manual

THOMAS JAEGER

Introduction to European Union Law

Foundations
Institutions
Enforcement
Internal Market Rules

facultas

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PREFACE AND PRACTICAL INFORMATION

This manual provides an introduction to the law of the European Union (EU). It presents the essentials of EU law concisely and coherently: The information is limited in scope and depth and is designed to afford a first, fast exposure. Care was taken not to unduly truncate information, to ensure a thorough representation of the law and to paint a complete overall picture.

Focus on providing a thorough understanding of the basic characteristics of EU law, such as the concept of supranationality and its constitutive elements, the Union method, the hierarchy of norms in the EU legal system, the enforcement of EU law and the impact on the legal systems of the Member States. These determinants are key to understanding the unique and sometimes peculiar nature of EU law, i.e. the 'genetic' pattern of EU law. The section on the EU's legal 'DNA' is followed by details on a wide range of issues, from the setup of institutions and institutional decision-making through to EU competences and legislation, EU and national court competences, procedures for enforcement and more. The final section offers an insight into internal market and competition law in a nutshell.

In terms of reader guidance for this manual, especially as regards students who use the manual for their studies, there are three recommendations: First, a division into regular vs. small print passages is immediately obvious. Small print usually contains more in-depth information, but also excerpts from CJEU judgments for illustrative purposes and to familiarise the reader with the language used by the CJEU. It is recommended that students read through the manual in part twice: Concentrate on the regular text initially, to become familiar with the basics and all central pieces of information. With the second reading, include the small print sections to broaden your knowledge with further details and examples. Second, all main chapters conclude with exemplary questions. In part, they can be answered by revising the content of the respective chapter. Partly, however, they deliberately go beyond the information provided and require some independent reflection. Third, at the end of each main chapter, take some time for a two-minute paper and reflect upon the following two questions: 1) What was the most important insight I gained from what I read? Then go back to the text and try to find the passage with the relevant statement again. Check whether your knowledge corresponds to that statement in every detail. 2) Which questions remained unanswered for me? Then go back to the text again and try to answer the questions. If you have difficulty finding answers, use a textbook or the internet.

Finally, I would like to acknowledge the inputs and editorial work performed on the manuscript by my team at the University of Vienna, *Daniela Gschwindt*, *Moriz Kopetzki, Corinna Potocnik-Manzoun, Johannes Lukan* and *Julia Zöchling*. Thank you for your support!

I hope this text provides you with an enjoyable and instructive reading experience and a stimulating time!

Thomas Jaeger Vienna, June 2021

1. BASICS OF EU LAW

Art. 52 TEU takes a simple approach to the concept of European Union law (EU law; synonymously referred to as European law or also Union law): "The Treaties shall apply to ..." – followed by an enumeration of the Member States (MS) of the EU. Art. 255 TFEU complements this with minor modifications for the **territorial scope** of the Treaties (inclusion or exclusion of individual territories). However, separate from the EU Treaties there are additional laws applicable on the territories of the EU's MS (national law, international law, etc.).

Having said that, Art. 52 TEU leaves some questions unanswered in this regard. Firstly, does the list of MS to which 'the Treaties' apply already reflect the entire potential scope of application of EU law? Secondly, what is meant by 'Europe' as the focal point of European law? How does EU law differ from the legal regimes otherwise applicable in the territory of the MS? In other words: According to what criteria is EU law to be delimited and what characteristics distinguish it from other types of law?

1.1. Focus on 'Europe'

The term 'Europe' can be understood in a number of different ways: It could be meant as a **geographical** definition, referring to the continent of Europe, which is bordered to the north, west and south by bodies of water and in the east, the border is (controversially) considered to run along the Ural Mountains. However, and especially given the questionable geographical delimitation, Europe could also be defined **culturally and historically**. This means an area with a common history and (consequently) similar or more or less homogeneous cultural and social values stretching across various national borders. Add to this mix the fact that one could adopt a **political** definition of Europe. Such a definition would revolve around common concepts of law and society, i.e. Europe is understood as a community of values. Insofar as such values are laid down in a constitution or other norms at the paramount level, this may also be referred to as "constitutional patriotism":[1] which determines membership in a community by the members' subscription to a common constitutional order and the values enshrined therein.

