

Module 05 – European Union Law MQF Level 5, 4 ECTS

Lecture 4 - Direct Effect, Principle of Supremacy and Competence

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Competences - Introduction

- The European Union (EU) only has the competences (powers) conferred on it by the treaties (principle of conferral).
- Under this principle, the EU may only act within the limits of the competences conferred upon it by the EU Member States in the treaties to attain the treaties' objectives.
- Competences not conferred upon the EU in the treaties remain with the Member States.
- The Treaty of Lisbon clarifies the division of competences between the EU and EU countries.

EU competences

Exclusive

- customs union
- the establishing of the competition rules necessary for the functioning of the internal market
- monetary policy for the member states whose currency is the euro
- conservation of marine biological resources under the common fisheries policy
- common commercial policy
- concluding international agreements
 - when their conclusion is required by a legislative act of the EU
 - when their conclusion is necessary to enable the EU to exercise its internal competence
 - in so far as their conclusion may affect common rules or alter their scope.

Article 3 TFEU

Shared

- internal market
- social policy, limited to the aspects defined in the TFEU
- economic, social and territorial cohesion
- agriculture and fisheries, excluding the conservation of marine biological resources
- environment
- consumer protection
- transport
- trans-European networks
- energy
- area of freedom, security and justice
- common safety concerns in public health matters, limited to the aspects defined in the TFEU
- research, technological development and space
- development cooperation and humanitarian aid

Article 4 TFEU

Support, coordinate or supplement actions of the member states

- protection and improvement of human health
- industry
- culture
- tourism
- education, vocational training, youth and sport
- civil protection
- administrative cooperation

Legally binding EU acts in these areas cannot imply the harmonisation of national laws or regulations.

Article 6 TFEU

Provide arrangements within which EU member states must coordinate policy

- economic policy
- employment
- social policies



Article 5 TFEU

Article 2 – TFEU

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Division of Competences

- The principle of conferral means that the EU can only act within the limits of the competences that have been conferred upon it by the EU treaties.
- There are three types of competences.
 - Exclusive (Article 3 TFEU): Only the EU can act in these areas, for example the customs union and trade policy.
 - Shared between the EU and EU Member States (Article 4 TFEU): Member States can act only if the EU has chosen not to, for example in the transport, cohesion policy, energy and environment areas. Member States may ask the European Commission to repeal an adopted legislative act in one of the shared areas, so as to ensure better compliance with the principles of subsidiarity and proportionality.
 - The EU can support, coordinate or supplement Member States' actions (Article 6 TFEU): for example in the culture and tourism areas. In these areas, the EU may not adopt legally binding acts that require the Member States to harmonise their laws and regulations.
 - The EU can take measures to ensure that Member States coordinate their economic, social and employment policies at the EU level (Article 5 TFEU).
- The EU's common foreign and security policy is characterised by specific institutional features. The policy is defined and implemented by the European Council and by the Council of the European Union, with only limited roles for the European Parliament and the Commission. The President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy represent the EU in matters relating to the common foreign and security policy.

Exclusive Competence

- Exclusive competences of the EU regulated by Article 3 TFEU.
- Areas in which the EU alone is able to legislate and adopt binding acts. Member States are able to do so themselves only if given the powers by the EU to implement these acts. The EU has exclusive competence in the following areas:
 - customs union
 - the establishing of competition rules necessary for the functioning of the internal market
 - monetary policy for euro-area countries
 - conservation of marine biological resources under the common fisheries policy
 - common commercial policy.

Article 3 – TFEU

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Shared Competence

- Shared competences of the EU are regulated by Article 4 of the TFEU.
- The EU and its Member States are able to legislate and adopt legally binding acts.
- Member States exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence.

Article 4 - TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;
 - (c) economic, social and territorial cohesion;
 - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
 - (e) environment;
 - (f) consumer protection;
 - (g) transport;
 - (h) trans-European networks;
 - (i) energy;
 - (j) area of freedom, security and justice;
 - (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Supporting Competences

- Supporting competences of the EU are regulated by Article 6 of the TFEU.
- The EU can only intervene to support, coordinate or complement the action of its Member States.
- Legally binding EU acts must not require the harmonisation of the laws or regulations of the Member States.

