



# THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL LEGAL SYSTEMS

# MAIN QUESTIONS

- Which source of law will take precedence in case of conflict between EU law and national law?
- What will the effect of EU law in the Member States be?
- Who receives rights and obligations under EU law?
- Where and how may such rights be enforced?

# ORIGINAL SITUATION (THE TREATIES)

- The founding Treaties did not directly address these questions.
- The Member States originally assumed that EEC law would have the same domestic effects as other sources of international law.
- So, the status of the EEC Treaty was determined by each Member State's own constitutional rules.

# ORIGINAL SITUATION (THE TREATIES) (2)

- In dualist States (such as the UK), international law is only binding on individuals if it has been adopted by the national authorities and made part of domestic law.
- In dualist States, it was considered that the EEC Treaty would bind the state
- but not provide enforceable rights to individuals unless specifically incorporated.

# ROLE OF THE EUROPEAN COURT OF JUSTICE

- In monist States (such as NL, FR), once ratified, international law automatically forms part of the national legal system.
- In monist States, it was assumed that EEC law automatically became part of that State's domestic legal system.
- So, the status – and impact – of EEC law varied from State to State.
- The ECJ, however, took a different approach and developed two fundamental principles:
  - 1. direct effect**
  - 2. supremacy.**



# THE DOCTRINE OF SUPREMACY OF UNION LAW

# THE CREATION OF THE DOCTRINE OF SUPREMACY

- While the Court did not address the issue of supremacy of EU law directly in Case 26/62, *Van Gend en Loos* (*Van Gend*), it explained that Union (then Community) law constitutes a ‘new legal order . . . for the benefit of which the States have limited their sovereign rights, albeit within limited fields’.
- (The Court’s judgment resulted in Union law (what is now Art 34 TFEU) being applied, rather than the conflicting national (Dutch) law, which was set aside by the domestic court.)
- The Court clearly recognized that to allow Member States to apply conflicting national law rather than Union law would severely undermine the ability of the EU to achieve its aims.
- Thus, the doctrine of the supremacy (or primacy) of Union law was established.



# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY

- The implications of the doctrine of supremacy were not fully addressed until Case 6/64, *Costa v ENEL*.
- In this judgment the Court confirmed that where national law and EU law conflict, EU law must take precedence, even where the national law has been enacted subsequent to EU law;
- this ruled out the possibility of national law taking precedence under the concept of 'implied repeal' (i.e. a constitutional principle under which legislation is presumed to have been repealed by later, conflicting, legislation).

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (2)

- The Court provided a number of arguments in support of its *dicta*.
- First, it confirmed that EU law is an integral part of domestic legal systems, and that Member States had created this new legal system by limiting their sovereign rights and transferring power to the EU.
- Drawing heavily on the spirit and aims of the (then EEC) Treaty, the Court pointed out that the uniformity and effectiveness of Union law would be jeopardized should national law be allowed to take precedence.

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (3)

- In addition, the Court argued that the obligations undertaken by the Member States would be ‘merely contingent’ rather than ‘unconditional’ if they could ‘be called into question by subsequent [national] legal acts’.
- The Court also referred directly to the text of the EEC Treaty to support its judgment.
- Although the original Treaties did not – and the TEU and TFEU still do not – provide directly for the supremacy of European law, the Court of Justice has argued that Art 288 TFEU, which provides for the direct applicability of regulations, would be meaningless if Member States could negate their effect by enacting subsequent, conflicting legislation.

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (4)

- While *Van Gend* and *Costa* dealt with the theoretical principle of supremacy, the Court had little to say on the practical application of the concept.
- A serious threat to the supremacy of EU law was revealed in Case 11/70, *Internationale Handelsgesellschaft* (IHG), when the German Administrative Court voiced its concern over the legal foundations on which the principle of supremacy was based.
- The German Court was concerned that fundamental rights contained within the German constitution could be overruled by European law.

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (5)

- The ECJ made it clear that EU law is supreme over all forms and sources of national law
- at the same time it declared that the Union recognized such fundamental rights as an 'integral part of the general principles of law' whose protection would be ensured 'within the structure and objectives of the Community' (now Union).

