effect of directives

- Case C-144/04 *Mangold* [2005] ECR I-9981
  - seemed to indicate that a directive (banning age discrimination), even before the expiration of the transposition phase, could have direct horizontal effect (in the employment dispute Mangold had argued illegal age-discrimination).
  - The ECJ however had based the judgement on the General Principle of law of non-discrimination only interpreted by the directive – i.e. stressed that Mangold was a case of direct effect of primary law.



# Direct effect of directives

- C-555/07 *Kücükdeveci v. Swedex* [2010] ECR I-nyr confirms and clarifies that a MS must disapply MS law in conflict with EU law if:
  - A directive can merely give ‘specific expression’ to the general principle of non-discrimination (para 21),
  - After expiration of its period of transposition, a dispute concerning the directive falls ‘within the scope’ of EU law (para 23),
  - Then the MS court is obliged to disapply conflicting MS law (para 47) to ensure full effectiveness of EU law (para 48) even in a horizontal dispute between private parties.

# Direct effect of directives

- Two interesting cases illustrate the difficulties of the distinction between vertical and horizontal direct effect:
  - C-151/02 *Kiel v. Jaeger* [2003] ECR I-8389.
  - C-397/01 to C-403/01 *Pfeiffer and others v. Deutsches Rotes Kreuz* [2004] ECR I-8835.
- In both cases, the same question arises:
  - does a directive which *inter alia*, restricts the maximum working week to 48 hours (which the ECJ has applied to hospital doctors' night shifts), and
  - which has not been correctly transposed into German law, have direct effect?

# Direct effect of directives

- Difference:
  - In *Jaeger*, the employer is a public entity (a hospital owned by the City of Kiel).
  - In *Pfeiffer*, the employer is a private entity (a foundation of the German Red Cross).
- ECJ:
  - *Jaeger*: direct effect in line with the *Marshall* case-law.
  - *Pfeiffer*: no direct effect in line with the *Faccini Dori* case-law. But: ‘when hearing a case between individuals, a national court is required (...) to interpret [the body of rules of national law] (...) in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.’ (paragraph 119)

# Trans-temporal rules under Lisbon for the former 'third pillar' matters

Under Art. 10(1) of Protocol 36 to the TEU (on transitional measures)

- with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers:
  - of the Commission under Art 258 TFEU shall not be applicable
  - of the ECJ under Title VI EU (pre-Lisbon), shall remain the same, including where they have been accepted under Article 35(2) EU.

# Therefore: Framework Decisions under old Article 34 EU

## Old Article 34(2) EU:

‘(...) acting unanimously on the initiative of any Member State or of the Commission, the Council may: (...)

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions 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. They shall not entail direct effect; (...)’

## See Case C-105/03 *Pupino* [2005] ECR I-837:

The general principle of sincere and loyal cooperation (as explicitly mentioned in Art. 10 EC, now Art. 4(3) TEU) requires MS to implement and apply also Framework Decisions. Individuals rights under general principles remain untouched thereof.