Article 6 – TFEU

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.

Special Competences

- The EU can take measures to ensure that Member States coordinate their economic, social and employment policies at EU level.
- The EU's common foreign and security policy is characterised by specific institutional features, such as the limited participation of the European Commission and the European Parliament in the decision-making procedure and the exclusion of any legislation activity. That policy is defined and implemented by the European Council (consisting of the heads of states or governments of the Member States) and by the Council of the European Union (consisting of a representative of each Member State at ministerial level). The President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy represent the EU in matters of common foreign and security policy.



Exercise of Competence

- The exercise of EU competences is subject to two fundamental principles laid down in Article 5 of the Treaty on European Union:
 1. proportionality: the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the Treaties;
 2. subsidiarity: in the area of its non-exclusive competences, the EU may act only if — and in so far as — the objective of a proposed action cannot be sufficiently achieved by the EU countries, but could be better achieved at EU level.

Principle of Proportionality

- The principle of proportionality is laid down in Article 5(4) of the TEU.
- It seeks to set actions taken by European Union (EU) institutions within specified bounds.
- Under this principle, EU measures:
 - must be suitable to achieve the desired end;
 - must be necessary to achieve the desired end; and
 - must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (proportionality in the narrow sense).
- It is closely linked to the *principle of subsidiarity*, which requires that the EU take action ONLY if it is more effective than action taken at the national, regional or local level.
- Another related principle, the *principle of conferral*, states that any policy areas not explicitly agreed on in the treaties by all Member States remain in their domain.
- In the case of a breach of the principle of proportionality, applicants may – provided the conditions are met – challenge the validity of relevant measures before the Court of Justice of the European Union.

What is Proportionality?

- Proportionality is a general principle of EU law, which follows from the European Court of Justice's case law.
- It requires Member States to strike the right balance between preserving the:
 - fundamental freedoms guaranteed by the Treaty (such as the freedom to provide services) and
 - Member States' margin of discretion to decide on how to protect a public interest objective (such as public health).

The European Court of Justice defines this balance as follows:

- National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions - (ECJ):
 1. they must be applied in a non-discriminatory manner;
 2. they must be justified by imperative requirements in the general interest;
 3. they must be suitable for securing the attainment of the objective which they pursue;
 4. they must not go beyond what is necessary in order to attain it.

Principles of Subsidiarity

- The principle of subsidiarity is defined in Article 5(3) of the TEU.
- It aims to ensure that decisions are taken at the closest possible level to the citizen and that constant checks are made to verify that action at the European Union (EU) level is justified in light of the possibilities available at the national, regional or local level.
- Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive jurisdiction), unless it is more effective than action taken at the national, regional or local level.
- It is closely linked to the principle of proportionality, which requires that any action taken by the EU not go beyond what is necessary to achieve the aims of the treaties. Another related principle, the principle of conferral, states that any policy areas not explicitly agreed in the treaties by all EU Member States remain in their domain.
- In the event of a breach of the principle of subsidiarity, the European Committee of the Regions or Member States may refer an adopted act directly to the Court of Justice of the European Union.

- In areas in which the EU does not have exclusive competence, such as the protection of the environment, the principle of subsidiarity defines the circumstances in which it is preferable for action to be taken by the EU, rather than the Member States.
- In other words, the principle of subsidiarity authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States.
- Subsidiarity is first and foremost a political principle, a sort of rule of reason. Its aim is to regulate the exercise of powers and to justify their use in a particular case.
- There are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity:
 1. the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence);
 2. the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity);
 3. the action can, therefore, by reason of its scale or effects, be implemented more successfully by the EU (i.e. added value).

Competences - Conclusion

- EU Competence is the result of the interaction of 4 variables:
 1. MS Choice as to the scope of EU Competence
 2. MS and EP acceptance of EU Legislation
 3. Jurisprudence of the EU Courts
 4. Decisions taken by the institutions as to how to interpret & prioritize the power accorded to the EU.
- There were two principal objectives driving reform in this area: clarify as to the scope of EU Competence and containment of EU power.