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (6)

- In Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal*, as a result of a preliminary reference, the ECJ was required to consider whether a national court should dis-apply conflicting national legislation, even in situations where that court had no domestic jurisdiction to do so (in Italy, this function was only to be carried out by the Constitutional Court).
- The Court provided that where conflict arises between national and European law, the national court is required to give immediate effect to EU law and not wait for a ruling from the Constitutional Court.

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (7)

- **This judgment is important, in that it confers on all domestic courts' jurisdiction that they may not have under domestic law.**
- Once more, the European Court emphasized the need for such action in order to ensure the effectiveness of Union law.

# THE DEVELOPMENT OF THE DOCTRINE OF SUPREMACY (8)

- A further example of the jurisdiction of national courts being extended by Union law can be found in Case C-213/89, *R v Secretary of State for Transport ex p Factortame Ltd (Factortame (No 2))*.
- In this case, the ECJ explained that a national rule must be set aside by a national court if that rule interferes with an EU law right.
- This can be seen as an additional example of the practical consequences of the doctrine of supremacy.





# THE DOCTRINE OF DIRECT EFFECT OF EU LAW

# THE CREATION OF THE DOCTRINE OF DIRECT EFFECT

- The ECJ provided a ground-breaking judgment in Case 26/62, *Van Gend en Loos (Van Gend)*.
- Van Gend imported goods from Germany into the Netherlands.
- He was required, by Dutch law, to pay customs duty on the goods to the Dutch authorities.
- The importers challenged the legality of the duty, claiming that it was an infringement of what is now Art 30 TFEU.
- The Dutch tribunal referred the question to the ECJ under the preliminary reference procedure (Art 267 TFEU).

# THE CREATION OF THE DOCTRINE OF DIRECT EFFECT (2)

- In order to arrive at its decision, the Court of Justice drew heavily on its purposive method of interpretation, relying not only on the wording of the Treaty, but also on the spirit and aims of the Union (then, Community).
- In its judgment, the Court declared that the Union constituted a new legal order of international law, which conferred both rights and obligations on individuals, as well as on the participating Member States, without the need for implementing legislation.
- The Court further concluded that national courts must protect such rights.

# THE CREATION OF THE DOCTRINE OF DIRECT EFFECT (3)

- In other words, the Court of Justice provided that EEC law (now EU law) had direct effect, which can be seen as a two-pronged concept under which:
  - a) EU law provides individuals, as well as Member States, with rights and obligations; and
  - b) such rights and obligations are enforceable by national courts.
- From this judgment, which was opposed by a number of Member States, it can be concluded that **the Court was motivated by the need to ensure the integration, effectiveness and uniformity of EU law.**

# THE CONDITIONS FOR DIRECT EFFECT (VAN GEND CRITERIA)

- The Court explained in *Van Gend* that **not all Treaty articles** would be capable of **direct effect**.
- It is now clear that any provision must first fulfill a set of **criteria** if it is to be directly effective (the *Van Gend criteria*, also called the *Reyners criteria*).
- The ***Van Gend criteria*** require that in order to have direct effect, the legal provision must be:

# VAN GEND CRITERION N. 1

## clear and precise

- it is logical that if law is to be enforceable, both parties must be clear as to what their respective rights/obligations are. The ECJ has therefore declared that a provision must be 'sufficiently clear and precise' before being capable of direct effect.
- This does not necessarily mean that the whole provision must comply: for example in Case 43/75, *Defrenne v Sabena*, it was held that only part of Art 119 EEC (now Art 157 TFEU) fulfilled this criterion but that part was still held to have direct effect;

# VAN GEND CRITERION N. 2

## **unconditional**

- a provision will not be unconditional if the right it provides is in some way dependent on the judgment or discretion of an independent body unless that discretion is subject to judicial control (an example of this may be found in Case 41/74, *Van Duyn*);



# VAN GEND CRITERION N. 3

## **not subject to any further implementing measures on the part of either the Union or national authority**

- this criterion would appear to have been subject to a liberal application by the Court, as can be demonstrated in Case 2/74, *Reyners*.
- In this case, based on the wording of the Treaty, it had been anticipated that secondary legislation would have to be enacted before the objectives contained in Art 52 EEC (now Art 49 TFEU) would provide rights to individuals.
- However, the Court declared the provision to be directly effective, explaining that to do otherwise could result in individuals being denied their EU law rights.



