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ECJ, Competences, Core Principles of EU Law



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OUTLINE

1. EU Law and Principle of Conferral
2. The Problem with Competences
3. Core Proceedings before the CJEU
4. Fundamental Principles of the EU Law



How to Read a Legal Opinion

- [Orin KERR: How to Read a Legal Opinion](#)
- **Caption** Costa v ENEL
- **Case Citation** European Court of Justice, Judgment of 15 July 1964, Cost a / E.N.E.L.
- **Author** The Court: A.M. Donner, President, Ch.L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux and R. Lecourt (rapporteur), judges; Advocate-general: K. Roemer; Registrar: A Van Houtte
- **Facts of the Case**
- **Law of the Case**
- **Separate (Concurring and/or Dissenting Opinions)**



How to Read a Legal Opinion

- Facts
- Legal Arguments by the Parties
- Disposition (the action the court took – affirm, reverse, etc.)
- Reasoning
 - Source of the law
 - Method of reasoning (following statute, precedent, public policy ground, morality)
- Significance of the Opinion
- Final ruling
- Separate Opinion



2. EU Law and Principle of Conferral



Principle of Conferral

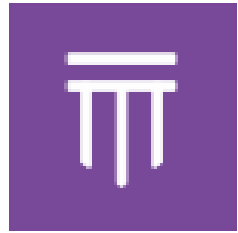
- JURISDICTION AREAS
 - 1. **No jurisdiction** of the EU
 - 2. **Autonomous jurisdiction** (authority) of the EU
 - 3. **Overlap of EU/member states authority**
- Principle of Conferral
 - *EU is not a sovereign, does not have inherent powers, but conferred competences (by Treaties)*



Principle of Conferral

Article 5 (ex Article 5 TEC)

1. The limits of Union competences are governed by **the principle of conferral**. The use of Union competences is governed by the **principles of subsidiarity and proportionality**.
2. Under the principle of conferral, the Union shall act only **within the limits of the competences conferred upon it by the Member States** in the Treaties to attain the objectives set out therein. Competences **not conferred upon** the Union in the Treaties **remain with the Member States**.
3. Under the **principle of subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act **only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States**, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. (...).
4. Under the **principle of proportionality**, the content and form of Union action shall not exceed what is **necessary to achieve the objectives** of the Treaties. (...)



EU Competences

- Why is it important? Compared to national parliament, if EU legislates, it needs to justify its authority to do so
- EU does not have **INHERENT** powers, they must be *conferred*
- *i.e. constitutional principle of conferral*
- Legislative competence = material field within which an authority (EU) can act (legislate)
- Problem: instead of list, different types of competences in individual policies

Table 3.1 Union Policies and Internal Actions

Part III TFEU - Union Policies and Internal Actions			
Title I	The Internal Market	Title XIII	Culture
Title II	Free Movement of Goods	Title XIV	Public Health
Title III	Agriculture and Fisheries	Title XV	Consumer Protection
Title IV	Free Movement of Persons, Services and Capital	Title XVI	Trans-European Networks
Title V	Area of Freedom, Security and Justice	Title XVII	Industry
Title VI	Transport	Title XVIII	Economic, Social and Territorial Cohesion
Title VII	Common Rules on Competition, Taxation and Approximation of Laws	Title XIX	Research and Technological Development and Space
Title VIII	Economic and Monetary Policy	Title XX	Environment
Title IX	Employment	Title XXI	Energy
Title X	Social Policy	Title XXII	Tourism
Title XI	The European Social Fund	Title XXIII	Civil Protection
Title XII	Education, Vocational Training, Youth and Sport	Title XXIV	Administrative Cooperation

Article 192
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure ... shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

Title XX - Environment
Article 191 Aims and Objectives
Article 192 Legislative Competence
Article 193 Powers of the Member States



EU Competences

- Understanding of these thematic competences further complicated by
 1. Spill-over into other policy areas (i.e. the list is not definitive)
 2. Rise of EU's general competences according to A 114 and A 352
 - These are two different additions to thematic competences EU has
 3. Doctrine of implied powers