Depending on the definition chosen, the concept of Europe can be either **inclusive or exclusive**: If oriented towards characteristics that are linked to a person's unchangeable characteristics, it is largely exclusive. This applies to the geographical definition, which necessarily excludes states not situated on the European continent (e.g. Cyprus, which geographically belongs to Asia) regardless of their political system, values or shared European history. Similarly, the cultural-historical definition is also exclusive insofar as it cements historical differences and negates cultural change. Historical terms such as 'Occident' vs. 'Orient', the division of Europe into a Western Roman and an Eastern Roman Empire in 395 AD or religious differences are then stylised into politically insurmountable integration barriers. In contrast, the political definition is inclusive and therefore to be preferred. It opens the option of being

1 Cf. *Sternberger*, Verfassungspatriotismus (1990); *Habermas*, Citizenship and National Identity, 20, in: Van Steenbergen (ed.), The Condition of Citizenship (1994).

European to every social community and individual who professes European values and subscribes to the European 'constitution' and its values. This definition of what is Europe progresses dynamically as society evolves as it is both flexible and adaptive.

1.2. Characteristics of EU Law

Those states traditionally part of geographical and historical Europe have embraced a wide **variety of intergovernmental cooperation** models. These typically also comprise some shared values, for example, the Council of Europe (task: economic and social progress in Europe, especially the ECHR), the OSCE (peacekeeping), EFTA (free trade) and NATO (defence alliance), among many others. In contrast to the EU, these forms of cooperation are somewhat limited to one or only a few specific purposes. They neither entail nor envisage ever doing so, the width and depth of cooperation embraced by the EU. In other words, these cooperative models' common value basis is much narrower and thinner than that of the EU.

Consequently, these vehicles for cooperation are neither equipped with the effective **tools** for law-making and regulation that the EU has (see Union method) nor do they **impact** the individual rights and legal relations between citizens as intensely as EU law does (see supranationality). In fact, European law today essentially resembles national law in the way it functions, i.e. how it is generated and how it affects its legal subjects. 'The Treaties', therefore, functionally resemble a constitution (or what would be termed a constitution at the national level), i.e. the legal foundation and pillars of a state political order. From a functional point of view, European law is not (any longer) a part of public international law and must therefore be distinguished from common public international law. This distinction from public international law, as well as the Union method and its supranationality, are discussed in more detail in this chapter.

Use of the **term constitution** remains contested for the EU legal order because of the term's programmatic nature: It implies the existence of a state unit and thus indicates the formation of a state (federal state) as the ultimate goal of integration. Whether such a goal exists, rather than aiming for looser forms of union between states (a confederation of states), is legally and politically undecided and disputed in Europe. In view of the popular rejection of the draft Constitution for Europe in 2005, the use of the term is at least questionable in the European context for the time being. As such, it is preferable that the Treaties should simply be referred to as **primary law** (see sources).

1.2.1. Authors of EU Law

Based on that approach presented above, EU law can thus be defined as the entirety of the legal norms **generated within the framework and on the basis of primary law** as the foundation of the EU's (quasi-)constitutional legal order. EU law thus comprises any legal act originating from an entity competent to legislate or otherwise act based on and following the procedures of the Treaties. Both the creation of EU law (Union method) and the law thus created (supranationality) are characterised by unique features which will be discussed hereunder as they are fundamental to the understanding of European law.

This definition of European law according to its legislator applies to both **primary and secondary legislators**, i.e. to MS and institutions alike, as long as they act based on and within the procedures prescribed by the Treaties (see sources). EU law thus includes the primary legal framework of the EU shaped by the MS (especially the TEU, TFEU, Protocols and the CFR)[2] as well as the secondary law derived from it by the institutions of the EU (Directives, Regulations, Decisions, etc.,[3] as well as the EU's international agreements[4]). Moreover, the definition applies regardless of whether those norms pertain to **some or all MS**, e.g. under the so-called 'enhanced cooperation',[5] 'opt-outs'[6] and the like. It is also irrelevant whether **non-EU states** participate in the application of a given act alongside EU MS, for example, in the case of the Schengen regime on border controls (which includes Iceland, Norway and Liechtenstein) or the Customs Union (which includes Turkey).

