



Part I: The Structure of the EU Judicial System and How it Works

The General Principles of the EU Legal Order – Matching Substance and Procedure

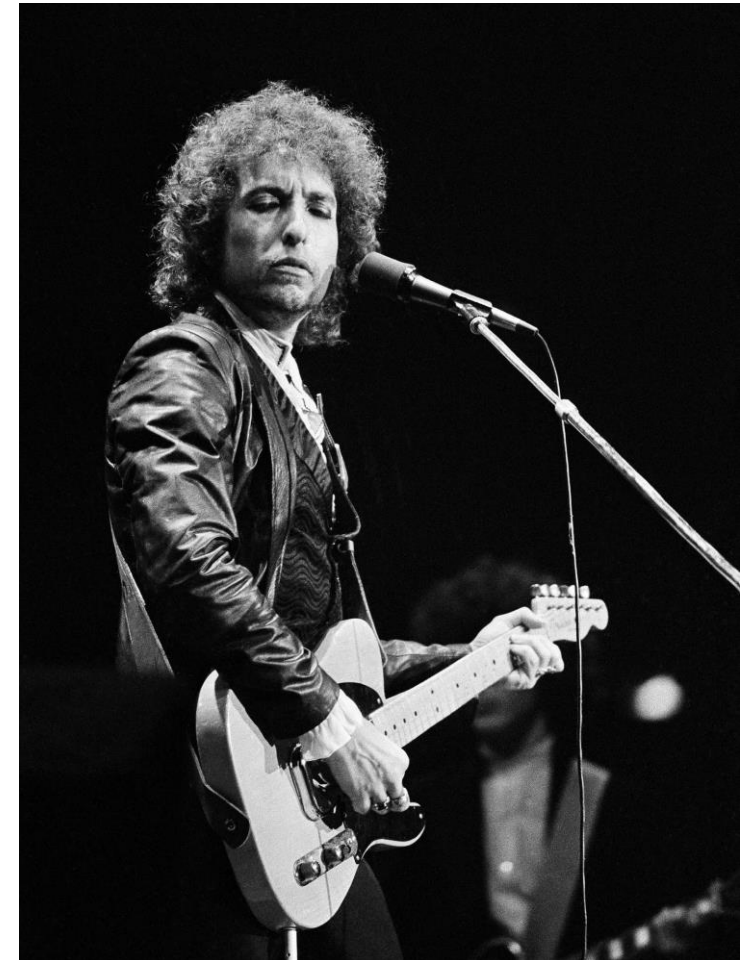
Part A. THE NATURE OF THE EU LEGAL ORDER

A new legal order with direct effect
in the national legal orders

The Key Question of EU Law

- Is EU law international law?
- Is EU law domestic law
- Or is it something else?

The answer, my friends, is not Blowin' in the Wind → it is to be found in the case-law of the Court of Justice!



A new legal order of international law

“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.”*

Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62 , EU:C:1963:1, p. 12.

* Later, the Court suppressed the term “*of international law*” and replaced “*within limited fields*” by “*in ever wider fields*”, meaning that the fields in which Member States have limited their sovereign rights are now considerably wider. See, for example, Opinion of the Court of 18 December 2014, 2/13, EU:C:2014:2454, para 157.



The Treaties create their own legal system

EU law stems from the EC/EU Treaties, which constitute “an independent source of law”.

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply”.

“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.”

Judgment of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, EU:C:1964:66, p. 593-594.

EU law: a *tertium genus*

- The EU has **characteristics of an international organization**: it is a very advanced and far-reaching international organization, with unique characteristics; it was created by its Member States in the Treaties; it is an international player which respects "the principles of the United Nations Charter and international law" (Article 21 TEU); moreover, "agreements concluded by the Union are binding upon [its] institutions and on its Member States".
- The EU is a **supranational legal order**: the defining element of the EU is that its authority (within the reach of its competences) trumps the authority of its Member States. In addition, the EU has *multiple levels of government and governance*. It is the interaction between those levels that make it unique (a **multilevel constitutional system**). **A spiral reasoning!**
- **A federation?**: some say the only legitimate and sustainable route for the EU is federalism, but this proposition is not universally accepted.