1. Spill-over

- **1. Spill-over**
 - Follows from a soft conferral principle (EU has authority to interpret **whether it has a competence**)
 - The Working Time Directive (C-84/94), includes provision that allows the Union to ***encourage improvements, especially in the working environment, as regards the health and safety of workers.***
 - **Can EU adopt legislation on general organization of working time?**



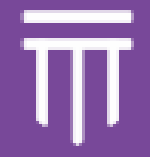
1. Spill-over

Article 118a. [153 TFEU]

1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

2. In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

- **Can EU adopt legislation on general organization of working time?**



EU Competences

There is nothing in the wording of Article [153 TFEU] to indicate that the concepts of “working environment”, “safety” and “health” as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time.¹⁰



EU Competences

- Case Casagrande C-9/74
 - Abolishment of discrimination between different MS as regards employment, remuneration and other conditions of work – in order to facilitate the free movement of persons in the internal market. EU legislation also facilitates integration of worker and his/her family into the host state (children shall be admitted to general educational etc. courses under the same conditions as the nationals of that state, if such children are residing in the state's territory).
 - ECJ interpreted admission of workers' children as related also to general measures intended to facilitate educational attendance: including educational grants



2. General Competence

- **A. Article 114:** harmonization, horizontal competence (approximation of national laws which have as an aim to establish and allow functioning of the internal market)
 - 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.
 - 1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.



2 General competence

- A. Article 114
 - Tobacco Advertising: first constitutional boundary: first time a European law was annulled as going beyond the harmonization power
- B. Article 352 = residual competence
 - Action necessary to attain objectives of the Treaties but Treaties have not provided EU with the necessary powers
 - Environmental policy prior to the SEA
 - ECJ: this cannot be used to qualitative leaps such as accession to ECHR



EU Competences

- 3. Implied powers
 - = treaty-making powers, or external powers



ECJ's role

- *Review of all European law measures*
- *Review of the acts of member states*

- Infringement proceedings (**enforcing** the law)
- Actions for annulment (**annulling EU** legal acts)
- Actions for failure to act (**ensuring** the EU takes action)
- Preliminary rulings (**interpreting** the law)
- Actions for damages (**sanctioning EU institutions**)



Infringement

Article 258 TFEU

- If the **Commission** considers that **a Member State** has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
- If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter **may bring the matter before the Court of Justice** of the European Union.

Article 259 TFEU

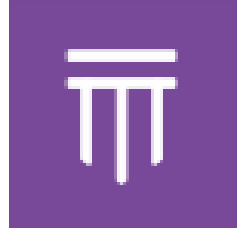
- **A Member State** which considers that **another Member State** has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
- Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the **Commission**.
- The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
- If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.



Infringement

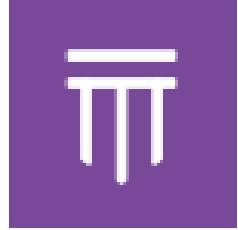
Article 260 TFEU

1. If the **Court of Justice of the European Union** finds that a **Member State** has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the **Commission** considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
 - If the Court finds that the Member State concerned has not complied with its judgment it may impose a **lump sum or penalty payment** on it.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures **transposing a directive** adopted under a legislative procedure, it may, when it deems appropriate, **specify the amount of the lump sum or penalty payment to be paid by the Member State** concerned which it considers appropriate in the circumstances.
 - If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned **not exceeding the amount specified by the Commission**. The payment obligation shall take effect on the date set by the Court in its judgment.



Infringement

- Most famous cases?



Infringement

- Most famous cases?
- Article 258 (initiated by the Commission)
 - Poland & Hungary: violation of LGBTQI rights
 - Commission v Poland (C-791/19)
- Article 259 (initiated by the Member State)
 - Hungary v Slovak Republic (C-364/10)
 - Spain v United Kingdom (C-145/04)
 - Dutch Tweede Kamer resolution?
 - Commission v Poland (C-791/19) intervention of 5 member states
- Sanctions?