1.2.2. Differentiation from Public International Law

In addition to the **EU's founding treaties**, EU law has its origins in public international law. Even though at present it is formally based on international treaties, traces of international law can also be observed in many areas of EU law. Dogmatically, thus, the classification of European law as a subcategory of public international law (which is the majority opinion) or, as preferred here, as an autonomous discipline in its own right, is disputed. In either case, EU law has been marked from its beginning by a process of **dissociation from public international law**.

This dissociation was triggered by the ECJ through the development of a concept of supranationality in its case law, the leading such case being *van Gend* in 1963. The Court's adoption of this view means that it considers EU law as neither international law nor national law but a unique legal regime (*sui generis*).

Case 26/62, ***van Gend & Loos***, ECLI:EU:C:1963:1, p. 12.

The firm van Gend was subjected to customs duties for importing chemicals to the Netherlands from Germany. The EEC Treaty foresaw a standstill obligation and transitional period from 1958 to 1968, after which all customs duties between MS were eventually abolished. Van Gend claimed that duties had been increased in breach of the standstill obligation. The question then arose, is it possible for van Gend to directly invoke a provision of the EEC Treaty?

"The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, 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 to the Treaty which refers not only to 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 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 task assigned to the Court of Justice under [Art. 267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an **authority which can be invoked by their nationals before those courts** and tribunals.

2 See particularly Art. 48 TEU.
3 See particularly Art. 288 TFEU.
4 See Art. 216 TFEU.
5 See particularly Art. 20 TEU.
6 E.g. Prot. No. 30.

The conclusion to be drawn from this is that 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 the institutions of the Community."

The principles laid out in *van Gend* constitute the starting point for the Court's ever-increasingly detailed and comprehensive body of case law on the **supranational character** of EU law. *Van Gend* was quickly followed by numerous other judgments (see some leading cases in Chapter 1.2.4.) elaborating upon the various aspects of supranationality that are now so familiar to us today.

This process of dissociation from public international law the CJEU initiated in 1963 has subsequently been continued by according changes to primary law: In the various treaty reforms, the MS (as the 'masters' of the Treaties) successively adopted, strengthened and expanded the **Union method** (majority decisions, parliamentary participation, etc.; see Chapter 1.2.3.). In contrast, the primary legislator (i.e. the MS as masters of the Treaties) has been more cautious as regards enshrining the characteristics of supranationality into primary law: To date, many key characteristics have not yet been codified (see the table on the characteristics of supranationality in Chapter 1.2.4.) and thus have the status of being unwritten general principles of law (see Chapter 3.). This reluctance to codify reflects the difficulties in capturing the essence of such open principles without unduly restricting them or, *vice versa*, overstretching them so that they lack appropriate boundaries.

The Fig. 1 below summarises the key **similarities and differences** between public international law and European law that exist today. The left column details examples where the public international law origins of EU law may still be recognised while the right-hand column contrasts these with key features which give EU law a strong resemblance to national law.

Resemblance to Public International Law	Resemblance to National Law
• EU law is based on international Treaties • European politics and legislation are still visibly branded by a multinational and diplomatic negotiating approach – e.g. Common Foreign and Security Policy (CFSP) – e.g. areas still requiring unanimous decisions in the Council – e.g. consensual decision-making as the preferred method for the Council and European Council – e.g. compromises in Council decision-making transitional arrangements 2014-2017 (Art. 3 Prot. No. 36) compromise on blocking minority (Decl. No. 7) – e.g. Protocols and Declarations in the TEU/TFEU	• Principles and functioning of EU law today are fully detached and fundamentally different from public international law • Process of 'constitutionalisation': gradual adoption of characteristics typically known from national law – Quality and effects of EU law: guided by 'supranationality' instead of sovereignty – Institutionally and procedurally: 'Union method' instead of pure intergovernmentalism

Fig. 1

The process of 'constitutionalisation', initiated by *van Gend,* is the reason for the **overwhelming practical significance** of EU law in the MS' national legal systems today: Because EU law's mode of operation is similar to national law and many areas of everyday life are governed by EU law, citizens are as affected by EU law as they are by the national laws they live under. Hence, from a citizen's perspective, EU law is of comparable importance for everyday life and business as national law. Classic international law, in contrast, plays hardly any (visible) role in an individual's everyday life due to its lack of such characteristics.