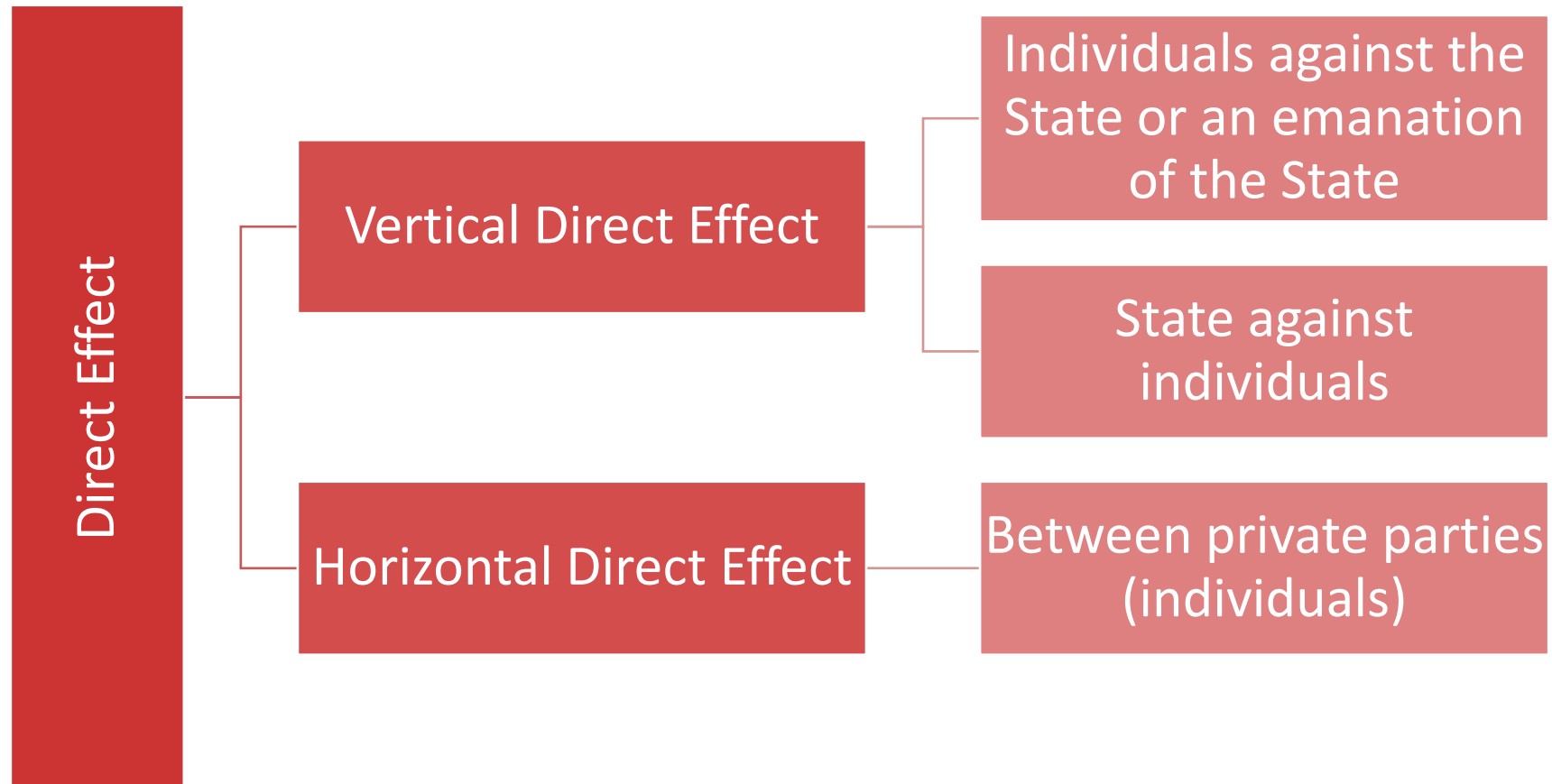
The EU is neither international law nor domestic law. It is a ***tertium genus***, a separate legal order with a supranational character and independent institutions. It is autonomous vis-à-vis both international law and domestic law of the Member States. Such constitutional principles stem from the case law of the Court of Justice.

