

Using EU Law and procedural safeguards in Practice

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Introduction

Thank you for the invitation to be present today.

There are now a number of hard-fought EU procedural safeguards in place with a number of them already implemented in the national legislation of Member States. A few more need to be implemented yet.

From a practitioner point of view, these new rights require intense - or proper - or at the very least - some form of examination by practitioners in order to familiarise oneself with the exact wording of these Directives, to familiarise oneself with the objectives underlying these Directives, and in order to be aware of whether the rights which flow from these Directives are being enforced and complied with at a national level - and specifically, within the courtroom.

Essentially, these rights are of no or little value unless they are identified, enforced and defended. The EU institutions have done their work, and now it is time for Member States and practitioners to honour their side. To reach this point has not been easy, and it has required courage, dedication, creativity and persistence from all sides. Congratulations must be directed towards the Commission and Parliament in this regard, and to the other actors involved including NGO's, academics etc.

From a practitioner perspective, as it is highly unlikely that a client will be aware of any of their "new" rights this adds to a practitioner's responsibility to be aware of the legislation.

Toolkits

To assist you, I wish to refer to three practical toolkits which have been prepared by an NGO "Fair Trials". These toolkits have been drafted with practitioners in mind. Your task of familiarising yourself with a number of these Directives has been made easier with regard to these toolkits. The toolkits cover:

- The Right to interpretation and translation <https://www.fairtrials.org/wp-content/uploads/Language-Rights-Toolkit-FINAL.pdf> (this Toolkit covers suspected and accused persons' right to interpretation in police interviews, hearings and in meetings with their lawyer, and their right to translation of essential documents, and it can be used alongside an online training video)
- The Right to information <https://www.fairtrials.org/wp-content/uploads/Right-to-Info-Toolkit-FINAL.pdf> (this toolkit concerns the suspect's right to be informed about his procedural rights, to information about the charges he is being accused of. and to access the case file and materials in the case)
- The Right of Access to a lawyer (this Toolkit discusses Directive 2013/48/EU on the Right of access to a lawyer in criminal proceedings including Access to a lawyer with regard to general issues and specific issues regarding waiver and derogations, for example).

There is no point or value in me going into these three Directives from a practical perspective as the work has already been done for you with these three toolkits.

However, I would like to take a step-back and explain what Directives are and how they combine with national practice. All of this must be understood within the context of how EU law enters our national legislation and through our national legislation how it enters our courtrooms, and this is where we will begin.

EU objectives

It has been referenced many times that bringing the European Union closer to its citizens is an objective that the institutions have identified and are pursuing. Making the European Union a tangible asset for its citizens is key to its democratic legitimacy.

Law is the essential tool to meet citizens' needs and expectations and to achieve the policy goals enshrined in the Treaties. If legislation is the way to achieve these goals, its effective application is crucial to ensure that citizens can enjoy their rights deriving from EU law. Without effective application, EU law would remain dead letter and the EU's very existence and purpose would be called into question.

However, the effective application of EU law is a challenge in itself.

On the one hand, EU law, or the so-called *acquis*, constitutes an immense and diverse body of rights and obligations that is binding on - and in - all EU Member States. The *acquis* is constantly evolving. It comprises the Treaties; legislation adopted pursuant to the Treaties; the case law of the Court of Justice; decisions adopted under the Common Foreign and Security Policy; international agreements concluded by the Union, and agreements entered into by the Member States among themselves within the sphere of the Union's activities. To date, the *acquis* covers a wide array of fields, from classical internal market law to justice and home affairs; from the fundamental freedoms of the Single Market (free movement of persons, goods, services and capital) to the fundamental rights of the Charter; from specific and often very technical legislation in fields such as food safety, veterinary and phytosanitary policy, energy, taxation, transport, employment, fisheries or agriculture to judicial cooperation in civil, commercial and criminal matters.

On the other hand, EU law has to be applied in the current 28 Member States, each with its own legal culture, each with its own structure and each with its own language, and it must be applied to the benefit of more than 500 million European Union citizens, to its commercial actors and also to non-EU country nationals where applicable.

It has taken national legal practitioners a long time to understand that EU law is not a separate body of law beyond their reach, but it is part of the law of every Member State which they shall make use of for the benefit of their clients.

It has also taken national judges a long time to understand that EU law is not just a matter for the Court of Justice of the EU but that its enforcement is their own right and duty. The national judge has always been the first judge of Union law; access to justice on the grounds of EU law has in the first instance always meant access to the national courts.

