

# **Diritto dell'Unione europea**

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A.Y. 2017-2018

**La natura del sistema giuridico dell'UE:**

**A) la diretta efficacia**

**B) il primato del diritto dell'UE sul  
diritto nazionale**

Lezioni n. 10 e 11

## Primo caso: diritto primario

- Mark, cittadino tedesco abilitato all'esercizio della professione notarile in Germania, desidera aprire uno studio a Genova
- La legge notarile italiana riserva l'accesso alla professione ai cittadini italiani
- Art. 49 TFUE vieta le restrizioni alla libertà di stabilimento dei cittadini di uno Stato membro nel territorio di un altro Stato membro. Tale libertà importa tra l'altro *«l'accesso alle attività autonome e al loro esercizio ... alle condizioni definite dalla legislazione del paese di stabilimento nei confronti dei propri cittadini»*

## Secondo caso: diritto secondario

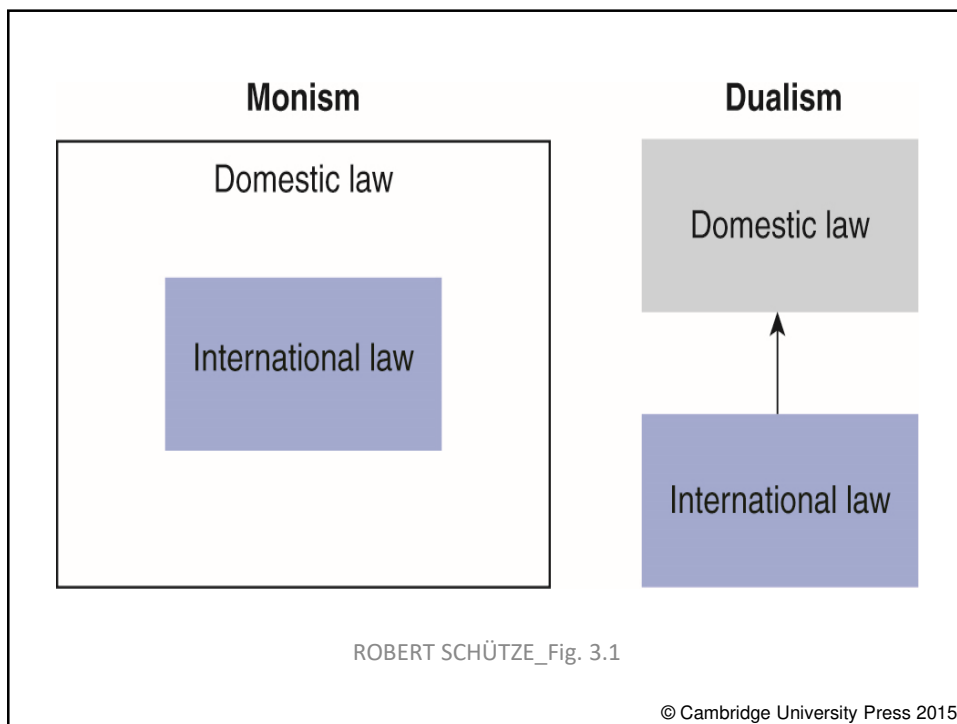
- Ai sensi dell'art. 7 direttiva 1995/46/CE, gli Stati membri dispongono che il trattamento di dati personali possa essere effettuato soltanto quando, in particolare, la persona interessata abbia manifestato in maniera inequivocabile il proprio consenso
- La legge italiana non prevede nulla sul trattamento dei dati personali (anche se il termine per il recepimento della direttiva è scaduto)
- Marco ha un contratto di telefonia con Mobile Phone, che raccoglie, conserva e utilizza i suoi dati personali senza il suo consenso

## The issues at stake

- L'art. 49 TFUE impone un obbligo (negativo) in capo agli SM: abolire le discriminazioni in base alla cittadinanza
- L'art. 7 direttiva 1995/46/CE impone un obbligo agli SM: disciplinare il trattamento dei dati personali nel senso da esso prescritto
- What about Mark e Marco? Sono solo «indirettamente interessati» da tali norme oppure esse producono effetti giuridici diretti nei loro confronti?