Annulment

Article 263 TFEU

- *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*
- *It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*
- *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*
- *The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*



Annulment

Article 264 TFEU

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 266 TFEU

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.



Annulment

- i.e. **Review of legality** of
 - Legislative acts
 - Acts of Council, European Commission and ECB
 - Acts of European Parliament and European Council intended to produce legal effects vis-à-vis 3rd parties
- **Applicants**
 - Privileged (MS, EP, Council, Commission)
 - Semi-privileged (Court of Auditors, Committee of Regions)
 - Non-privileged (individuals)
- **Grounds**
 - Lack of competence
 - Infringement of procedural requirement (C-138/79 SA Roquette Frères v Council and C-139/79 Maizena GmbH v Council)
 - Infringement of Treaties or Charter
 - Infringement or RoL related to the application of Treaties
 - Misuse of powers
- Famous cases?



Action for Failure to Act

- *Article 265 TFEU*

*Should the **European Parliament, the European Council, the Council, the Commission or the European Central Bank**, in infringement of the Treaties, fail to act, the **Member States and the other institutions of the Union** may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.*

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

...

Article 266 TFEU

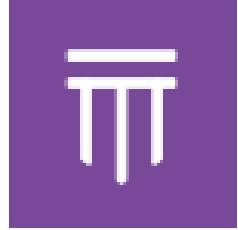
The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.



Preliminary Ruling Procedure

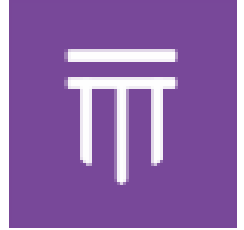
Article 267

- The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
 - (a) the interpretation of the Treaties;
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
- Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is **no judicial remedy** under national law, that court or tribunal **shall bring the matter before the Court**.
- If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the **minimum of delay**.



CJEU and domestic courts

- Possibility v obligation
 - Change of the case law
- Validity of EU acts
 - C-293/12 and C-594/12 Digital Rights Ireland
- Interpretation of the EU law by the court of the last instance
- *283/81 CILFIT – CILFIT criteria*
 - there is no obligation if
 - a) the interpretation of EU law has no connection to the result of the dispute
 - b) **acte clair doctrine**
 - c) **acte éclairé doctrine**
 - Herculean judge?
 - What about constitutional courts?



CJEU and domestic courts

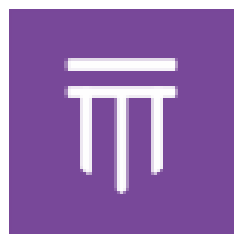
What preliminary rulings are courts referring?

1) Do provisions of EU law have direct effect?

- *Van Gend en Loos*

2) How to interpret provisions of EU law?

3) Conformity of domestic legislation with EU law



CJEU and domestic courts

- Who refers and why?
 - Judicial attitudes and educational background
 - Patterns of transnational economic exchange
 - Public support for integration
 - Democratic aversion to judicial power
 - Legal culture
 - Economic clusters
 - Institutional differences among domestic courts
 - strategic behavior of lower courts

- “[O]ver the entire life of the Community, appellate courts have been more active than lower courts in referring questions to the European Court. If we consider the fact that there are many more lower than appellate courts, and that lower courts process the vast bulk of national litigation, this discrepancy is all the more striking. Because a core function of appellate judging is to resolve disputes involving legal interpretation and conflict of law, we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be.” (Stone Sweet and Brunell 1998: 90)



Four Freedoms of Single Market

- Freedom of movement of persons
- Freedom of movement of goods
- Freedom of movement of Services and capital
- Freedom of establishment



Core principles

- Direct effect
- (Su)premacy
- State liability
- Fundamental rights



Direct effect and supremacy

- What is the direct effect?
- Where do you find it?
- How did the ECJ arrived to direct effect?



What is the direct effect?

