

The EU legislation

Sources of EU law

- primary law
- secondary law
- Other sources of law

Sources of primary law

- Sort of “constitution” of the EC
 - the ECSC Treaty of 1951 (Treaty of Paris)
 - the EEC Treaty of 1957 (Treaty of Rome)
 - the EURATOM Treaty of 1957 (Treaty of Rome)
 - the Merger Treaty of 1965
 - the Acts of Accession of the United Kingdom, Ireland and Denmark (1972)
 - the Budgetary Treaty of 1970
 - the Budgetary Treaty of 1975
 - the Act of Accession of Greece (1979)
 - the Acts of Accession of Spain and Portugal (1985)
 - the Single European Act of 1986
 - the Treaty of Maastricht of 1992 (Treaty on European Union)
 - the Acts of Accession of Austria, Sweden and Finland (1994)
 - the Treaty of Amsterdam of 1997
 - the Treaty of Nice of 2001
 - the Treaty of Accession 2003
 - the Treaty of Accession 2005
 - The Lisbon Treaty 2009

Sources of secondary law

- Unilateral acts:
 - See art. 288 TFEU
 - Atypical acts
- In some sense also agreements:
 - interinstitutional agreements

Art. 288 TFEU

- To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
- A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
- Recommendations and opinions shall have no binding force.

- **Article 113:** The **Council** shall, acting **unanimously** in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning **turnover taxes, excise duties and other forms of indirect taxation** to the extent that such harmonisation is necessary to ensure the **establishment and the functioning of the internal market and to avoid distortion of competition.**
- **Article 114 : 1.** Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The **European Parliament and the Council** shall, acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee, adopt the measures for the **approximation of the provisions laid down by law, regulation or administrative action in Member States** which have as their object the **establishment and functioning of the internal market.**

Regulations

- Regulations are legislative instruments of general application.
- binding in their entirety
- directly applicable
- Transposition is not necessary nor welcomed

- REGULATION No 1 determining the languages to be used by the European Economic Community
- THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,
- Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;
- Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;
- HAS ADOPTED THIS REGULATION:
- Article 1
- The official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian.
- Article 2
- Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.
- Article 3
- Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.
- Article 4
- Regulations and other documents of general application shall be drafted in the four official languages.
- Article 5
- The Official Journal of the Community shall be published in the four official languages.
- Article 6
- The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.
- Article 7
- The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.
- Article 8
- If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.
- This Regulation shall be binding in its entirety and directly applicable in all Member States.

Directives

- Reconcile two objectives:
 - secure the necessary uniformity of EU law
 - Allows respecting the diversity of national traditions and structures
- binding on Member States
- They are not directly applicable

- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
- HAS ADOPTED THIS DIRECTIVE:
- Article 6
- Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.
- Article 7
- Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.
- Article 8
- Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.
- Article 9
- 1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof.
- Article 11
- This Directive is addressed to the Member States.

CCC § 53

- If the agreement was concluded by means of distant communication devices, the consumer may withdraw from the agreement within 14 days after the performance was taken over. ...
- Should the consumer exercise his right of withdrawal according to the sec. 7, the supplier is entitled only to the reimbursement of the direct cost of returning the goods.

Directive 97/7 Art. 6:

- For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

Decisions

- individual act addressed to a specified person
- binding only on those to whom they are addressed
- No need to implement them

Recommendations and Opinions

- not binding and therefore arguably not law

Principles of application of the EU law

- **Direct applicability:** A legislative measure has legal consequences without state intervention (e.g. regulation)
- **Direct effect:** A legislative measure grants rights/duties to individuals. Such rights/duties must be upheld/enforced by national courts.
- The direct effect principle has been formed by the ECJ and is not stated in the Founding Treaties.

Direct effect rationale

- Ensure that the fundamental aims of the EU legislation are fulfilled (effet utile/effectiveness principle)
- Special nature of EU law

Van gend en Loos case

- dispute between the state and a company
- state breached the Treaty of Rome
- Article 12 of the Treaty of Rome (now replaced by Article 30 TFEU) stated:
"Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."

ARTICLE 10 of the Czech Constitution

- *Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, **form a part of the legal order**; if a treaty provides something other than that which a statute provides, the treaty shall apply.*

- The Community constitutes a **new legal order of international law** for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only **imposes obligations on individuals but is also intended to confer upon them rights** which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community ...
- The wording of article 12 contains a **clear and unconditional** prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by **any reservation on the part of states which would make its implementation conditional** upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.

"Van Gend criteria"

- The provision must:
 - be sufficiently clear and precisely stated,
 - be unconditional or non-dependent,
 - confer a specific right for the citizen to base his or her claim on.

Varieties of direct effect

- Vertical E. = against state (Van Gend en Loos)
- Horizontal = concerns the relationship between individuals (Defrenne v. SABENA)

EU Legislation and direct effect/applicability

- EC Treaty
- Regulations
- Directives
- Decisions
- Opinions/ recommendations
- International agreements

Directives

- **Grad v Finanzamt Traunstein** - D. could be directly effective
- **Van Duyn** – direct effect of directives
- **Becker** - "wherever the provisions of a directive appear...to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or insofar as the provisions define rights which individuals are able to assert against the State."
- **Pubblico Ministero v. Ratti** - time limit for implementation must expire
- **Marshall** - directive can not have a horizontal direct effect

Van Duyn (case 41/74)

- By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, article 3 (1) of Directive 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the community or of member states. Secondly, because member states are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, **legal certainty for the persons concerned requires that they should be able to rely on this obligation** even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.