In other words, and almost ironically, it is the Member States, masters of the Treaties, that have been endowed with the mission of applying EU law in their respective legal systems,

and whose performance is monitored by the European Commission and the Court of Justice, guardians of the Treaties.

The Lisbon Treaty is in fact the first EU Treaty to explicitly recognise the crucial role played by the national judiciaries in the enforcement of EU law. Article 19(1) TEU states that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*”.

What does this mean?

This means that Member States’ courts are at the forefront of the concrete and daily application of EU law to Union citizens. They are primary actors in providing Union citizens with the legal certainty that EU law will be effectively applied, in an equal and uniform manner, and that the legal rights they derive from EU law will be enforced. It is the national courts which, as first judges of EU law, make the idea of a Union based on the rule of law a reality, bringing the “community of law” to life. In this sense, national courtrooms are often the place of the main and most striking European experiences for Union citizens. The proper awareness by practitioners and the proper application of EU law by Member States’ judiciaries is thus a key element in reinforcing the democratic legitimacy of the European Union and constitutes a democratic imperative to ensure respect for the rule of law.

EU v. National law

However, practitioners are normally acquainted with national law and national legal systems. Members of national judiciaries are usually primarily recruited based on their knowledge of their own national law, not of EU law. For them, to apply EU law as they would apply national law is thus a challenge. This is also true for practitioners.

Furthermore, the application of EU law to specific cases, which is the essence of judicial work, is sometimes complicated not only by the quantitative aspect of EU law but also by its quality.

Indeed, the drafting of EU legislation is often the product of compromises among various political actors at a European level, and its application by national judges in concrete situations may sometimes highlight ambiguities or inconsistencies to an extent much less felt in domestic legislation. The expansion of EU law in terms of its volume and the fields covered has also translated into an accumulation of layers of legislative acts, making their application more complex.

Principles of EU Law

It may be beneficial to speak about two principles that need to be recognised with regard to EU Law. The first one is the concept of “Precedence” and the second one is the concept of “Direct effect”.

Precedence of European law

According to the precedence principle, European law is superior to the national laws of Member States. The precedence principle applies to all European acts with a binding force. Therefore, Member States may not apply a national rule which contradicts European law. The precedence principle guarantees the superiority of European law over national laws. The CJEU enshrined the precedence principle in the *Costa versus Enel* case of 15 July 1964. In

this case, the Court declared that the laws issued by European institutions are to be integrated into the legal systems of Member States, who are obliged to comply with them. European law therefore has precedence over national laws. Therefore, if a national rule is contrary to a European provision, Member States' authorities must apply the European provision. National law is neither rescinded nor repealed, but its binding force is suspended. The Court later clarified that the precedence of European law is to be applied to all national acts, whether they were adopted before or after the European act in question.

Why this principle?

With European law becoming superior to national law, the principle of precedence therefore ensures that citizens are uniformly protected by a European law assured across all EU territories.

What is the scope of the principle?

The precedence of European law over national laws is absolute. Therefore, it applies to all European acts with a binding force, whether emanating from primary or secondary legislation. In addition, all national acts are subject to this principle, irrespective of their nature: acts, regulations, decisions, ordinances, circulars, etc), irrespective of whether they are issued by the executive or legislative powers of a Member State. The judiciary is also subject to the precedence principle. Member State case-law should also respect EU case-law.

The Court of Justice has ruled that national constitutions should also be subject to the precedence principle. It is therefore a matter for national judges not to apply the provisions of a constitution which contradict European law.

Who is responsible for ensuring compliance with the principle?

The Court of Justice is responsible for ensuring that the precedence principle is adhered to. Its rulings impose penalties on Member States who infringe it, on the basis of the various remedies provided for by the founding Treaties, notably proceedings for failure to fulfil an obligation.

It is also the task of national judges to ensure the precedence principle is adhered to. Should there be any doubt regarding the implementation of this principle, judges may make use of the reference for a preliminary ruling procedure.

This brings me to the second aspect – the direct effect of European Law:

The direct effect of European law

The principle of “direct effect” enables individuals to immediately invoke a European provision before a national or European court. This principle only relates to certain European acts. Furthermore, it is subject to several conditions.

The direct effect of European law is, along with the principle of precedence just mentioned, a fundamental principle of European law

The direct effect principle ensures the application and effectiveness of European law in EU countries. However, the CJEU defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and an EU country or be extended to relations between individuals.