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Direct Effect

- What is direct effect? It defines the relationship between the citizens of MSs and the EU.
- Direct effect is a concept, which is mainly used in the situations of parallel application of two or more legal systems: national and inter-/supranational or state and federal.
- Its rationale concerns the question of establishing legally binding and directly enforceable rights and obligations for the individuals vis-à-vis the states (vertical direct effect) and individuals vis-à-vis one another (horizontal direct effect).
- Therefore there are two types of Direct Effect:
 - Vertical Direct Effect – Individuals vis-a-vis states
 - Horizontal Direct Effect – Individuals vis-a-vis one another.



Direct Effect

- The term 'direct effect' is sometimes confusingly used for defining the nature of EU legislative acts, when distinguishing the acts requiring a separate domestic implementation (e.g. directives) and those not requiring such implementation (e.g. regulations).
- EU regulations always have direct applicability, but not all provisions of the directly applicable (*i.e. not requiring further transposition by a domestic legislative act*) EU laws, are necessarily directly effective; and vice versa, even some provisions of the EU legislative acts, which are not designed to be directly applicable (*i.e. EU directives*) may become directly effective if not transposed by the Member State in due course.
- The concept of direct effect is also closely linked – but again only partially – with the principle of primacy of one legal system over the other. The fact that the provisions of international or EU law may have primacy over the provisions of domestic law does not automatically imply the direct effectiveness of such provisions; and vice versa, not all directly effective provisions of EU law have necessarily the primacy over the domestic law.

Horizontal & Vertical Direct Effect

- There are two aspects to direct effect: a vertical aspect and a horizontal aspect.
- Vertical direct effect is of consequence in relations between individuals and the country. This means that individuals can invoke a provision of EU law in relation to the state.
- Horizontal direct effect is of consequence in relations between individuals. This means that an individual can invoke a provision of EU law in relation to another individual.
- According to the type of act concerned, the Court 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 a vertical direct effect).

Direct Effect of Treaty Provisions

- Treaty Provisions are Primary Law
- As far as primary law is concerned, the Court established the principle of direct effect in the Van Gend en Loos judgment.
- However, it laid down the condition that the obligations must be precise, clear and unconditional and that they must not call for additional measures, either national or European.

Van Gend En Loos vs Netherlands - Facts

- The claimants, van Gend en Loos, imported chemicals from Western Germany to the Netherlands where they were asked to pay import taxes at Dutch customs, the defendants, which they objected to on the grounds it ran contrary to the European Economic Community's prohibition on inter-State import duties, as per Article 12 of the Treaty of Rome.
- The defendants contended that as the claimants were not a natural person but a legal person, they could not claim such rights.

Van Gend En Loos vs Netherlands – Issues

- Whether the European Community treaty gave rise to actionable rights and whether legal persons could rely upon such rights in the same manner as natural persons.

Van Gend En Loos vs Netherlands – Decision

- The European Court of Justice found for the claimants, viewing that the European treaties gave rise to rights for legal and natural persons alike. Further, the Court viewed that European Community law 'not only imposes obligations on individuals but is also intended to confer upon them rights'.
- Significantly, this case indicates that European treaty law has direct effect against Member States and that they are directly bound by its provisions. Subsequently, European law could be enforced by individuals through the national courts system of a Member State, rather than necessitating that the European Commission bring a legal action against the State in question for failure to comply with its international obligations.

Direct Effect of Treaty Provisions Cont.

- *Defrenne v SABENA [1976]* also added an extra requirement for treaty provisions to have Direct Effect:
 - This case said that for treaty provisions to have direct effect they have to be clear, precise, and unconditional AND it must be intended to confer rights upon an individual. So the judgment expanded/broadened the concept of Direct Effect.
- In the *Becker* judgment, the Court rejected direct effect where the countries have a margin of discretion, however minimal, regarding the implementation of the provision in question.
- In *Kaefer and Procacci v French State*, the Court affirmed that the provision in question was unconditional because it left no discretion to the Member States and therefore had direct effect.