Monism v Dualism

M: international law directly applicable as any domestic law

D: binding only on the state, not in; transposition needed

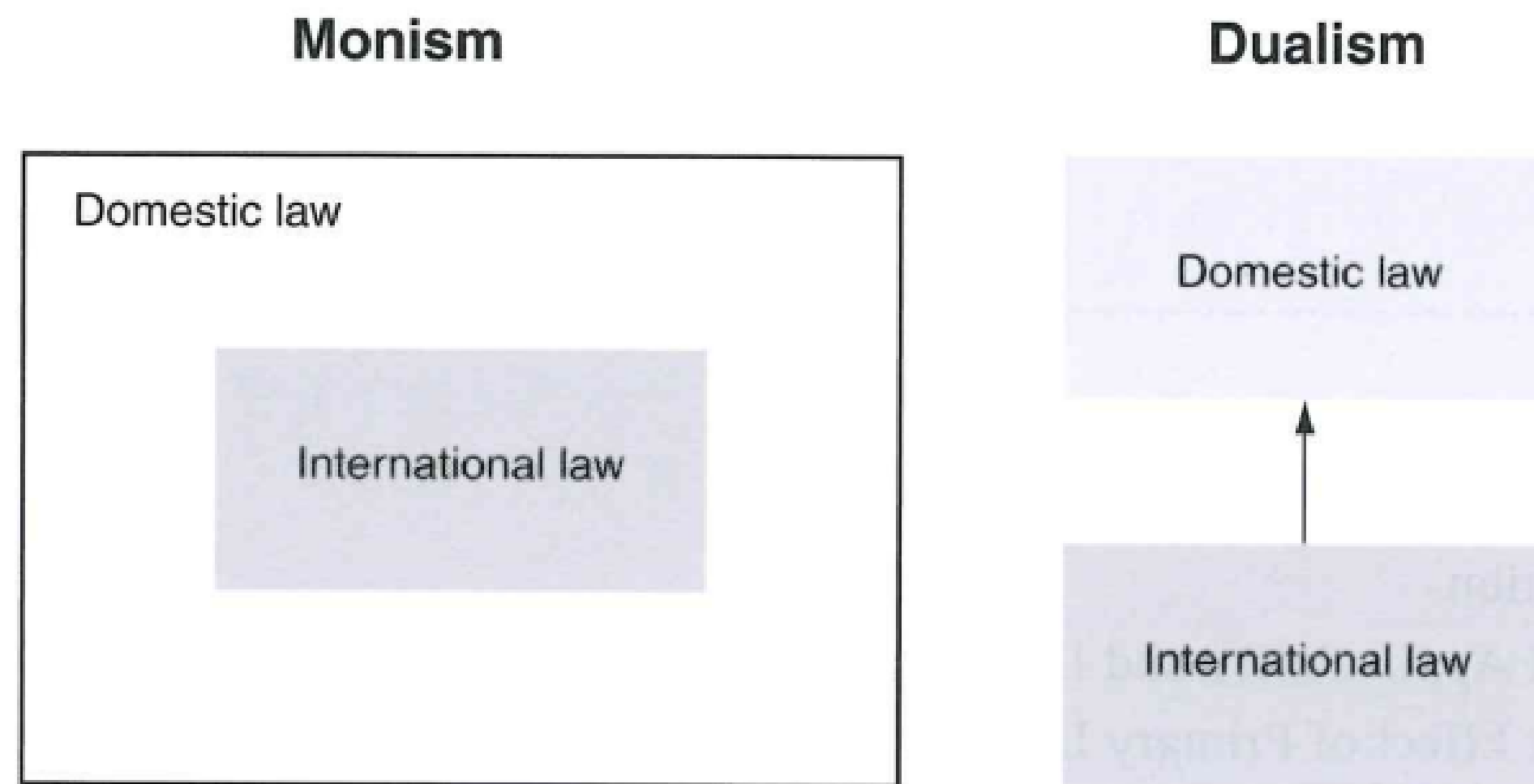


Figure 5.1 Monism and dualism



288 TFEU

- [1] To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
- [2] A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- [3] 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.
- [4] A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
- [5] Recommendations and opinions shall have no binding force.