1.2.3. Union Method

The term 'Union method' (formerly: Community method) as used here encompasses the peculiar characteristics of the EU's legislative decision-making process for secondary law. Arguably, a key feature among the manifold features of the Union is that MS influence in the adoption of secondary law is minimised because the MS **surrendered essential elements of** their **sovereignty** in the areas covered by the Union method.

Union method is a term to designate certain constitutive elements of the EU and the EU legal order. However, the term also serves to better distinguish those areas of Union law that function in a manner similar to the laws of the MS from those areas that are still shaped by the logic of public international law (where the Union method is therefore not applicable). With the benefit of historic hindsight, this distinction was particularly important for the three-pillar structure of the EU as set out in the Maastricht Treaty (see Chapter 2.). Today, the **CFSP** is the area that still remains outside of the Union method and where, accordingly, decision-making resembling that of public international law is still prevalent.[7]

The key characteristic of the Union method is its **parliamentary participation** in the legislative process which serves to enhance the democratic **legitimacy** and **transparency** of EU legislation. Furthermore, the Union method is characterised by legislative efficiency (particularly through **majority decisions** in the Council and other institutions) and the existence and defence of autonomous EU interests vis-à-vis the interests of the MS (e.g. the exclusive Commission right of **legislative initiative**). Additionally, the subjection of all EU legislation to guarantees of **fundamental rights**, to the **principle of legality** and **judicial review** also constitute fundamental features of the Union method which means, in a broad sense, it thus reaches beyond simple decision-making as such and encompasses elements having a supranational character.

An overview of the characteristics (for details see Chapters 4. and 5.):

- Commission **monopoly on legislative initiative**:[8] This has existed since the beginnings of the EEC. Dissimilar to what is commonplace in public international law, it is not the MS that provide the impetus for shaping the law but an institution independent of the MS and committed solely to the interests of the EU. Although the MS may request the Commission to elaborate proposals for leg-

7 Rudimentary jurisdiction for the protection of individual rights is in place, see Art. 275 TFEU.
8 Cf. Art. 17 para. 2 TEU.

islation, the Commission is not bound by such requests and acts as a neutral 'filter' for individual national interests.

- **Qualified majority voting** in the Council as the rule:[9] This was gradually achieved by Treaty reforms and has now been the rule since Lisbon. Individual MS may be outvoted by others and must accept the majority view as legally binding – even if they disagree. That loss of sovereignty is balanced against a corresponding gain in their influence over the other MS. In public international law, in contrast, state sovereignty constitutes an absolute barrier against any rules that were not domestically approved.
- **Parliament as co-legislator** as the rule:[10] The parliament's role as co-legislator was gradually expanded by Treaty reforms and has also been the rule since Lisbon. Parliamentary participation guarantees the democratic legitimacy of EU law, which stands in contrast to public international law which is generally unconcerned by questions of democratic legitimacy because any of its provisions must be approved domestically anyway. While international organisations often employ some form of assembly of state representatives (e.g. the UN's General Assembly), their role is usually restricted to mere representation without significant decision-making powers. Moreover, representatives in such assemblies are not usually directly appointed by a popular vote, unlike the European parliament.
- Full **judicial control**:[11] This has always existed to some degree but was expanded via the inclusion of Maastricht's former Third Pillar into the TFEU (today, Area of Freedom Security and Justice;[12] although some modifications for Court jurisdiction still apply)[13] and minimal judicial protection in the area of the former Second Pillar (CFSP).[14] Judicial control is exercised by the CJEU (consisting of the ECJ and GC operating jointly with MS courts). The CJEU is the key institutional figure in securing both the Union method and the supranational effects of EU law (including for individual legal protection), a role sustained by its interpretative monopoly[15] and the prohibition[16] to withhold or withdraw any disputes involving EU law from its jurisdiction. The CJEU thus safeguards both the formal (legality and procedures) and the substantive (e.g. conformity with fundamental rights) correctness of EU legislation under the Union method with its judgments being both binding and enforceable.[17] Public international law, on the other hand, often lacks formalised judicial review and even where it is established, courts usually lack jurisdiction over actions brought by individuals (one exception is the ECtHR in Strasbourg) and any judgments made are generally not directly enforceable.