# DIRECT EFFECT OF DIFFERENT SOURCES OF UNION LAW

# DIRECT EFFECT AND TREATY ARTICLES

- The question of whether the principle of direct effect applies to Treaty articles was considered in the judgment of *Van Gend en Loos* and it is now well accepted that all Treaty articles that comply with the *Van Gend criteria* are capable of direct effect.
- In addition, the Court has provided that rights and obligations contained in Treaty articles may be enforced both against the State and public bodies (known as **vertical direct effect**: *Van Gend*) and against private bodies and individuals (known as **horizontal direct effect**: Case 43/75, *Defrenne v Sabena*).

# DIRECT EFFECT AND REGULATIONS

- Article 288 TFEU would appear to give regulations direct effect.
- The Article states that a regulation ‘shall be binding in its entirety and directly applicable in all Member States’.
- (Direct applicability, which should not be confused with direct effect, has been interpreted as meaning that a provision requires no implementation or further action by the States in order for it to take effect in national law.)
- While all regulations are directly applicable (as are Treaty articles), the Court confirmed in Case 9/70, *Franz Grad*, that regulations would only be directly effective when they fulfill the *Van Gend criteria*.
- As with Treaty articles, regulations may be enforced both vertically and horizontally.

# DIRECT EFFECT AND DECISIONS

- Decisions, as regulations, are directly applicable, but Art 288 TFEU provides that they can be binding on those to whom they are addressed (whether that be Member States, corporations or individuals).
- The Court of Justice has held that decisions will be directly effective, providing they fulfill the *Van Gend criteria*, against an addressee (Case 9/70, *Franz Grad*).

# DIRECT EFFECT OF INTERNATIONAL AGREEMENTS

- In an attempt to ensure that Member States respect any commitments arising from such agreements, the Court has ruled that international agreements (such as free trade agreements) may have direct effect if the circumstances are appropriate (Case 104/81, *Kupferberg*, Art 216 TFEU).

# DIRECT EFFECT AND DIRECTIVES

- This is a particularly controversial area.
- Article 288 TFEU provides that: ‘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.’
- Directives are therefore not directly applicable, as they require implementation into national law by each State’s legislative body.
- So, directives do not provide rights to individuals until they have been incorporated through national legislation, rather than through the directive itself;
- although they do place obligations on Member States.



# DIRECT EFFECT AND DIRECTIVES (2)

- The wording of Art 288 TFEU seems to preclude directives from being directly effective;
- Still, the ECJ has held that where a directive has not been properly implemented into national law, it may still give rise to direct effects (*Franz Grad* and *Van Duyn*).
- The Court has confirmed that in order for directives to be directly effective, they must satisfy the *Van Gend criteria*.
- While the first two criteria present few problems, it would appear that the final criterion is impossible to satisfy. However, once the date on which the directive should have been implemented has passed, the ECJ has shown itself willing to conclude that this criterion has also been satisfied (Case 148/78, *Pubblico Ministero v Ratti*).

# DIRECT EFFECT AND DIRECTIVES (3)

- The Court has argued that this approach results in directives being more effective;
- it also stops Member States from relying on their own 'wrongdoing' should they fail to incorporate a directive into domestic law.
- This development, however, has been criticized by some who argue that to allow directives direct effect removes the intended distinction between regulations and directives.

# DIRECT EFFECT AND DIRECTIVES (4)

- In response to such criticism, the ECJ has explained that directives are distinct as they may only be enforced vertically (that is, against the State) and not horizontally (that is, against individuals) (Case 152/84, *Marshall v Southampton and South West Hampshire AHA (Marshall (No 1))*).
- In the *Marshall* case, Miss Marshall wished to enforce rights emanating from the Equal Treatment Directive (Council Directive (76/207/EEC)), against her employer.
- She attempted to do this in the appropriate national court, i.e. an employment tribunal (ET).