Direct Effect & Secondary Law

- The principle of direct effect also relates to acts from secondary law, that is acts adopted by the EU institutions, such as regulations, directives and decisions, which are derived from the principles and objectives set out in the treaties.
- However, the application of direct effect depends on the type of act.

Direct Effect and Regulations

- A.288 TFEU – Regulation shall be binding in its entirety and directly applicable in all MSs. Idea is that it is automatically domestic law without the need of transposition.
- If automatically part of domestic law, there is no reason as to why it shouldn't be relied upon so long as it is clear, precise and relevant to the situation of the individual.
- So the issue lies with the part of the clear, precise and relevant to the situation of the individual.
- Direct Effect of Regulations was affirmed in the *Slaughtered Cows Case*.

Direct Effect and Regulations Cont.

- *Slaughtered Cows Case*: ECJ chastised the Italian Government for choosing a method of implementing a regulation that cast doubt on the legal nature and direct applicability of that measure.
- It held that all methods of implementation were contrary to the Treaty 'which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community.
- *Munoz Case*: ECJ stated that owing to their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect.

Direct Effect and Regulations Cont.

- *Amsterdam Bulb Case*: ECJ Rules that it is only if a national measure alters, obstructs or obscures the direct effect or nature of the regulation that it will constitute a breach of EU Law.
- Direct effect of regulations obliges not only the courts, but also relevant administrative authorities to give immediate effect to EU Law in practice. This is sometimes known as the administrative direct effect.



Direct Effect & Decisions

- Decisions may have direct effect when they refer to a *Member State* as the addressee.
- The Court therefore recognises only a direct vertical effect (*Hansa Fleisch v Landrat des Kreises Schleswig-Flensburg* judgment).

Direct Effect & Directives

- Directives are acts addressed to Member States which must be transposed into national law.
- However, in certain cases, the Court recognises the direct effect of directives in order to protect the rights of individuals.
- Therefore, the Court laid down in its *Van Duyn v Home Office* judgment that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise and when the Member State has not transposed the directive by the deadline.
- However, it can only have direct vertical effect – Member States are obliged to implement directives but directives may not be cited by a Member State against an individual (see *Ratti* judgment).

Direct Effect & Directives Cont.

⇒ Vertical Direct Effect will arise in the case of directives if:

- Clear, precise, and unconditional (Van Duyn v Home Office [1974])
- AND the implementation date for that directive must have passed (Ratti, [1979]). BUT in advance of the deadline, Member States have a duty not to adopt any measure that might compromise the result prescribed in the directive (Inter-Environnement Wallonie v Région Wallone [1997])
- The directive must give clearly identifiable rights to individuals (Defrenne v SABENA [1976])

⇒ Directives can only have vertical Direct Effect (Marshall v Southampton Area Health Authority, [1986]) → So, directives can only apply against the State (this includes “emanations of the state”)



Van Duyn v Home Office

FACTS OF THE CASE :

- Van Duyn claimed that the Home Secretary infringed her right under Article 45 TFEU and Free Movement of Workers Directive 64/221/EC by denying her the right to work at the Church of Scientology
- Article 45 provided for the freedom of movement for workers but under Article 45(3) limitations justified on the grounds of public policy, public security or public health are allowed
- Directive 64/221/EC Article 3(1) also set out that a public policy provision had to be 'based exclusively on the personal conduct of the individual concerned'
- The UK government argued that there directive has no vertical direct effect

Van Duyn v Home Office Cont.

Ruling (Courts of Justice) :

- Directives can have vertical direct effect
- The fact that Treaty provision allows for derogation does not deprive it of direct effect since derogations are subject to judicial control
- Both Directive 64/221/EC and Article 45 TFEU have direct effect in national law
- But the UK's decision is legal and within its discretion under EU law.

Van Duyn v Home Office Cont.