## Relationship between domestic and international law

- States as subjects of international law → it is for international law to determine whether and to what extent its own rules are legally binding **ON** the States
- What about the legal status of international law **IN** the States, i.e. within their internal legal order? → it is for the States only to determine whether and to what extent international rules are legally binding, i.e. are enforceable by a public authority (in particular, national courts)
  - two constitutional theories
    - Monism (ex. France)
    - Dualism (ex. Italy and UK)



### Direct effect: the notion

- *"The simple test is: a provision has direct effect when it is capable of being applied by a national court ... Direct effect simply means that a norm can be 'invoked' in and applied by a court"* (Schütze, 86-87)
- Capacity of a norm to be relied on 'directly', i.e. on its own, by a party before a national court →
  - i. the party's claim or defence is founded on that norm (the cause of action)
  - ii. the court has to apply it as the legal basis for its decision

Direct effect relates to the 'norms', individually considered, not to their legal source

## **THE CONDITIONS TO BE MET BY EU RULES FOR HAVING DIRECT EFFECT**

### The test for direct effect

If direct effect is the capacity of a provision to be relied on before a national court → to be the legal basis for a judicial decision

→ such a provision has to satisfy three criteria:

- i. To be 'clear'
- ii. To be 'unconditional' – the rule it lays down must be automatically applicable
- iii. To be 'absolute'

→ EU provisions must be '*sufficiently precise and unconditional*': ?

Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci*

Provisions of Directive 80/987 on the protection of employees in the event of the insolvency of the employer are sufficiently precise and unconditional

- as regards the determination of the **persons entitled to the guarantee (1)** and
- as regards the **content of that guarantee (2)**,
- where no implementing measures are adopted by the MS within the prescribed period the persons concerned cannot enforce those rights before the national courts, since the provisions of the directive do not identify the **person liable to provide the guarantee (3)**

and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period

- 1) The rule's rationale
- 2) The limitation to the rule: the wide definition of State (action)

**THE DIMENSION OF DIRECT EFFECT OF  
DIRECTIVE'S PROVISIONS: THE NO-  
HORIZONTAL-DIRECT-EFFECT RULE**

## the No-horizontal-direct-effect rule

- Direct effect of a Directive (provisions) – the possibility of relying on them before a national court – is based on the binding nature of Directives under Art 288 TFEU
- Yet such a binding nature exists only in relation to “*each member State to which (the directive) is addressed*”



A Directive may not **of itself** (= directly) impose obligations on a private party → a provision of a directive may not be relied upon as such against a private party  
(see lastly Case C-413/15, *Farrell*, para. 31)

*“The effect of extending the possibility of relying on directives that are not transposed to the sphere of relations between individuals would be to recognize a power invested in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations”*: settled case-law of the CJEU, see lastly Case C-413/15, *Farrell*, para. 31

The limitation to the rule:  
the wide definition of State (action)

*“... in accordance with the Court’s settled case-law, where a person is able to rely on a directive not against an individual but against the State, he may do so regardless of the capacity in which the latter is acting, whether **as employer** or **as public authority**.*

*In either case it is necessary to prevent the State from taking advantage of its own failure to comply with EU law” → estoppel argument*

*(see ex multis, Case C-413/15, Farrell, para. 32)*

Case C-188/89, *Foster and Others*, para. 18:

*“...unconditional and sufficiently precise provisions of a directive could be relied on against **organisations or bodies** which*

- (i) were subject to the authority or control of the State or*
- (ii) had special powers beyond those which result from the normal rules applicable to relations between individuals”.*



Case C-188/89, *Foster and Others*, para. 20: “a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon”

Case C-413/15, *Farrell*, para. 28: “the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State (1), and must possess special powers beyond those which result from the normal rules applicable to relations between individuals (2) cannot be conjunctive”

- 1) Absolute or relative primacy?
- 2) The ‘executive’ nature of primacy: the most general remedy in case of infringement of individual’s rights (stemming from EU law)

## THE PRIMACY OF EU LAW

## Il problema: conflitto tra norme

- È possibile che norme dell'UE disciplinino direttamente rapporti giuridici «interni» all'ordinamento nazionale (diretta efficacia)
- Ma tali rapporti sono al contempo disciplinati dal diritto nazionale
- Norme di due distinti ordinamenti, quello dell'UE e quello interno, vogliono regolare il medesimo rapporto giuridico → che succede in caso di contrasto tra tali norme?
- Due ordinamenti → due diverse prospettive:
  - a) dell'UE → Corte di giustizia
  - b) nazionale → Corte Costituzionale

## Le questioni in dettaglio

- 1) Chi vince il duello? → Quale norma prevale, quale invece cede?
- 2) A chi spetta dirimere il conflitto? → I giudici comuni o la Corte Costituzionale?
- 3) Se il diritto nazionale cede, vi è un ultimo baluardo di resistenza? → la teoria dei c.d. «controlimiti»

## **PRIMACY OF EU LAW AND FUNDAMENTAL RIGHTS**

### **Case C-399/11, *Melloni***

- Article 4a(1) of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union respectively, and is therefore compatible with the requirements under those articles.
- Although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute. The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, there is no violation of the right to a fair trial, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.

### Case C-399/11, *Melloni*

- Art 53 of the Charter of Fundamental Rights of the European Union does not allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.
- A different interpretation of Art 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

### Case C-399/11, *Melloni*

It is true that Art 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

However, Art 4a(1) of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein