

The Relationship between European Union Law and National Legal Systems

What is Union law?

Primary law and secondary law.

Forms of EU secondary law: regulations, directives, decisions and international agreements concluded by EU.

"Unwritten" legal principles.

The Commission "guardian of the Treaties": action for failure to fulfil EU law.

The role of the European Court of Justice ("ECJ"): the preliminary questions from national courts.

Direct effect of the Treaties

Van Gend en Loos (1963) (customs union)

Conditions for direct effect: clear and unconditional obligation, not contingent on any discretionary implementing measure.

"Horizontal" direct effect (i.e. between two private litigants): *BRT v SABAM* (1974) (competition law), *Defrenne v Sabena* (1976) (equal pay).

Not all provisions of the Treaty have direct effect: e.g. *Casati* (1981) (free movement of capital)

The principle of primacy of Union law

Costa v ENEL (1964) " *the law stemming from the Treaty, an independent source of law, could not, ..., be overridden by domestic legal provisions, however framed ... The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights*"

Internationale Handelsgesellschaft (1970): relationship with national constitutions and the emergence of fundamental rights.

Simmenthal (1978): the duty not to apply a provision conflicting with EU law.

Factortame I (1990): non application of rules on national remedies.

Constanzo (1989): the duty also applies to administrative authorities, not only courts.

The direct effect of Community legislation

Direct applicability and direct effect

Variola (1973) (regulations)

Grad (1970) (decision in conjunction with directive)

van Duyn v Home Office (1974)

Nederlandse Ondernemingen (1977) (control of limits left by directive, even if it leaves some choices)

Pubblico Ministero v Ratti (1979) ("estoppel" and individual may rely on directive to the extent that it complies with it)

Marshall (1986) and *Faccini Dori* (1994) (no "horizontal" direct effect)

Interpretation in line with Directive: *Von Colson and Kamann* (1984) (law implementing the directive) and *Marleasing* (1990) (law prior to the directive)

Kolpinghuis Nijmegen (1987) ("a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive")

Arcaro (1996) (limit of duty of construction in the criminal context)

The "incidental" effect of directives: Individuals may suffer a burden by virtue of a Directive, in "triangular" relationships. The third party may not be plaintiff or defendant, but the beneficiary of a public decision which is challenged (e.g. public procurement or environmental impact assessment).

The reaction of Member States

Generally respected.

Easier to accept in monists systems.

It has taken some time in some Member States.

Some courts may find that the legal basis of primacy and direct effect is to be found in their own domestic constitution.

As a result, some constitutional/supreme courts, while accepting the core principles, have reserved for themselves powers of exceptional review.

Full effectiveness of EU law: the problem of national remedies

Procedural autonomy: in the absence of Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding EU rights.

Two limits: national rules "must not be less favourable than those relating to similar domestic claims" (principle of equivalence) and must not embody requirements and time-limits "such as in practice to make it impossible or excessively difficult" to exercise those rights (principle of effectiveness).

Liability of Member States for breach of EU law

Francovich (1991) (lack of implementation of directive; damages against the State to compensate for lack of horizontal direct effect)

Brasserie du pêcheur and Factortame (1996) (individual may bring a damages claim in the national courts on account of an act or omission of a legislative organ).

Köbler (2003) (decisions of judicial bodies adjudicating at last instance).

Conditions for liability: EU law confers a right of reparation where three conditions are met: (i) the rule of law infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.