Effectiveness (*effet utile*) of EU law: the principle of direct effect

General remarks:

- The doctrine of direct effect applies in principle to all binding acts of Union law, including the Treaties, the Charter of Fundamental Rights, general principles of EU law, secondary legislation and international agreements of which the EU is a part;
- The most problematic issues concern the case of directives;
- In the more direct sense, one can define direct effect as meaning that provisions of binding EU law that are sufficiently *clear*, precise and unconditional can be invoked and relied on by individuals before national courts;
- In a broader sense, direct effect can be defined in terms of the capacity of a provision of EU law to confer rights on individuals that they may enforce before national courts.

Effectiveness (*effet utile*) of EU law: the principle of direct effect (1)



1. EU law gives rise to rights for individuals, the protection of which they can rely on before national courts

- *“Independently of the legislation of Member States, Community law*
- *[...] 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.”*

Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1, p. 12.

2. Treaty articles have vertical and horizontal direct effect

“The EEC Treaty [...] is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples” and “more specifically” by the fact that “the exercise of [the prerogatives of the institutions] affects Member States and also their citizens.

Furthermore, [...] the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.”

In addition, the Court drew a decisive argument from the very operation of the preliminary reference mechanism: *“[...] the task assigned to the Court of Justice under Article 177 [now Art. 267 TFEU] [...] confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals”*.

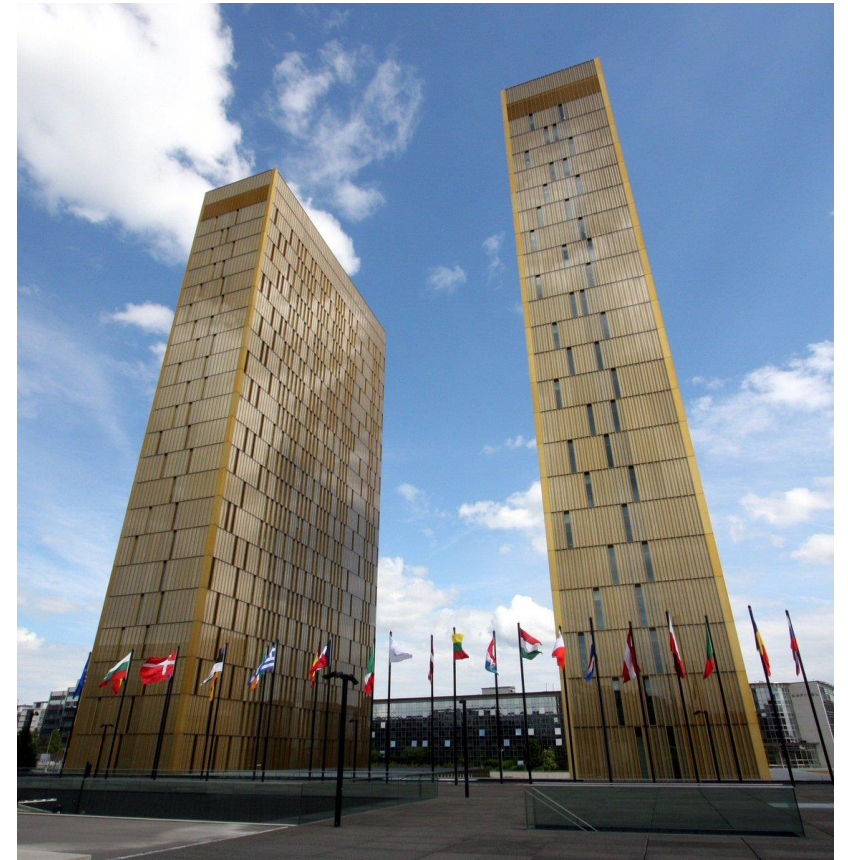
Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1, p. 12.

3. General principles can have vertical and horizontal direct effect

“For the principle of non-discrimination on grounds of age to apply in a case [...], that case must fall within the scope of European Union law.”