JUDGMENT :

Direct effect of directives

- Directives impose on MS the obligation to pursue a particular course of action, the useful effect of such an act would be weakened if individuals were prevented from relying on it before national courts
- Preliminary reference procedure implies that directives may be invoked by individuals in national courts
- Legal certainty in favour of individuals requires that they should be able to rely on the obligation of member states not to take into account factors extraneous to personal conduct when derogating from Treaty even though the directive has no automatic direct effect

Article 45 TFEU has direct effect

- The right to freedom of movement without discrimination under the article has direct effect
- Although Article 45(3) TFEU allows limitations to the free movement of workers on grounds of public policy, security or health, the application of these limitations are subject to judicial control

Ratti

FACTS OF THE CASE :

- Ratti argued that he should not have to comply with an Italian law on the labelling of solvents he sold as it was stricter than the standard under two EU directives.

Ratti Cont.

Ruling (Courts of Justice) :

- Directives have direct effect when unconditional and precise and only when their implementation period has expired.
- The directive whose implementation period has expired applied such that stricter standards under national law were precluded
- The unexpired directive could not be relied upon by Ratti

Ratti Cont.

JUDGMENT :

- The effectiveness of directives would be weakened if persons were prevented from relying on it before in national courts
- A member state which has not adopted implementing measures required by the directive in the prescribed period may not rely as against individuals on its own failure to perform the obligations which the directive entails
- The obligation created by the directive must be unconditional and sufficiently precise to be relied upon in national courts
- Thus, a national court can disapply a national law incompatible with a directive that is not implemented within the implementation period upon request from an individual
- Commentary: The Court employed an estoppel argument to justify the direct effect of directives: a member state cannot rely on its own failure to implement a directive

Direct Effect & Directives Cont.

⇒ Emanations of the State include:

- A hospital (*Marshall v Southampton Area Health Authority*, [1986])
- British Gas (*Foster v British Gas* [1990]) – the case gave the criteria for whether a body is an emanation of the state:
- An emanation of the state must provide a public service; provide that public service under state control; and have special powers to provide that service
- Regional and local government (*Fratelli Costanzo v Milano* [1989])
- School receiving State funding (*NUT v St Mary's School* [1997])

Direct Effect & Directives Cont.

⇒ Problems: it leads to discrimination against individuals who are claiming a right against an individual

In other words, individuals had to prove the defendant is an individual
→ this can lead to discrimination

To get around issue court came up with new doctrine: indirect effect

Indirect Effect

- A principle of interpretation whereby the courts of the member states of the European Union (EU) must interpret national laws (particularly any that implement EU directives) as far as possible in a manner that is consistent with the provisions of EU law even if they do not have direct effect.
- Directives can have indirect horizontal effect through national law. (Von Colson)
- Directives can have indirect horizontal effect through EU Primary Law. (Mangold)



Directives & Indirect Effect

⇒ To bridge the gap between horizontal and vertical effect

- Indirect effect is an interpretative tool by which individuals may use to rely on Directives against other individuals

⇒ Indirect Effect is the obligation of national courts to interpret and apply national law in a manner which is consistent with the wording and purpose of directives – this can mean that an individual can enforce a law from the EU against another individual in a national court (doctrine set down in case of Von Colson [1984])

- Also applicable if national law existed prior to directive (Marleasing [1990])
- In the case of Marleasing [1990] the ECJ made it clear that Member State courts should act on the presumption that relevant national legislation, whether passed before or after relevant directive, was intended to implement it
- Based on the now Article 4(3) TEU – national courts are under an obligation to interpret national law consistently with EU law, so far as is possible to do so, whether or not the directive has Direct Effect

Directives & Indirect Effect

⇒ Limitations by EU law:

- Interpretation cannot conflict with a general principle (Kolpinghuis [1987])
- National courts must consider the whole body of national rules and interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objectives of the directive (Pfeiffer [2004])
- Indirect effect only after the deadline expires (Adeneler [2006])
- No obligations on individuals if no proper implementation (Centrosteeel v Adipol [2000]), especially if criminal liability involved (Arcaro [1996])