Definition

The direct effect of European law has been enshrined by the Court of Justice in the judgement of **Van Gend en Loos** of 5 February 1963. In this judgement, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. I stress - not only ...obligations for EU countries, but also rights for individuals". Individuals may therefore take advantage of these rights and **directly invoke European acts** before national and European courts. However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system.

In the Van Gend en Loos case, the CJEU identified three situations necessary to establish the direct effect of primary EU law. These are that:

- the provision must be sufficiently clear and precisely stated;
- it must be unconditional and not dependent on any other legal provision;
- it must confer a specific right upon which a citizen can base a claim

In the Becker judgment (Judgment of 19 January 1982), the Court of Justice rejected the direct effect where the countries have a margin of discretion, however minimal, regarding the implementation of the provision in question (Judgment of 12 December 1990, Kaefer & Procacci).

I do not wish to complicate points but it is beneficial to mention two aspects of direct effect "Horizontal and vertical direct effect".

Horizontal and vertical direct effect

There are two aspects to direct effect: a vertical aspect and a horizontal aspect.

Vertical direct effect is of consequence in relations between individuals and the country. This means that individuals can invoke a European provision in relation to the country.

Horizontal direct effect is consequential in relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

Direct effect and secondary legislation

The principle of direct effect also relates to acts from secondary legislation, that is those adopted by institutions on the basis of the founding Treaties.

However, the application of direct effect depends on the type of act:

Very quickly:

- the regulation: regulations always have direct effect. In effect, Article 288 of the Treaty on the Functioning of the EU specifies that regulations are directly applicable in EU countries. We will see this when the EPPO comes into existence as the instrument that will be used is a Regulation.
- the directive: the directive is an act addressed to EU countries and must be transposed by them into their national laws.

However, in certain cases the Court of Justice recognises the direct effect of directives in order to protect the rights of individuals. Therefore, the Court laid down in its case-law that a directive has direct effect when its provisions **are unconditional** and **sufficiently clear** and **precise** and when the EU country has not transposed the directive by the deadline (Judgement of 4 December 1974, Van Duyn). However, it can only have direct vertical effect; EU countries are obliged to implement directives but directives may not be cited by an EU country against an individual (Judgement of 5 April 1979, Ratti);

- the decision: decisions may have direct effect when they refer to an EU country as the addressee. The Court of Justice therefore recognises only a direct vertical effect (Judgement 10 November 1992, Hansa Fleisch);
- international agreements: in the Demirel Judgement of 30 September 1987, the Court of Justice recognised the direct effect of certain agreements in accordance with the same criteria identified in the Judgement Van Gend en Loos;
- opinions and recommendations: opinions and recommendations do not have legal binding force. Consequently, they are not provided with direct effect.

One more thing that I would like to mention:

Indirect effect

The doctrine of indirect effect requires national courts, as organs of the Member State responsible for the fulfilment of EU obligations, to interpret domestic law consistently with directives. This doctrine achieves indirectly, through the technique of judicial interpretation of domestic law, the result obtainable through the doctrine of direct effect of directives.

Indirect effect can thus be seen both as an addition to, and as the corollary of, the doctrine of direct effect. In the case of provisions of directives having direct effect, national courts must disregard domestic law where there is a conflict between the directive and domestic law. In the case of a directive lacking direct effect, the national courts must make every effort to interpret domestic law consistently with the directive.

The doctrine of indirect effect is of vital importance to the enforcement of EU rights against private persons (horizontal direct effect). As directives have only vertical direct effect in claims based on directives against private persons, domestic law may be the only legal basis for a claim. The domestic court is obliged to exert itself to ensure that domestic law is interpreted consistently with the EU directive. However, this result is obtainable insofar as the national law is not wholly inconsistent with EU law.

The above is important to know.

This brings me to more of a focus on Directives

Today we are addressing Procedural Safeguards Directives.

- Directives are binding, as to the result to be achieved, upon any or all of the Member States to whom they are addressed, but leave to the national authorities the choice of form and methods.

- National legislators must adopt a transposing act or 'national implementing measure' to transpose directives and bring national law into line with their objectives.
- Individual citizens are given rights and bound by the legal act when the transposing act has been adopted (subject to what I mentioned earlier).
- Member States are given some discretion, in transposing directives, to take account of specific national circumstances.
- Transposition must be effected within the period laid down in the directive.
- In transposing directives, Member States guarantee the effectiveness of EU law, in accordance with the principle of sincere cooperation established in Article 4(3) TEU.