Direct effect and direct applicability

- Regulations and decisions: contain directly applicable norms
- *Van Gend en Loos* (Case 26/62)
 - Origins: reclassification of a chemical into a custom category entailing higher customs charges (BENELUX)
 - Van Gend en Loos: postal and transportation company, transporting formaldehyde from West Germany to the Netherlands
 - Opposes import tariff as contrary to the A12 of the Treaty of Rome:
 - "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."



Direct effect and direct applicability

Van Gend en Loos (Case 26/62)

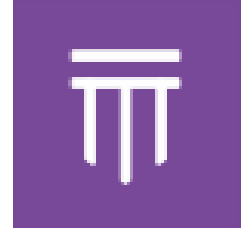
The wording of article 12 contains **a clear and unconditional prohibition** which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted 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 en Loos

The objective of the E[U] Treaty, which is to establish a **common market**, the functioning of which is of direct concern to interested parties in the [Union], implies that this **Treaty is more than an agreement which merely creates mutual obligations between the contracting States**. This view is confirmed by the preamble of the Treaty which refers **not only to the governments but to peoples**. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member States and also their citizens. Furthermore, it must be noted that the nations of the States brought together in the [Union] are called upon to cooperate in the functioning of this [Union] through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article [267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that **[European] law has an authority which can be invoked by their national before those courts** and tribunals. The conclusion to be drawn from this is that the [Union] 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 national. **Independently of the legislation of Member States**, [European] law therefore not only imposes obligations on individuals but is also **intended to confer upon them rights** which become part of their legal heritage.



Direct effect and direct applicability

- *Van Gend en Loos* (Case 26/62)
 - ECJ cut the umbilical cord with classic international law
 - A12 is capable of creating personal rights
- **European legal order in a new legal order**
- **It is more than international law**
- **It has authority which can be invoked by citizens**
- **It poses the citizens obligations and confers rights, independently on the legislation of member states**



Repercussions of direct applicability

Not all norms are directly applicable: **justiciable norms** (can be applied by a public authority)

Test:

1. Clear provision
2. Unconditional (does not depend on subsequent legislation – automatic prohibition)
3. Absolute provision (does not allow reservations).

ECJ eventually moved to a more lenient test (widening the interpretation of 3 criteria) – to simple: provision that can be applicable by a national court



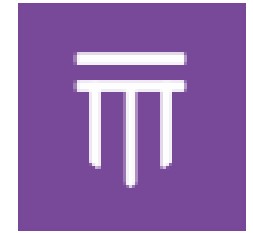
Examples of direct applicability?

Defrenne: Each Member State shall ensure that **the principle of equal pay** for male and female workers for equal work or work of equal value is applied.

Reyners: In order to **attain freedom of establishment** as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall **act by means of directives**.

Van Duyn: a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account as a matter of personal conduct of the individual concerned

The prohibition on **quantitative restrictions** shall **not** preclude [national] prohibitions or restrictions on imports, exports, or goods in transit justified **on grounds of public morality, public policy or public security**.