9 Cf. Art. 16 para. 3 TEU.
10 Cf. Art. 14 para. 1 TEU.
11 Cf. Art. 19 para. 1 TFEU.
12 See Arts. 67 et seq. TFEU.
13 Cf. Art. 276 TFEU.
14 Cf. Art. 275 TFEU.
15 Cf. Art. 19 para. 1 TEU.
16 Cf. Art. 344 TFEU.
17 Cf. Art. 280 TFEU.

Some characteristics of the Union method can also be found in the supranational character context. This is however inconsequential as there is no need to precisely delineate the elements of the Union method and supranationality vis-à-vis one another. What is important is the fact that jointly they are responsible for fully dissociating EU law's legal effects, legal quality as well as the functioning of the EU's institutions and procedures from public international law.

1.2.4. Supranationality

The second decisive characteristic of EU law, which is also the more important one for everyday legal practice, is the supranationality of its effects. Those effects are what assimilate the functioning of EU law with that of national law. EU law affects all entities subject to it (citizens, companies, etc.) by stipulating both immediate rights **(claims) and obligations** and where such claims exist both in relation to MS and between private parties.

Most provisions of (substantive) **primary law** are **addressed to the MS** (e.g. general principle of non-discrimination, market freedoms). Accordingly, rights (claims) for private individuals based on EU law by far outweigh the obligations imposed on them. Obligations for individuals are the exception (e.g. the exceptional third-party effects of market freedoms, competition law). **Secondary legislation**, in contrast, is more diverse: As is the case with national legislation, secondary law often seeks to steer and order private behaviour along the lines of primary law policy objectives. Accordingly, secondary law often addresses **private individuals** directly (Regulations) or indirectly (transposable Directives), thereby also imposing obligations (e.g. provisions governing consumer protection, product safety, data protection, etc.). When such obligations are laid down in a Directive, they initially remain in the background and only come to the fore to confront individuals in the guise of national laws implementing that Directive.

Fig. 2 below lists the **central elements** that together make up the supranational character of EU law. It also reflects whether an element is codified in (primary) law or remains an unwritten general principle of law. The figure also details the initial or otherwise leading judgments pertaining to each element, notwithstanding that all of them have been further elaborated upon and detailed in subsequent case law since the dates cited.

Elements	Codification?	Key judgments	Consequences
Autonomy	**x**	*van Gend* [1963] *Costa* [1964]	• legal order *sui generis* • uses own terminology and methodology • autonomously applicable without MS consent
Direct applicability	for regulations see Art. 288 TFEU otherwise: **x**	*Costa* [1964]	• no MS acts of transposition/consent required • no MS leeway for subsequent changes
Direct effect	**x** (disputed; for regulations, see Art. 288 TFEU)	*van Gend* [1963] *Ratti* [1979] *Faccini* [1994]	• direct rights for individuals • wherever a "clear, precise and unconditional obligation" is laid down (justiciability) • directly enforceable before MS courts

Primacy	**x** (Decl. No. 17)	*Costa* [1964] *Simmenthal* [1978]	• conflict resolution mechanism • disapplication of national law, no derogation • vis-à-vis MS law of any rank or kind
Loyalty/ Effectiveness	**Art. 4 para. 3 TEU** **Art. 19 para. 1 TEU** **Art. 291 para. 1 TFEU**	*San Giorgio* [1983] *Von Colson* [1984] *Factortame I* [1990]	• *effet utile* guiding interpretation • MS law to be interpreted in conformity with EU law • principles of equivalence and effectiveness as remedies for enforcement deficits
MS Liability for infringements	**x**	*Francovich* [1991] *Brasserie* [1996]	• substitute for lack of direct effect • parallels the EU's own tortious liability (Art. 340 TFEU)
Fundamental rights protection	**Art. 6 TEU** **CFR**	*IHG* [1970] *Hauer* [1979]	• standard for legality of acts of the institutions and (upon enforcement) the MS • legislation and administrative acts

Fig. 2 (author's own construction)

The starting point for EU law's supranational character is the **autonomy** of the EU legal order. The *van Gend* judgment characterises EU law as a legal order *sui generis*, meaning that it is independent of both international law and national law. This autonomy is the foundation and precondition for all further elements of supranationality and also means that EU law employs its own terms, concepts and methodology. Similarities to familiar national concepts (e.g. what is an undertaking, what is the state, etc.) play, at most, an indicative role but can never be binding or decisive for the interpretation of EU law.