# DIRECT EFFECT AND DIRECTIVES (5)

- The ET made a preliminary reference to the ECJ (under Art 267 TFEU), asking whether Ms Marshall could rely on the Directive.
- The Court replied that she could, as her employers were a public body and therefore part of the State – in other words, she could rely on the vertical direct effect of the Directive.)

# DIRECT EFFECT AND DIRECTIVES (6)

- This requirement has the unfortunate effect of discriminating between individuals who wish to enforce their rights against a State or public body, as compared to those wishing to pursue the same rights against a private body.
- The problem can be illustrated by consideration of Case 151/84, *Roberts v Tate & Lyle Industries* (the *Tate & Lyle* case), which mirrored the circumstances of *Marshall* (No 1).
- Ms Roberts also wished to enforce rights emanating from the Equal Treatment Directive but she was employed by a private corporation as opposed to an emanation of the State, so her rights were unenforceable.

# DEVELOPING THE EFFECTIVENESS OF DIRECTIVES

# VERTICAL DIRECT EFFECT: A WIDE INTERPRETATION OF 'STATE'

- To address the problem highlighted above, the ECJ has shown itself willing to adopt the widest possible definition of 'State'.
- The Court has been willing to recognize a Health Authority as part of the State (in *Marshall No 1*);
- in Case 103/88, *Fratelli Constanzo*, regional and local government were also considered to be within the definition.
- In Case 222/84, *Johnston v Chief Constable of the RUC*, the Chief Constable was also recognized as an 'emanation of the State'.

# VERTICAL DIRECT EFFECT: A WIDE INTERPRETATION OF 'STATE' (2)

- In Case C-188/89, *Foster v British Gas*, the Court of Justice provided some guidance (note: these are not criteria) on what could be considered an 'emanation':
  - a directive may be relied upon against organizations or bodies which:
    - a) have been made responsible for providing a public service; and/or
    - b) are subject to the authority or control of the State; and/or
    - c) have special powers beyond those which result from the normal rules applicable to relations between individuals.
  - These guidelines (not criteria), fail to provide an inclusive definition of 'State',
  - but have nevertheless proved helpful by making it clear that something more than mere control is necessary.



# VERTICAL DIRECT EFFECT: A WIDE INTERPRETATION OF 'STATE' (3)

- This conclusion is supported by the Court of Appeal's dicta in *Doughty v Rolls Royce* (1992).
- Although Rolls Royce was, at the time of the action, wholly owned by the British State, it was not considered an 'emanation of the State' as the company neither provided a public service nor had any of the 'special powers' referred to in Foster.
- Note that it is for the national courts to decide whether a defendant is an emanation of the state or not.

# INDIRECT EFFECT OR THE 'INTERPRETIVE OBLIGATION'

# INDIRECT EFFECT

- The ECJ's refusal to allow the horizontal direct effect of directives has without doubt lessened their effectiveness as legislative instruments.
- In an attempt at remedying this, the Court has developed a principle which has become known as 'indirect effect' or 'the interpretative obligation'.

# THE BASIC PRINCIPLE OF INDIRECT EFFECT

- In Case 14/83, *Von Colson*, the Court reminded Member States of their duty, provided under Art 10 TEC (now Art 4 TFEU), to ‘take all appropriate measures . . . to ensure the fulfilment of the obligations arising out of this Treaty’ and also to ‘facilitate the achievement of the Community’s tasks’.
- The Court explained that such obligations also bind all the authorities of the States including, for matters within their jurisdiction, the national courts.
- Consequently, an obligation is placed on national courts to interpret and apply national law in a manner which is consistent with the wording and purpose of directives.

# THE BASIC PRINCIPLE OF INDIRECT EFFECT (2)

- This judgment has been the subject of much academic criticism as, it is argued, it requires national courts to supplement the role of the domestic legislator.
- The principle has also been criticized for allowing the direct effect of directives via the 'back door', without the need to ensure that the restrictive Van Gend criteria are fulfilled.
- The principle has, however, undoubtedly succeeded in:
  - enhancing the effectiveness of unimplemented and/or incorrectly implemented directives;
  - penalizing Member States who fail to comply with their obligations.