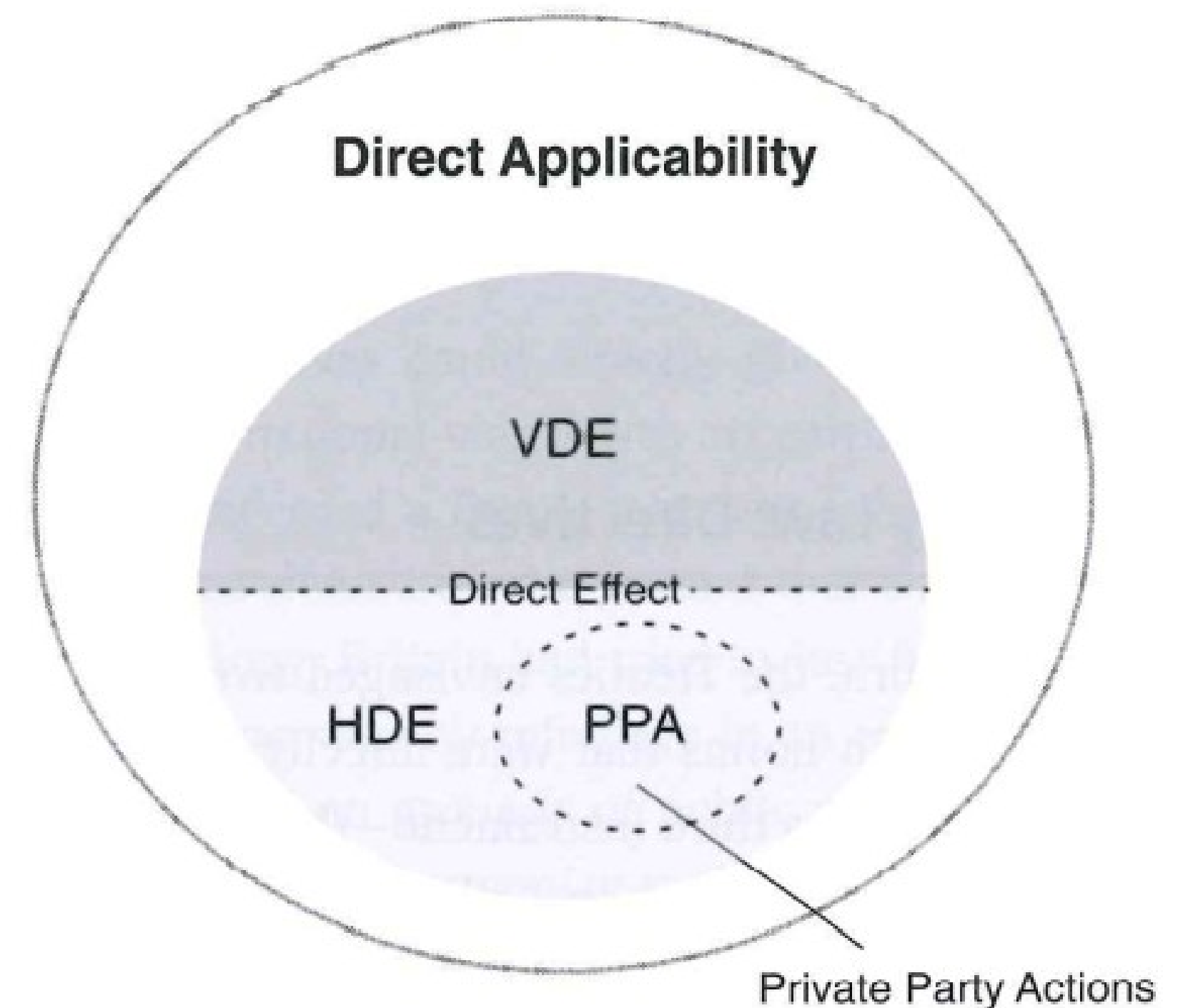


Horizontal and Vertical Direct Effect

Van Gend: Treaties are theoretically allowed to impose obligations on individuals

Horizontal DE:

- Between individuals
- Treaty provisions (*Familiapress v Bauer*)
- Decisions and Regulations
 - Two exceptions:
 - 1. Reg explicitly calls for a domestic act
 - 2. Reg is too general and needs a domestic act
- Directives: binding on states, dualist
 - *Variola*: sets out aim, not the road
 - ***Francovich*: vertical direct effect**



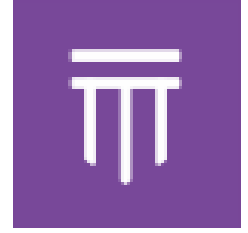
Repercussions of direct applicability

Direct applicability => Direct effect and Supremacy of [EU] Law

Direct applicability: no transposing national provision is needed

Direct effect: sets out rights/obligations for individual (sufficiently precise and clear provision)

Supremacy: only of those provisions, which have direct effect. I.e. not whole system of EU law, but! Potentially also any norm of EU law, irrespective of its legal force



Supremacy of EU Law?