Ratti (Case 148/78)

- Ratti, a manufacturer of solvents in Italy, was charged with failure to comply with Italian labelling legislation. He claimed that his products were labelled according to EEC standards contained in two directives
- Directive No 1 was adopted in 1973 and was to be implemented in 1974
- Directive No 2 was adopted in 1977 and was to be implemented in 1979

Marshall v South West Area Health Authority (Case 152/84)

- Miss Marshall sought to rely on Art.5 of the Equal Treatment Directive 76/207 when she was required to retire at 60 when men did not have to retire until the age of 65.

Kolpinghuis Nijmegen BV. Case 80/86

- member state (NL) has not yet adopted the measures needed to implement the directive 80/777/EEC on the approximation of the laws of the member states relating to the exploitation and marketing of natural mineral waters – implementation period has already expired
- Criminal proceedings against an undertaking was initiated for breach of this D
- Undertaking was selling a tap-water as mineral water

Faccini Dori v Recreb (Case C-91/92)

- Consumet entered into a contract, later tried to cancel it.
 - Under national law – not possible
 - Under EU directive on consumer protection yes, however, it was not implemented in Italy (5 years after deadline)
 - If Italy did implement it, P could cancel it
- The company replied it does not agree and that it had assigned its claim to Recreb.
- Recreb sues Paola ...

Mangold case C-144/04

- Mangold was a 56-year-old German man employed on a fixed term contract in a permanent full-time job.
- His employer was an attorney at law Mr. Helm.
- According to German law, fixed term contracts are unlawful unless they can be objectively justified. However, if the employee is over 52, that requirement does not apply.
- Mangold sues Mr. Helm and claims that he is a subject of discrimination
- Mr. Helm and Mangold both agree during the trial that there is no reason or justification for the contract to be fixed.
- There was a directive Employment Equality Framework Directive that had to be implemented in 2006

Why should a directive have the direct effect?

- A way to achieve the goal of the EU
- The effectiveness principle

Do not forget

- What is a state? – wide interpretation!

When could D. have DE?

- precise in its wording and
- grants rights to individuals, which may be pleaded before national courts,
- the member state has not abided by the set deadline.
- It cannot be invoked against but only in favour of individuals

Directives - indirect effect

- the national court must apply the legislation adopted for the implementation of the directive in conformity with EC law, in so far as it is given discretion to do so, under national law (14/83 Von Colson)
- The same principle applies as regards national case law

Von Colson case

- *“23. Although... full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection.26. ... national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189.*
- *28. ... if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.*

Marleasing case

- Marleasing – creditor - Barviesa – debtor
- Barviesa establishes La Comercial
- Marleasing sues La Comercial for declaration that it shall be nullified
- Directive 68/151 limits the cases in which a company may be nullified
- This directive was not implemented on time

Marleasing

- *.it should be observed that, as the Court pointed out in its judgment in Case 14/83 [Von Colson and Kamann v Land Nordrhein-Westfalen](#) [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.*

International Agreements

- International commitments of the European Union should be respected in the member states
- They can, in certain circumstances, also be directly enforceable
- i.e. agreements with association countries have direct effect
- The GATT provisions are not directly effective

Conclusion

- EC Treaty provisions Regulations/ Directives, Decisions and Agreements with third countries are in principle directly effective, provided they are clear, unambiguous, unconditional and no further action is needed for their implementation. In this case, they may be invoked before national courts but not horizontally. However, a compensation for non-implementation may be asked from the state.

SUPREMACY

- created by the ECJ
- No reference in EC Treaty.
- based on the effet utile principle (the effectiveness principle)

Relevant ECJ judgments

- Implicitly mentioned in the Van Gend en Loos case.
- Explicitly mentioned in (6/64 Costa v. Enel)
 - It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question
- EC law is supreme even over constitutions (Internationale Handelsgesellschaft)
- Italian Minister of Finance v Simmenthal – lex posterior shall not be applied in case of EU and national law conflicts

Conclusion

- Legislation with direct effect is a source of rights and obligations.
- A national law contrary to a EU rule of direct effect will lack enforcing power.
- There is priority of application of EU law/ not cancellation of the contrary national law.
- National courts are obliged to abstain from applying contrary national law.
- No posterior national law, contrary to the EU law is allowed to be issued.
- National law is neither interpreted, not applied by the ECJ. National courts judgments may not be attacked there.
- Only exceptionally may national law supplement EU law.

Conclusion

- Since EU law overrides national laws, every national court is obliged to give immediate effect to EU law, irrespective of whether it has national jurisdiction.
- EU Law overrides national law if it is “directly effective
- If it is not directly effective, the national courts and authorities should interpret the national law provision by considering the spirit and rationale of this EU law provision (indirect effect)

Conclusion

- National provisions do not become void but they are not applied in the case in question. They may still be applied in other cases to the extent that they are not contrary to the EU law provisions.
- Member-states are obliged to repeal such laws to the extent that the community legislator aims at harmonising national laws in a given field

Third Pillar application of the supremacy and direct effect principles

- Does not apply anymore!
- Direct effect was explicitly forbidden (art.34, § 2 b EU Treaty)
- Application only of indirect effect (no direct effect) in framework decisions. C-105/03 Maria Pupino.