# THE DEVELOPMENT OF THE DOCTRINE OF INDIRECT EFFECT

- The Von Colson judgment left a number of questions unanswered with regard to the exact extent of the principle of ‘indirect effect’.
- In Case 80/86, *Kolpinghuis Nijmegen*, the Court made it clear that it would not be possible to interpret national legislation in the light of a directive should this result in conflict with any of the general principles of Union law, such as non-retroactivity or legitimate expectation.
- Thus, there are limits on the application of indirect effect, and national courts need only interpret national law to conform with directives ‘in so far as it is possible’.

# THE DEVELOPMENT OF THE DOCTRINE OF INDIRECT EFFECT (2)

- In Case C-106/89, *Marleasing*, the ECJ confirmed that national legislation, which has been interpreted by a national court in the light of a non-implemented or incorrectly implemented directive, can be relied on, not only by an individual against a State, but also against another individual and even where such national law pre-dates a directive and was not intended to implement it.
- This would appear to be allowing unincorporated directives to be enforced against individuals, thus achieving 'horizontal direct effect' in all but name.

# THE DEVELOPMENT OF THE DOCTRINE OF INDIRECT EFFECT (3)

- However, the decision in *Marleasing* has been tempered in Case C-456/98, *Centrosteeel*, where the ECJ provided that a directive cannot of itself impose criminal liability on individuals in the absence of proper implementing legislation.
- Further, the Court has confirmed that the interpretive duty only arises once the date for implementation has passed (Case C-212/04, *Adeneler and Others*).



# THE DEVELOPMENT OF THE DOCTRINE OF INDIRECT EFFECT (4)

- Academics have highlighted that indirect effect is the most used means of ensuring proper effect of incorrectly or unimplemented directives and its importance should not, consequently, be underestimated.
- The Court has regularly reaffirmed its importance and, in joined Cases C-397–403/01, *Pfeiffer and Others* (a case relating to the ‘Working Time Directive’), provided that ‘the requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty . . . to ensure the full effectiveness of Community law . . .’.

# 'INCIDENTAL' OR 'TRIANGULAR' EFFECT

- Despite the Court of Justice's decision in *Marshall (No 1)* prohibiting the horizontal direct effect of directives, in Case C-194/94, *CIA Security International* the Court appeared to allow the equivalent of horizontal effect to directives, albeit in limited manner.
- It would seem that where an individual attempts to demonstrate that national law conflicts with a directive, and such illegality is proven, the Court has signaled that EU law (i.e. the directive) must be applied – even where this has an impact on a third party, providing that no legal obligations are imposed directly on the individual(s) as a result.

## 'INCIDENTAL' OR 'TRIANGULAR' EFFECT (2)

- Once more, the ECJ cited the enhanced effectiveness of directives as its aim in allowing this.
- Other cases in which this principle has been utilized include Case C-443/98, *Unilever Italia* and Case C-201/02, *Wells*.
- However, due to its limitations, it should be noted that the 'incidental effect' of directives is likely to arise only in very limited circumstances.

# ADDITIONAL THOUGHTS ON THE SOURCE OF AN EU RIGHT OR OBLIGATION

- While the matter of the relevant source of a right or obligation (that is, whether the right in question emanates from a treaty article or regulation, for example) is rarely problematic, Case C-144/04, *Mangold* is worth taking a moment to consider.
- In this case it appeared that the source of the claimant's right was a Directive, the expiry date of which had not yet passed.
- Consequently, the Directive could not have direct effect but, as the right in question related to a matter of discrimination, the Court of Justice provided that the right could emanate from the General Principle of Non-discrimination, as opposed to the Directive in question.

# STATE LIABILITY FOR DAMAGES (THE FRANCOVICH PRINCIPLE)

- In view of the limitations placed on the direct effect of directives, and despite
- the possibility of enforcing rights under the principle of indirect effect, a number of barriers may still exist with regard to the enforcement of rights emanating from a directive
- (for example, there may be no national law to interpret or interpretation may simply not be possible due to the wording of the national legislation being very precise).