- Two perspectives:
 - *European*
 - Absolute
 - *National*
 - Relative
 - Ultra vires control



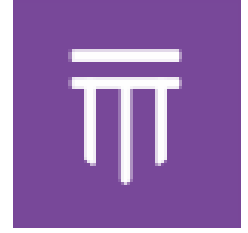
European Perspective of Supremacy

- Over domestic law
 - Fear of decentralization
 - *Costa v ENEL*
 - *Principle of autonomous interpretation*
- Over constitutional law
 - Internationale Handelsgesellschaft
 - Solangene?
- Over international treaties
 - A 351 TFEU
 - The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more on the other, shall not be affected by the provision of the Treaties.
 - Limits:
 - Obligations towards third states
 - Kadi: x derogation from principles of liberty, democracy and respect for human rights and fundamental freedoms of A2 TEU
 - Matthews: the fact that MS delegates part of its sovereignty on IO does not mean that it will stop complying with FR



Primacy or Supremacy of EU Law?

- Costa v ENEL (6/64)
 - Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)
- Should EC law, the Treaty of Rome in particular, be considered dominant over national statutes?
- Treaty's provision on single market did not have direct effect -> only the Commission can bring a case against Italy. HOWEVER, Mr Costa can turn to Italian courts and contest the compatibility of national law with the EC law

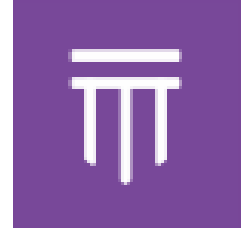


Primacy or Supremacy of EU Law?

Costa v ENEL (6/64)

Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)

By contrast with ordinary international treaties, the E[U] 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... The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it **impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.** Such a measure cannot therefore be inconsistent with that legal system. **The executive force of [European] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...** 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 [European] law and without the legal basis of the [Union] itself being called into question.



Primacy or Supremacy of EU Law?

- European view: supremacy
 - confirmed in Internationale Handelsgesellschaft
 - Can European legislation violate fundamental rights as granted by the German Constitution?
 - Are the fundamental structural principles of national constitutions, including human rights, beyond the scope of Union supremacy?
 - ECJ: Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficiency of [European] law. The validity of such measure can only be judged in the light of [European] law.
 - The whole of European law prevails over the whole of national law



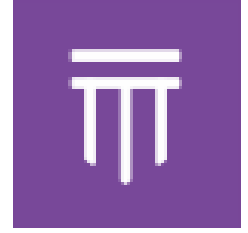
Repercussion of the Supremacy

- *Simmenthal II*
 - *What consequences flow from the direct applicability of a provision of [Union] law in the event of incompatibility with a subsequent legislative provision of a Member State?*
- National courts are under a direct obligation to give immediate effect to European law.
- Supremacy = rules of [European] law must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force
- Effect
 - Break (x)
 - Principle of precedence:



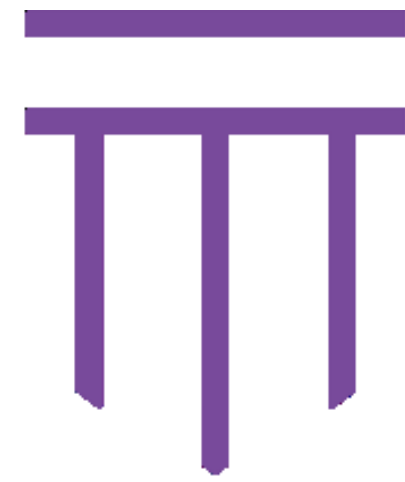
Repercussion of the Supremacy

- Principle of precedence (Simmenthal 106/77)
 - [I]n accordance with the **principle of precedence** of [European] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force **render automatically inapplicable** any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also **preclude the valid adoption of new legislative measures** to the extent to which they would be incompatible with [European] provisions.
- = principle of executing force



National challenges to Supremacy

- Human rights
- Competence limits



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