As mentioned earlier, in principle, directives are not directly applicable. The Court of Justice of the European Union, however, has ruled that certain provisions of a directive may, exceptionally, have direct effect in a Member State even if the latter has not yet adopted a transposing act in cases where:

- (a) the directive has not been transposed into national law or has been transposed incorrectly;
- (b) the provisions of the directive are imperative and sufficiently clear and precise; and
- (c) the provisions of the directive confer rights on individuals.

If these conditions have been met, individuals may invoke the provision in question in their dealings with the public authorities. Even when the provision does not confer any rights on the individual, and only the first and second conditions have been met, Member State authorities are required to take account of the untransposed directive.

On the other hand, and just to note, an individual may not rely on the direct effect of an untransposed directive in dealings with other individuals.

According to the case-law of the Court (Francovich case, joined cases C-6/90 and C-9/90), *an individual citizen is entitled to seek compensation from a Member State which is not complying with Union law*. This is possible, in the case of a directive which has not been transposed or which has been transposed inadequately, where:

- (a) the directive is intended to confer rights on individuals;
- (b) the content of the rights can be identified on the basis of the provisions of the directive; and
- (c) there is a causal link between the breach of the obligation to transpose the directive and the loss and damage suffered by the injured parties. Fault on the part of the Member State does not then have to be demonstrated in order to establish liability.

The Directives do not create new systems

EU law tends to leave procedures to the Member States to organise, under a principle known as 'national procedural autonomy'. Whilst the Directives actually regulate procedure, and so go further than this, they impose only minimum standards and the legal basis, Article 82(2)(b), TFEU specifies that they should 'take into account the differences between the legal traditions' of the Member States' justice systems. In other words, there is no 'harmonization' and the fundamental structures of justice systems are not altered.

Remedies

It is also important to stress that the effective application of EU law in national courtrooms and the effectiveness of Union rights in particular ultimately depend on the existence of corresponding remedies. Without a remedy, there is no right. The failure to transpose a directive in due time exposes the infringing State to an action for damages before the relevant national court. The Court of Justice has thus also contributed to the creation of a decentralised system of remedies.

More generally, “ in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)”

The Court of Justice has even pushed the logic of the effective application of EU law to its end by stating the obligation for national judges to create a new remedy when it is the only possible way to enforce Union rights.

Thus, while deciding on remedial issues, national judges have to navigate between enforcing the principle of an effective application of EU law and preserving the principle of legal certainty in the application of national rules.

Conclusion

As a conclusion, these Directives take many years to agree, the decision-making process and the legislative process itself can be complex. These specific Directives confer Rights on individuals. They are or will be in your national legislation. They are for you and they are to be used by you. Acquaint yourself with them, understand them, observe their enforcement practice and use them. Thank you.

References

- LEAP – Fair Trials Toolkits on procedural safeguards
- Applying EU law as national law: Enforcing EU Law in the Courtroom (with extracts used in the paper) - Dr. Wolfgang Heusel, Academy of European Law (ERA), Germany with Contributors: Dr Karine Caunes (ERA), Ramin Farinpour (ERA), Dr Angelika Fuchs (ERA), Florence HartmannVareilles (ERA)
- European Commission information on Sources of EU Law
- European Foundation for the Improvement of Living and Working Conditions
- EU factsheets on EU legislation