Directives & Indirect Effect

⇒ Limitations by national law:

- Interpretation only in so far as the court is given discretion to do so under national law (Von Colson [1984]) → So, this is the duty of consistent interpretation
- Interpretation can only go “so far as possible” (Paola Faccini Dori v Recreb [1994])
- Disapplication of national law if impossible to interpret it in conformity with the directive (Kücükdeveci v Swedex [2010])

Directives & State Liability

- An individual may enforce a directive, despite the prohibition on horizontal direct effect, when they sue the MS in damages, this is pursuant to the *Francovich* ruling.
- One sues for loss caused by the state's failure to implement a directive.
- Court general regards Francovich as a last resort, after direct effect and harmonious interpretation have been deemed unavailable in the case.



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EU Law and National Law - SUPREMACY



Supremacy - Introduction

- Supremacy was developed by the Court based on its conception of the 'new legal order'.
- Court rules that the aim of creating a uniform common market between different states would be undermined if EU law could be made subordinate to national law.
- Most national courts do not accept the CJEU's view of supremacy of EU law.

Supremacy – ECJ Perspective

- In Van Gend en Loos the Court declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. EU law therefore has direct effect.
- In Costa v ENEL (Case 6/64), the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus in order for EU norms to be effective they must take precedence over any provision of national law, including constitutions.

Costa vs ENEL – Facts

- The claimant, Costa, was an Italian citizen with shares in the Italian electricity supply company Edisonvolta, and he sought to oppose moves by the State to nationalise the electric industry.
- Thus, he attempted to assert that the creditor for his electric bill remained Edisonvolta rather than the new national company, ENEL. Costa subsequently submitted that nationalisation was in violation of the Treaty of Rome.
- The Italian Constitutional Court viewed that the traditional rules of statutory interpretation, *lex posterior derogat legi anteriori*/ priori ought apply, whereby in the event of statutory incompatibilities, the newer law prevails, meaning the more recent Italian nationalisation statute would prevail over the earlier Treaty of Rome.

Costa vs ENEL – Issue?

- Should EC law, specifically the Treaty of Rome, be considered dominant over national statutes?

Costa vs ENEL – Decision/Outcome

- The European Court of Justice overturned the verdict of the Italian Constitutional Court, finding that the Treaty of Rome's provision regarding the single market did not have direct effect and subsequently was one that only the EC could bring a charge against a Member State for violating.
- However, the claimant was entitled to avail himself of the national Courts system in Italy, and attempt to contend that a national statute was not compatible with EC law, which the national Courts were thus entitled to decide.
- It can subsequently be found that Courts are obligated to hear and refer cases until they reach the furthest domestic appeal level where such cases concern EU law.

Supremacy – ECJ Perspective

- The Court in *Costa vs ENEL* deployed a number of arguments to justify its conclusions that EU Law should have supremacy over national Law:
 1. There is what may be termed a contractarian argument: EU Law should have primacy because it flowed from the agreement made by MS when they joined the EU.
 2. Functional: capturing the idea that the very aims of the Treaty could not be achieved unless primacy was accorded to EU Law.
 3. Egalitarian: If MS law could unilaterally take precedence over EU law then that would lead to discrimination in the application of EU Law as between MSs.
 4. Analytical: MS obligations in the treaty would be merely contingent rather than unconditional if they were subject to later national legislative acts.

Internationale Handelsgesellschaft

- The Court rules that the legal status of a conflicting national measure was not relevant to whether EU Law should take precedence.
- The principle of supremacy of EU law is unconditional, EU laws cannot be judged in light of national law
- Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice

Internationale Handelsgesellschaft - Facts

- Regulations under the Common Agricultural Policy permitted exports only if an export licence is obtained by paying a deposit which could be forfeited if export is not made during the licence's validity period
- IH did not complete its exports of maize during the period of validity
- IH claimed that the licensing system was a disproportionate violation of their right to conduct a business under the German Basic Law
- The German Constitutional Court held that the system of deposits is contrary to the principles of freedom of action and disposition, economic liberty and proportionality under German Basic Law, and that even if it were valid, forfeiture cannot be limited to only cases of force majeure and not all cases where there is no fault