The **direct applicability** (validity) of EU law is the logical consequence of its autonomy: EU law **enters into force** and applies on and for the territories of the MS autonomously and immediately without any further need for action (transposition, consent) by the MS. EU law becomes legally valid in and binding for the MS upon its formally correct adoption by the EU legislator. Accordingly, the MS have no right of refusal or veto and, in particular, no possibility to amend or detract from a binding EU legal act (unless the law in question specifically provides for this).[18]

Direct applicability is not to be confused with the **direct effect** of EU law: Use of the term effect emphasises a shift of focus to enforcement where EU law endows individuals with direct individual rights (**claims**) that are enforceable before their domestic courts. Furthermore, depending on the type of act (not for Directives), individuals may also face obligations imposed on them by EU law. Thus, EU law establishes a direct link between the supranational legal sphere and the individual with the existence of such a link having already been highlighted in the 1963 *van Gend* judgment when the Court stated: "The … Community [now: EU] constitutes a new legal order … for the benefit of which the states have limited their sovereign rights … 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

18 E.g. Art. 114 paras. 4 et seq. TFEU.

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 the institutions of the Community."[19]

The directly effective provisions of EU law take the form of claims enforced before national courts under **national system of remedies**.[20] Which particular MS court has jurisdiction to hear a particular EU law-related dispute, what remedies are available there and how to best fit EU law-based claims into the domestic enforcement system is decided nationally. The MS enjoy wide organisational and procedural autonomy in that regard (principles of **decentralised enforcement** and **procedural autonomy**; see Chapter 6.). That autonomy is, however, limited by the minimum requirements of equivalence, effectiveness and compliance with rule of law standards (see Chapter 6.).
National courts are thus ultimately the anchor points for the application and effect of EU law in the MS and vis-à-vis individuals. Their role is essential because they, under the guidance of the ECJ in the preliminary ruling procedure, ultimately safeguard the supranational character of EU law in practice and ensure the correct and consistent application of its provisions in each MS. National court judges thus wear a '**double hat**' in procedures pending before them: they act simultaneously (in one case) as judges for the relevant national law aspects of the case and for its EU law aspects.

The **primacy** EU law asserts over national law goes hand-in-hand with the former's direct applicability and direct effect. The principle of primacy[21] was first formulated by the ECJ in the judgment *Costa* of 1964, thus handed down shortly after *van Gend,* and is a conflict resolution rule for those (frequently occurring) situations where EU law and national law both apply to the same set of facts and thereby stipulate contradictory rules or outcomes. This conflict resolution rule is as simple as it is effective: EU law always takes precedence over national law when both apply to a specific situation (hence precisely: primacy in application). EU law does not invalidate (derogate) conflicting national law directly but rather blocks its application with the ultimate fate of the disapplied national norm (formal repeal, invalidation, etc.) being left to the national legal system. Worth noting in this respect is the fact that primacy applies without the conflicting national provision first having to be declared incompatible or formally repealed by national constitutional courts.[22] As a rule, primacy covers EU law of any hierarchical level (primary, secondary, etc.) vis-à-vis the entirety of national law (i.e. national law irrespective of its type (for details see Chapter 3.).

Case 6/64, ***Costa/E.N.E.L.***, ECLI:EU:C:1964:66, p. 593 et seq.

Mr Costa challenged the electricity bill of Italy's then national energy provider ENEL in order to oppose Italian legislation for the nationalisation of electricity generation companies. He based his argument on an alleged incompatibility of that legislation with various provisions of the EEC Treaty. The question then arose, is the request for a preliminary ruling at all permissible? Italy argued that its national courts should apply national law only without regard to the Treaty.

19 Case 26/62, *van Gend & Loos*, ECLI:EU:C:1963:1, p. 12, emphases added.
20 See Art. 19 para. 1 TEU.
21 Today recognised by Decl. No. 17 to the Treaty of Lisbon.
22 See Case 106/77, *Simmenthal*, ECLI:EU:C1978:49, paras. 17 et seq.

"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 … 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, albeit within limited fields, and have thus created a body of law **which binds both their nationals and themselves**.
The integration into the laws of each Member State of provisions which derive from the Community, 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 Community 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** … **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.
The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a **permanent limitation of their sovereign rights**, against which a **subsequent unilateral act** incompatible with the concept of the Community **cannot prevail**."