“It follows that it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.”

Judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paras 23 and 27.



3. The Charter has vertical and horizontal direct effect

→ The Charter has vertical direct effect, but only some provisions were afforded horizontal direct effect

*“The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).”*

Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para 76.

“ Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”

Judgment of 11 September 2018, *IR v JQ*, C-68/17, EU:C:2018:696, para 78.

Article 288 (ex Article 249 TEC)

“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.”

However, Article 218(11): Opinion of the Court on the compatibility with the Treaties of an international agreement envisaged before entering into force.

4. Regulations have vertical and horizontal direct effect

→ Regulations are directly applicable in the sense that they are part of national legal systems, without the need for transposition or adoption by national legal measures. Regulations have legal effect in Member States independently of any national law.

“regulations are directly applicable and, consequently, may by their very nature have direct effects”

Judgment of 13 november 1974, *Van Duyn v Home Office*, C-41/74, EU:C:1974:133, para 12.

“owing to their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect”

Judgment of 17 September 2002, *Muñoz and Superior Fruiticola*, Case C-253/00, ECLI:EU:C:2002:497, para 27.

5. Decisions have vertical and horizontal direct effect

“[A]lthough [...] regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that article can never produce similar effects.” “Particularly in cases where [...] the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ('l'effet utile') of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law”.

Judgment of 6 October 1970, *Grad v Finanzamt Traunstein*, C-9/70, EU:C:1970:78, para 5.

6. Directives can have vertical direct effect



- The directive is the principal EU harmonization instrument used to coordinate Member State's laws within the internal market;
- The method of implementation need not be uniform in every Member State, but the objectives and substance of the directive must be properly secured in each Member State;
- While directives can be enforced directly by individuals against the state after the time limit for their implementation has expired (vertical direct effect), resulting if necessary in the disapplication of conflicting domestic law, they cannot of themselves impose obligations on individuals (no reverse vertical direct effect);
- Member States are precluded by their failure to implement a directive properly from refusing to recognize its binding effect in cases where it was pleaded against them.

*“It would be incompatible with the binding effect attributed to a **directive** by Article [288 TFUE] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the **useful effect** of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law . **Article [267 TFUE]** [...] implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between member states and individuals.”*

Judgment of 13 November 1974, *Van Duyn v Home Office*, C-41/74, EU:C:1974:133, paras 12-15.

6.1. Unconditional and sufficiently precise

*“It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is **unconditional and sufficiently precise**.”*

Judgment of 5 April 1979, *Ratti*, C-148/78, EU:C:1979:110, para 23.

“On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.”

Judgment of 12 July 1990, *Foster*, C-188/89, ECLI:EU:C:1990:313, para 18.

6.2. Failure to implement the directive

“[...] according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be *unconditional and sufficiently precise*, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.”

Judgment of 5 October 2004, *Pfeiffer and Others*, Joined Cases C-397/01 to C-403/01, EU:C:2004:584 para 103 and the case-law cited.





“22. [...] a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

24. Therefore [...] after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law – even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.”

Judgment of 5 April 1979, *Ratti*, C-148/78, EU:C:1979:110, paras 22-24.

6.3. Directives do not deploy a horizontal direct effect

“With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.”

Judgment of 26 February 1986, *Marshall v Southampton and South-West Hampshire Area Health Authority*, C-152/84, EU:C:1986:84, para 48 (this ruling was expressly confirmed ten years later in judgment of 14 July 1994, *Faccini Dori v Recreb*, C-91/92, ECLI:EU:C:1994:292).

“As to that submission, the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights. Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.”

Judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, para 56.

Conclusive summary

- The EU is not international law or domestic law: it is a *tertium genus*;
- The doctrine of direct effect applies in principle to all binding EU law including the Treaties, the Charter of Fundamental Rights, general principles of EU law, secondary legislation and international agreements;
- Until now, the CJEU has not given horizontal direct effect to directives.



Books:

- K. Lenaerts & P. Van Nuffel, “European Union Law”, Sweet & Maxwell, 3rd edition, 2011, pp. 16-24;
- Barnard & Peers, chapter 6.