Internationale Handelsgesellschaft - Decision

- The Court held that Regulations are valid under EU law and cannot be judged in light of national law
- Recourse to national law to judge the validity of measures adopted by Community institutions would have an adverse effect on the uniformity and efficacy of Community law
- The validity of such measures can only be judged in light of Community law, otherwise the legal basis of the Community itself will be called into question
- There the validity of a Community measure cannot be affected by incompatibility with fundamental rights under the national constitution
- But whether any 'analogous guarantee' inherent in Community law has been disregarded may be checked
- Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice
- The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community
- The deposit system does not infringe those fundamental rights

Simmenthal Case

- ECJ in this case developed its supremacy doctrine by making it clear that it applied irrespective of whether the national law pre-dated or post-dated EU Law.
- An EU Measure rendered inapplicable any conflicting provision of national law, and prevented the adoption of new national law that would conflict with Union law.
- ECJ said that even if the Constitutional Court was the only national court empowered to pronounce on the constitutionality of a national law, where a conflict between national law and EU Law arose before another national court, that court must give immediate effect to Union law without awaiting the prior ruling of the Constitutional Court.

Factortame Case

- Apparently, the obligation to ignore conflicting national law was demonstrated more pointedly in Factortame case.
- 'The conflict here arose between a few provisions of the European Community Treaty which prevent discrimination on the grounds of nationality and Part Two of the provided that fishing boats registered in the United Kingdom (UK) which were fishing for the quotas allocated to the UK by European Community must be owned and managed by UK citizens.
- It was later held that parts of the Merchant Shipping Act 1988 were incompatible with the relevant provisions of the European Community Treaty.
- Here, the outcome was that any legislation passed or to be passed in the UK must be interpreted with applicable European law in mind.'



Supremacy: MSs Perspective - Germany

- The German Courts accept the supremacy of EU Law, subject to limits.
- The conceptual foundation for acceptance of supremacy is primarily found in the German Constitution, but the German Federal Constitutional Court has also adverted to some aspects of the communautaire reasoning of the ECJ.
- The German Courts continue to possess jurisdiction where EU Law impringes on fundamental rights protected by the German Constitutions, but any claimant will have to show that the protection afforded by EU Law is generally deficient before the German Courts will exercise their jurisdiction.
- German Courts also regard themselves as possessing the ultimate *Kompetenz-Kompetenz* to decide whether EU Action is within the scope of EU Competence. This would only be exercised where the EU Institution clearly acted in excess of competence accorded by the Treaties, and then only after the CJEU has been given the opportunity to rule on the contested EU provision.

Supremacy: MSs Perspective - Italy

- The Italian Courts have accepted the supremacy of EU Law, subject to the qualifications mentioned below.
- The supremacy of EU Law is based on Article 11 of the Italian Constitution and not the Communitaire reasoning of the ECJ.
- The Italian courts do not accept that EU Law has primacy over the Italian Constitution, and they retain ultimate authority over the issue of whether EU Law infringes fundamental rights.
- The Italian courts regard themselves as possessing the ultimate *Kompetenz-Kompetenz*, being prepared in principle to adjudicate on the division of competence between national law and EU law.



Supremacy: MSs Perspective - France

- French Courts generally accept, subject to what is said below, the supremacy of EU Law over national law.
- The supremacy accorded to EU Law is, however, not by virtue of the inherent nature of EU Law as the courts of justice would have it, but under the authority of their own national legal order.
- The French courts do not accept that EU Law takes precedence over the constitution.

Supremacy – Conclusions

- The Supremacy of EU Law still clearly retains its bi-dimensional character, despite the monist view of supremacy asserted by the ECJ in *Simmenthal* and *Internationale Handelsgesellschaft*.
- MS Courts generally locate the authority of EU Law in the national legal order or national constitution and not in the jurisprudence of the Court of Justice or in the sovereignty of the EU.



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