- In Cases C-6 and 9/90, *Francovich and Bonifaci v Italy (Francovich)*, the Court of Justice held that, should a Member State fail to incorporate a directive into national law, an individual who suffers damage as a consequence may claim compensation from that State, thereby ensuring greater effectiveness of directives.
- But this right to compensation was subject to several criteria:
  - a) the directive must be intended to confer a right on citizens;
  - b) the content of the right must be identifiable by reference to the directive;
  - c) there must be a causal link between the State's breach and the damage suffered.
- The Court's judgment in *Francovich* reinforces Member States' obligations under Art 4 TEU and also provides a further incentive to Member States to ensure that EU law rights are not denied to individuals.

# THE DEVELOPMENT OF STATE DAMAGES

- The Francovich ruling has been of immense importance to Union law and the principle has been clarified and extended in a number of later cases.
- While in *Francovich*, the ECJ's decision related to a Member State's failure to fulfill its obligations in relation to directives, in joined Cases C-46 and C-48/93, *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport ex p Factortame Ltd and Others (Pêcheur and Factortame)*, the Court confirmed that damages could also be available in situations where a Member State had failed to fulfill obligations derived from other sources of Union law.



- Once more, however, the Court explained that certain criteria must be fulfilled:
  - a) the rule of law infringed must be intended to confer rights on individuals;
  - b) the breach must be sufficiently serious;
  - c) there must be a direct causal link between the States breach and the damage caused.
- The Court also provided that the principle applied to whichever State organ was responsible for the breach or omission, legislative, executive or judicial.

# THE COURT OF JUSTICE'S INTERPRETATION OF 'SUFFICIENTLY SERIOUS'

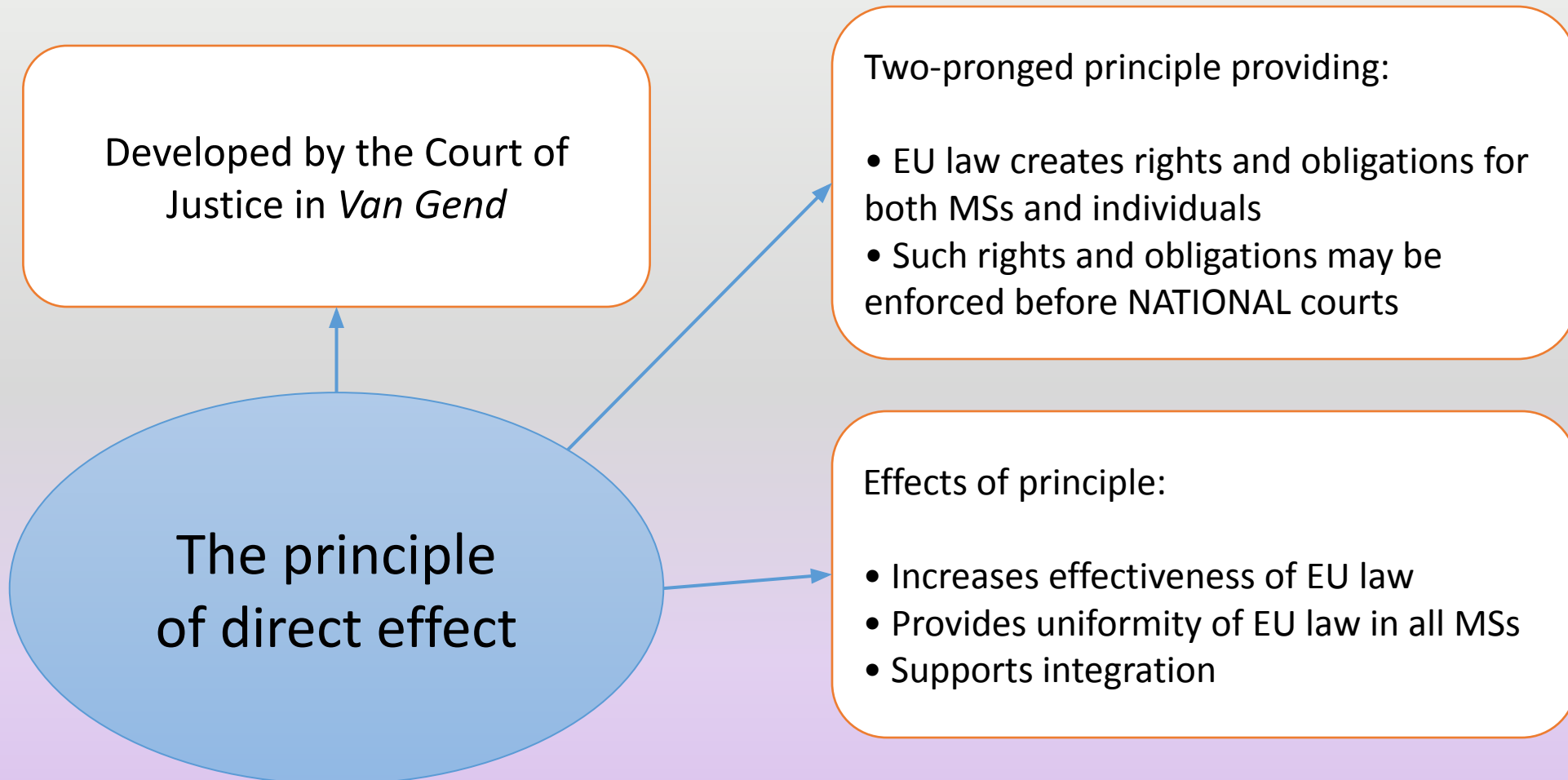
- With regard to what will constitute a 'sufficiently serious' breach, the Court has put forward various factors that may be taken into account, including the following:
  - a) the degree of clarity and precision of the EU rule that has been breached (if the rule is imprecisely worded, the breach will not be sufficiently serious: Case C-392/93, *R v HM Treasury ex p British Telecom*);
  - b) the 'intentionality' or 'voluntariness' of the infringement and the damage caused (intentional fault is not essential: Cases T-178, 179 and 188–90/94, *Dillenkofer v Germany*);
  - c) the degree of discretion provided to the Member State by the provision (where there is no, or limited, discretion, the infringement of law in itself may be sufficient to establish the existence of a sufficiently serious breach: Case C-5/94, *R v MAFF ex p Hedley Lomas*).

