

EU law seminar II – Enforcement of EU law in the Member States

24.03.2020

Learning Objectives:

1. What are the EU legal sources?
2. What are their legal effects within national legal orders?
3. When do EU legal acts start to produce legal effects?
4. What are the conditions for Directive to produce direct effects?
5. When does a Directive start to produce direct effects within domestic legal orders?
6. What effects does a Directive produce before its transposition within the domestic legal order?
7. Do legal effects of a Directive differ depending on whether they are invoked by an individual against a State authority or a private party or by a States against an individual?
8. What is direct and indirect effect of Directives?

Mandatory reading:

1. C-148/78 *Ratti* ECLI:EU:C:1979:110 (conditions to be fulfilled by a Directive to enjoy direct effect; ascendant vertical direct effect of Directives; moment when a Directive can produce direct effect; the judgment is also important for developing the estoppel argument within the relation between EU and national legal order)
2. Case C-91/92 *Faccini Dori* ECLI:EU:C:1994:292 (rejection of horizontal directive effect of Directives)
3. C-80/86 *Kolpinghuis Nijmegen* ECLI:EU:C:1987:431 (descendant direct effect of Directive: state authorities invoking a Directive to hold the criminal liability of an individual)
4. Case 102/81 *Nordsee* ECLI:EU:C:1982:107 (power to address preliminary reference to the CJEU)
5. C-283/81 *CILFIT* ECLI:EU:C:1982:335 (the institutional perspective of direct effect – the preliminary reference procedure: acte claire and act eclairé doctrine for establishing when national courts have to address a preliminary reference to the CJEU)

Optional Reading suggestions:

- Core, general reading: Hartley T.C., *The Foundations of European Union law*, 8th edition, 2014, sections 4.3, 4.4, 4.5, p. 218-224.
- For a thorough contextual commentary of *Kolpinghuis* see L Marin, "C-80/86 – *Kolpinghuis Nijmegen*: The General Principles of European (Criminal) Law as Limitation to the Enforcement of EU Law: The *Kolpinghuis Nijmegen* Rule." *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*. Ed. Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano. Oxford: Hart Publishing, 2019. 7–20
- For a commentary of *CILFIT*, see D Edward, *CILFIT and Foto-Frost in their Historical Context*, in *Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, edited by Miguel Maduro, and Loic Azoulay, Bloomsbury Publishing, 2010. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/eui/detail.action?docID=570371>.

- An example of a student essay on EU principles of direct effect, supremacy and consistent interpretation, see Alejandro Pizarroso Ceruti, *The European Court of Justice: Legal Interpretation and the Dynamics of European Integration*, 25 Colum. J. Eur. L. 253 (2019).

Starting Notes for answering the above mentioned questions:

EU legal acts: Types and hierarchy

Hierarchy is a ranking of acts according to ‘the democratic legitimacy of their respective authors and adoption procedures’ (Koen Lenaerts and Marlies Desomer, ‘Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures’ (2005) 11 *European Law Journal* 744



The legal effects of EU legal acts:

Type of EU legal act	Addressees	Effects
Regulation	All Member States, natural and legal persons	<ul style="list-style-type: none"> • Directly applicable (no need of transposition) • binding in their entirety from the moment of their publication in the Official Journal • They have vertical and horizontal direct effect if requirements are fulfilled
Directive	All or specific Member States	<ul style="list-style-type: none"> • Binding with respect to the intended result. • It is not directly applicable, it requires transposition within a prescribed period of time. Form and method are left to the Member States. • Only vertical Direct effect under certain circumstances
Decision	Not specified All of specific Member States; specific natural or legal persons	Directly effective only for the addressees, under certain circumstances and binding in their entirety
Recommendation	All or specific Member States, other EU bodies, individuals	Not binding
Avis	All or specific Member States, other EU bodies Not specified	Not binding

Conditions for direct effect of Directive:

- In addition to the Van Gend en Loos requirements (the provisions must lay down clearly identifiable individual rights, the exercise of the rights is not conditional, and subject to further implementation), **the time allowed for implementation of the Directive has to have expired** (see more in Ratti). If Directive cannot produce direct effect during the transposition period, what kind of effect can they produce: indirect effect, see *Kolpinghuis*
- Against whom can an individual rely on the direct effect of the Directive:
 - *Ascendant direct effect*: An individual can invoke a Directive against a national public authority of the Member State for failing to implement the Directive within the prescribed time period (a Member States is precluded, estopped by its failure to properly implement a Directive from refusing to recognise direct effect); or for incorrectly implementation.
 - *Descendant direct effect* : Direct effect cannot have the effect of penalising the individual, meaning that a State authority cannot invoked the provisions of a

Directive in detriment of the citizen's rights (meaning when the citizen's position under the law as amended under the directive was more favourable than under the old law) see more in *Kolpinghuis*.

- CJEU has rejected the *horizontal direct effect* of Directive (that is between an individual and another private party), see *Faccini Dori* and *Kolpinghuis*.

Questions for further reflection:

Why has the CJEU rejected the horizontal direct effect?

In which circumstances is a national court exempted from the obligation to address a preliminary reference to the CJEU?