USING EU LAW AND PROCEDURAL SAFEGUARDS IN PRACTICE

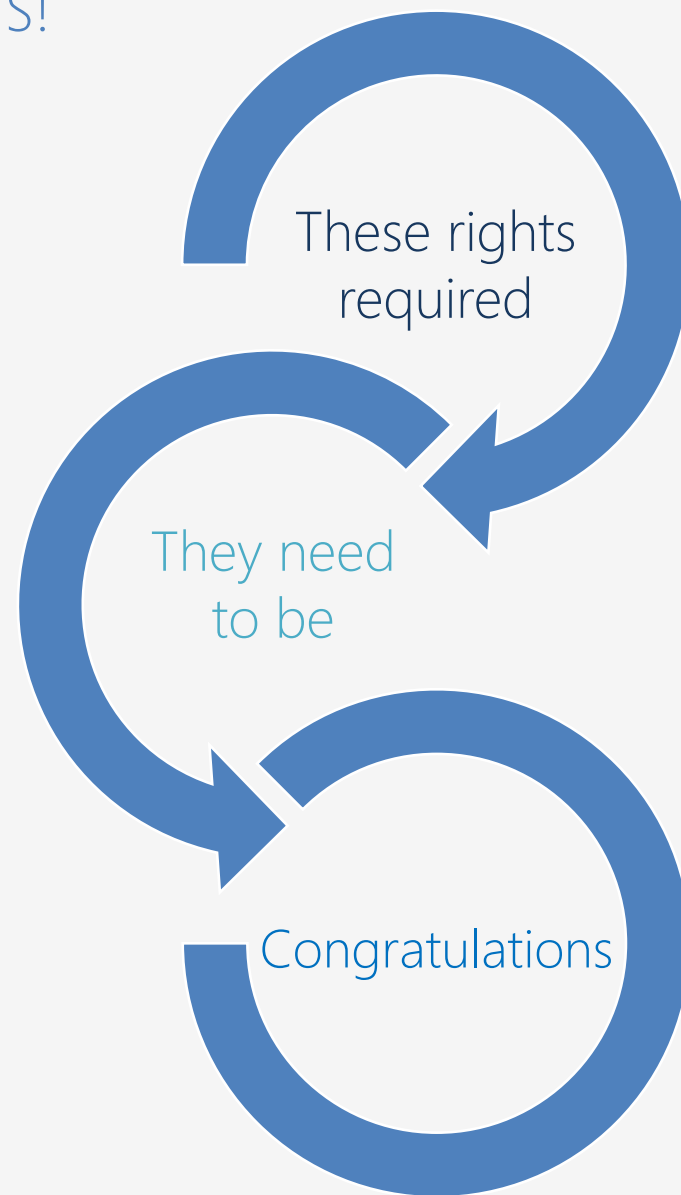
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Peter Mc Namee
Legal Advisor

A number of **hard-fought EU procedural safeguards**

- Some already implemented in the national legislation of Member States
- Some not implemented yet in the national legislation of Member States

These new rights require **examination by practitioners** in order to **familiarise** oneself with the exact wording and objectives, and to be **aware** of whether the rights are being **enforced** and **complied** with at a national level and within the courtroom

CONGRATULATIONS!



- Courage
- Dedication
- Creativity
- Persistence

- Identified
- Enforced
- Defended

- European Parliament
- European Commission
- NGO's, Academics, etc.

- ✓ Drafted with practitioners in mind.
- ✓ Task of familiarising with some of these Directives made easier
- ✓ The toolkits cover:

The Right to Interpretation and Translation

It covers suspected and accused persons' right to interpretation in police interviews, hearings and in meetings with their lawyer, and their right to translation of essential documents

The Right to Information

It concerns the suspect's right to be informed about his procedural rights, to information about the charges he is being accused of and to access the case file and materials in the case

