

European Union Law

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The nature of EU legal order: A) the doctrine of direct effect

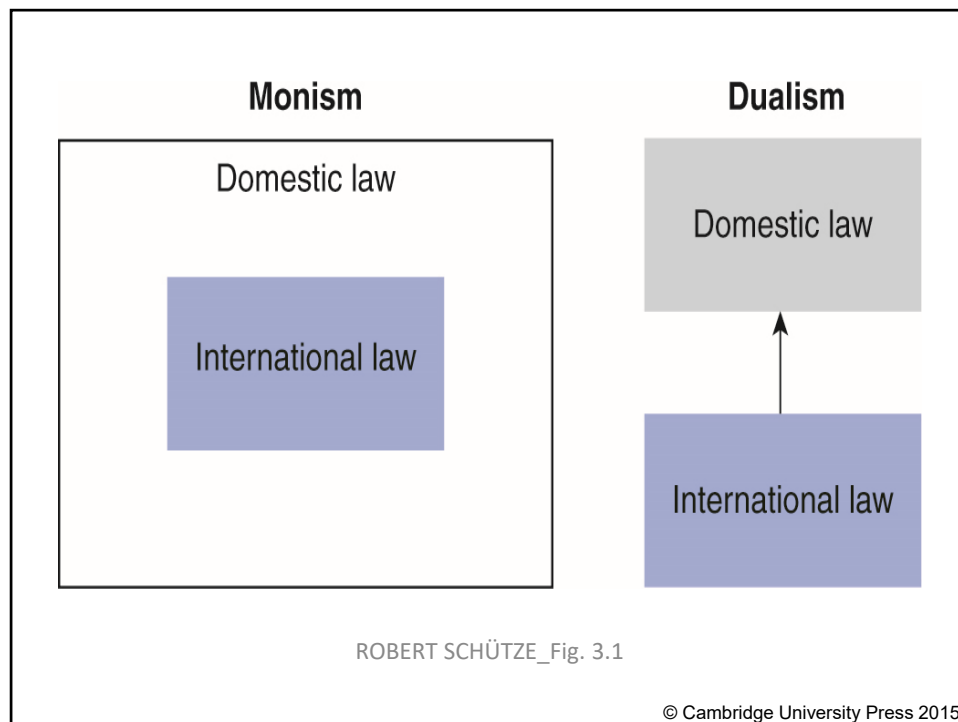
Lesson No 13

The nature of EU legal order: B) Supremacy on domestic law

Lesson No 14

The 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 each State only to determine whether and to what extent international rules are legally binding, i.e. are enforceable by a public authority (notably, national courts)
- two constitutional theories
- Monism (ex. France)
 - Dualism (ex. Italy and UK)



Direct **applicability** vs direct **effect**

Direct **applicability**: a 'federal' question

It refers to the *normative* validity of the source of EU law within national legal orders: are EU norms to be treated as law **on their own**?

Direct **effect**: a 'separation- of-powers' question

It refers to the *individual* effect of a norm, to its ability to execute itself: can the norm be directly relied on to solve a specific case? Is it able **of its own** to regulate that relationship?

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 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

SOME EXAMPLES

Primary law: Free movement of service

Article 56 TFEU: *“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”.*

Related provisions:

Art 52(1): - Reasons of general interest

Art 57: - what are services “within the meaning of the Treaties”?

Art 54: - what if the services provider is a company or firm?

Primary law: Free competition

Article 101 TFEU:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: ...

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: ..."

Secondary law: GDPR

Article 82 (Right to compensation and liability):

"1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage".

Secondary law: Directive 95/46/EC

Article 23 (*Liability*)

"1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

2. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage".

- 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 cannot **of itself** (= directly)

- i) impose obligations on a private party →
- ii) be relied upon as such against a private party
(see lastly Case C-122/17, *Smith*, para. 42)

*“If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, **that would amount to recognising a power 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**”*: see Case C-91/92, *Faccini Dori*, para. 24; Case C-122/17, *Smith*, para. 42

→ but what in cases where the EU is empowered to adopt either regulations or directives?

In choosing the legal instruments by which to act, the EU legislature must take into account the different impact on individuals

The practical consequences

- Even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons
- A directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive

See Case C-122/17, *Smith*, para. 43 and 44

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

PRIMACY OF EU LAW AND FUNDAMENTAL RIGHTS

The problem

- A conflict of norms belonging to two different legal orders in a specific situation → it implies the direct effect of both norms
- How to resolve such a conflict → necessarily a dual perspective (of each legal order involved):
 - a) EU perspective
 - b) National perspective(s)

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 Article 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