According to *van Gend* and *Costa*, direct applicability is thus stated explicitly in Art. 288 TFEU where it describes the legal nature of regulations.[23] As a consequence, the **transfer of sovereignty** by the MS to the EU that has taken place in certain areas is irreversible. It may only be modified or reversed by a Treaty amendment or upon withdrawal from the Union. However, in the everyday application of EU law by the MS, that transfer of powers is **definite and unconditional** (for the views on alleged limitations of primacy in core constitutional areas of the MS, see Chapter 3.5.).

The principles of direct applicability, direct effect and primacy of EU law have been confirmed, furthered and deepened in subsequent case law and the process of providing ever more detail is still ongoing.[24] From among the early case law, *Internationale Handelsgesellschaft* of 1970 and *Simmenthal* of 1978 should be highlighted as key cases. *Internationale Handelsgesellschaft*[25] made it clear that the principle of primacy applies **to EU law of any kind** (primary law, secondary legislation, administrative acts of the institutions) and **vis-à-vis MS law of any kind**, including constitutional law.

A conflict between MS law and EU law can thus never have as its outcome the illegality of EU law. If a MS court of any instance believes EU law to be invalid (e.g. because of a fundamental rights conflict or procedural defects), that court is obliged to lodge a **preliminary reference** on that matter with the ECJ (see Chapter 4.6.6.). Any other course of action would constitute a grave violation of EU law.

23 Cf. Case 26/62, *van Gend & Loos*, ECLI:EU:C:1963:1, p. 24 et seq.; Case 26/62, *Costa/ENEL*, ECLI:EU:C:1964:66, pp. 1269 et seq.

24 E.g. regarding the expansion of direct effect, Case C-414/16, *Egenberger*, ECLI:EU:C:2019:139, paras. 70 et seq.; regarding primacy (direct invalidation of a MS act), Joined Cases C-202/18 und C-238/18, *Rimšēvičs*, ECLI:EU:C:2019:139, paras. 64 et seq. and 97.

25 Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, paras. 3 et seq.

Simmenthal[26] clarified that national law conflicting with EU law becomes inapplicable immediately upon the **entry into force of the EU rule**. The same is true for any subsequently enacted national legislation contrary to EU law.[27] No *lex posterior* rule applies because the conflicting provisions do not occupy the same hierarchical level. According to *Simmenthal,* MS law that is contrary to EU law does not have to be declared invalid (e.g. by the national constitutional court) for a national court to apply directly effective EU law instead of the (previously) relevant national law.

Case 106/77, ***Simmenthal***, ECLI:EU:C:1978:49, paras. 17 to 24

Mr Simmenthal opposed Italian fees for meat inspection, something he considered to be incompatible with the EEC market organisation for beef. The question here was, did the conflicting MS provisions first need to be declared invalid by the Italian Constitutional Court for the national judge to disapply them?

"Furthermore, in accordance with the principle of the precedence of Community 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 — insofar 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 national legislative** measures to the extent to which they would be incompatible with Community provisions.

Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the **effectiveness of obligations undertaken unconditionally and irrevocably** by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.

The same conclusion emerges from the structure of [Art. 267 TFEU] which provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of interpretation or validity relating to Community law is necessary to enable it to give judgment.

The effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court.

It follows from the foregoing that every national court must, in a case within its jurisdiction, **apply Community law in its entirety** and **protect rights which the latter confers on individuals** and must accordingly **set aside any provision of national law which may conflict with it**, whether prior or subsequent to the Community rule.

Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.

The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted

26 Case 106/77, *Simmenthal*, ECLI:EU:C:1978:49, paras. 17 et seq.

27 In that context, see also Art. 2 para. 2 TFEU (termination of MS legislative competence when EU legislation is passed).

subsequently, and it is **not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means**."