# EXPANSION OF THE PRINCIPLE TO ACTIONS AGAINST PRIVATE PARTIES

- In addition to the Francovich principle being expanded beyond non- or ineffective implementation of directives to any sufficiently serious breach of Union law by a Member State, it would now appear that such actions for damages may also be available against private bodies.
- This can be evidenced by Case C-453-/99, *Courage Ltd v Crehan*.
- In this case an individual brought an action against another individual for damage suffered as a result of a breach of EU competition law.
- No national remedy was available for the breach;
- So, the Court of Justice confirmed that an action may be brought under the Francovich principle not just against Member States but against private individuals/bodies that cause loss to another through breach of Union law.

TO RECAPITULATE:

# DIRECT EFFECT



# DIRECT EFFECT OF UNION LAW

(Note: EU law also enjoys SUPREMACY)

What is the source of the EU right?

- a) **Treaty Article or Regulation:** Enforceable before national court IF source satisfies the 3 *Van Gend/Reyners* criteria (if not, right may not be enforceable through direct effect). Capable of vertical and horizontal d/effect (*Defrenne*)
- b) **Decision:** Enforceable against addressee only IF 3 *Van Gend/Reyners* criteria satisfied (if not, right may not be enforceable)
- c) **Directive:** More problematic. Enforceable only IF 3 *Van Gend/Reyners* criteria are satisfied. Implementation date also must have passed (*Ratti*). Only enforceable vertically against a State (*Marshall*). Note the broad interpretation of 'State' (guidance on what may be an emanation of the State provided in *Foster v British Gas*)

# ALTERNATIVES TO DIRECT EFFECT

- Where direct effect is not available, consider:
  - a) Indirect effect** (interpretive obligation): National law may be interpreted in light of an unincorporated directive once date for implementation has passed (*Von Colson*) in so far as it is possible to do so (*Marleasing*).
  - b) Incidental direct effect:** Directive may be given effect where national law and directive conflict and national law is disapplied, thereby giving rights, under the directive, to an individual (*CIA* and *Unilever*). Only available in exceptional circumstances.
  - c) State damages:** Available where an individual has suffered loss as a result of MS breach (failure to incorporate directive or other sufficiently serious breach: *Francovich*, *Pêcheur* and *Factortame*). Criteria must be satisfied.