The obligation to fully apply EU law **applies to every entity of the state**, including administrative authorities and all courts. These entities are obliged to bring potentially conflicting national law, as far as is possible, into line with EU law (e.g. via **consistent interpretation of national law**, see Chapter 6.3.2.) or else disregard (**disapply**) conflicting national provisions on their own account.[28]

The direct effect of EU law thus both enables and requires MS authorities and courts to directly enforce EU law for the benefit of individuals appearing before them. **Decentralised enforcement** by MS authorities is the rule for EU law: EU authorities[29] and the CJEU[30] only enforce EU law directly where EU law explicitly requires it. However, MS are not completely free in the choice of structures and procedures applied to the enforcement of EU law. EU law or, more specifically, the principle of (vertical, i.e. between MS and the EU) **loyalty,**[31] stipulates qualitative requirements for national procedures and the effectiveness of legal protection at the national level. Procedures for the enforcement of EU law must, firstly, at least be equivalent to those for the enforcement of national law and, secondly, must be effective (principles of **equivalence and effectiveness**). For all of the rights (claims) conferred upon an individual by EU law, MS must designate a court competent to hear them and lay down the remedies and procedures needed for enforcement of the full scope of the claim.[32] Any MS remedies and procedures too restrictive to ensure equivalent or effective enforcement must be disapplied (e.g. overly short deadlines, caps on claims, etc.).

Another characteristic of EU law's supranationality is the **liability of MS** for breaches of EU law.[33] Liability acts as a second safety net for individuals to prevent them from losing their rights entirely where enforcement of the primary claims (payment or action, correction, injunction) is no longer an option. Where the above mechanisms failed to deliver correct application of EU law (e.g. erroneous application, blocked horizontal direct effect of directives; see Chapter 6.), individuals may still seek **compensation for any damages** incurred from any incorrect application of EU law (e.g. where an EU law-based right to termination of a contract is denied, the cost of performance of that contract may be claimed as damages). In such cases, the fault giving rise to liability is a MS' breach of its obligations under EU law (e.g. failure to transpose provisions of a Directive into national law) and, similarly to primacy, MS liability is thus a (secondary) tool to mitigate the effects for individuals of contradictions between MS law and EU law (see Chapter 6.4.3.). In terms of case law, the ECJ first confirmed the principle of MS liability in its judgment *Francovich* in 1991.

28 Cf. Case 14/83, *Von Colson*, ECLI:EU:C:1984:153, para. 26.
29 E.g. competition law, cf. Arts. 105 and 108 TFEU.
30 Cf. the actions assigned to the CJEU under Arts. 258 et seq. TFEU.
31 Cf. Art. 4 para. 3 TEU; Art. 47 CFR.
32 Cf. Art. 19 para. 1 subpara. 2 TEU.
33 The EU is likewise liable, see Art. 340 TFEU.

Joined Cases C-6/90 and C-9/90, ***Francovich and Bonifaci***, ECLI:EU:C:1991:428, paras. 31 to 36

The former Directive 80/987 secured unpaid wages for employees whose employer had become insolvent by requiring MS to establish guarantee funds to cover lost wage claims. Italy failed to transpose the Directive in a timely manner and, as a result, such a fund did not exist when this case was brought to court. Mr Francovich had only occasionally received advance payments on his salary from his employer in Vicenza. When the employer went bankrupt and a seizure attempt was unsuccessful, Mr Francovich demanded the lost amount in compensation from the Italian state. The question here was, does Italy's failure to correctly implement the Directive within the prescribed timeframe render it liable for damages incurred by Mr Francovich?

"31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions ....

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals ….

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to **obtain redress when their rights are infringed** by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is **particularly indispensable where**, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, **individuals cannot enforce before the national courts the rights conferred upon them** by Community law.

35 It follows that the principle whereby a **State must be liable for loss and damage caused to individuals** as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in [Art. 4 para. 3 TEU], under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the **obligation to nullify the unlawful consequences of a breach of Community law** …."

The bounds imposed on the EU legislator by the protection of **fundamental rights** are the final key characteristic of EU law's supranationality highlighted here. It is a common feature of modern constitutional systems based on the rule of law that even a democratically elected majority may not deprive minorities or individuals of certain inalienable (and therefore: fundamental) rights. The rights enshrined in the CFR in particular[34] thus create boundaries for both the EU legislator and all instances of EU law enforcement (by EU institutions and MS).[35] Fundamental rights protection is a characteristic for both the Union method (with regard to the limits of legislation) and its supranational character (with regard to the protection of individual rights before MS authorities and in a court).

34 Cf. Art. 6 TEU.

35 Cf. Art. 51 para. 1 CFR.