The Right of Access to a lawyer

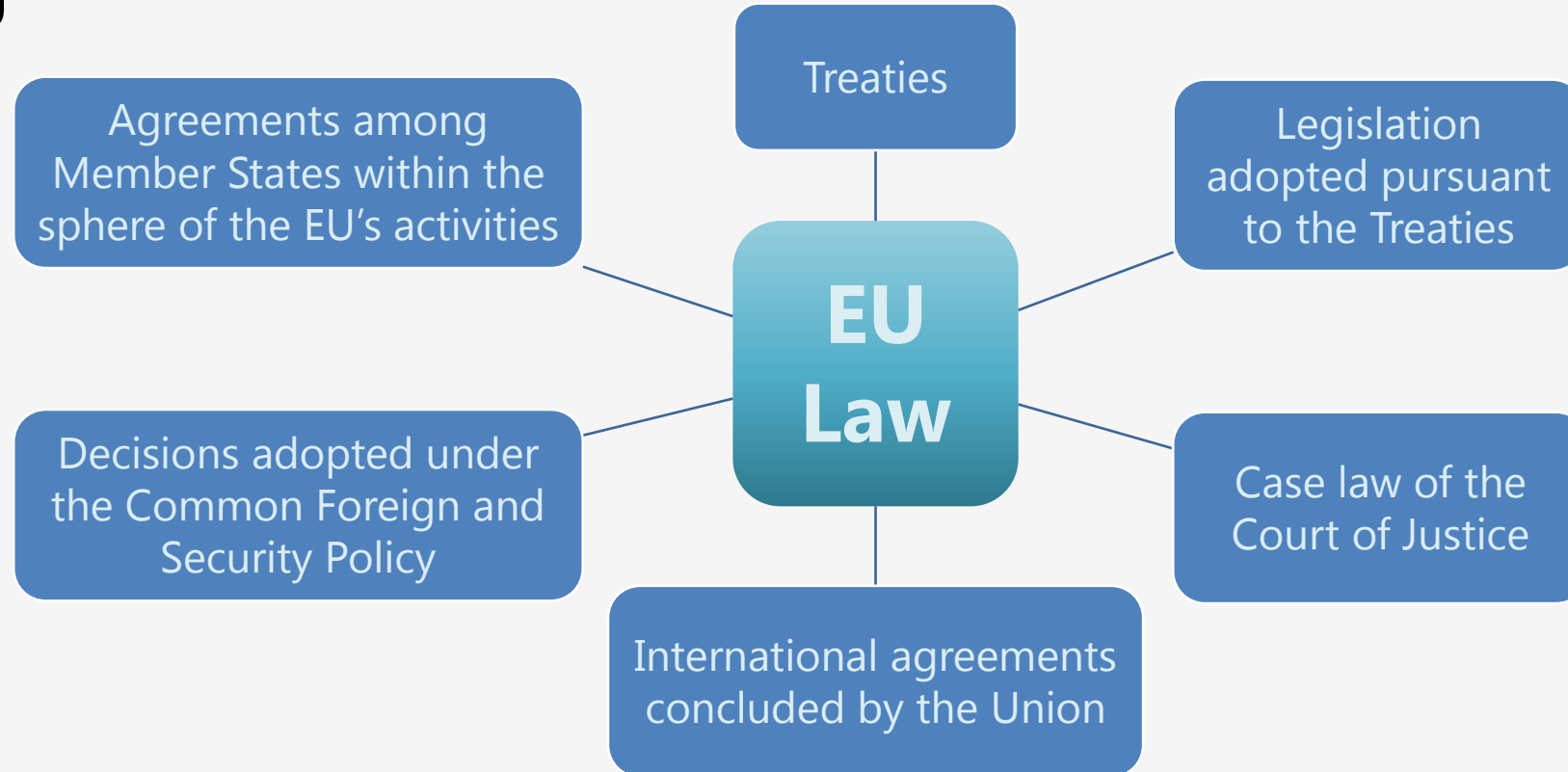
It discusses Directive 2013/48/EU on the Right of access to a lawyer in criminal proceedings including Access to a lawyer with regard to general issues and specific issues

Objective of the Institutions
= Bringing the European Union closer to its citizens

Making the European Union a tangible asset for its citizens
= Key to its democratic legitimacy

Law is the **essential tool** to meet citizens' needs and expectations and to achieve the policy goals enshrined in the Treaties. If legislation is the way to achieve these goals, its **effective application is crucial** to ensure that citizens can enjoy their rights deriving from EU law. **However, the effective application of EU law is a challenge in itself.**

EU law or the “acquis” constitutes an immense and diverse body of rights and obligations that is binding on and in all EU Member States and constantly evolving



EU OBJECTIVES

The acquis covers a wide array of fields

Specific and often
very technical
legislation

Classical
internal
market law

Justice and
home affairs

Judicial cooperation
in civil, commercial
and criminal matters

Food safety, veterinary and
phytosanitary policy

Fundamental rights of the
Charter

Energy, taxation, transport,
employment, fisheries or
agriculture

Fundamental
freedoms of the
Single Market

- ✓ EU law has to be applied in the current 28 Member States
- ✓ Each with its own legal culture, its own structure, its own language
- ✓ And to the benefit of more than 500 million EU citizens, to its commercial actors and also to non-EU country nationals where applicable.

National legal practitioners have to understand that EU law is not a separate body of law beyond their reach, but it **is part of the law of every Member State** which they shall make use of for the benefit of their clients.

National judges have also to understand that EU law is not just a matter for the Court of Justice of the EU but that **its enforcement is their own right and duty**. The national judge has always been the **first judge of Union law**.

The **Member States, masters of the Treaties**, have been endowed with the mission of applying EU law in their respective legal systems, and whose performance is monitored by the European Commission and the Court of Justice, guardians of the Treaties.

The **Lisbon Treaty** is the first EU Treaty to explicitly recognise the crucial role played by the national judiciaries in the enforcement of EU law.

Article 19(1) TEU states that “***Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law***”.

Member States' courts:

Forefront of the concrete and daily application of EU law to Union citizens

Primary actors in providing Union citizens with the legal certainty that EU law will be effectively applied, in an equal and uniform manner, and that the legal rights they derive from EU law will be enforced

As first judges of EU law, make the idea of a Union based on the rule of law a reality. National courtrooms are often the place of the European experiences for Union citizens. The proper awareness by practitioners and the proper application of EU law by Member States' judiciaries is thus a key element in reinforcing the democratic legitimacy of the European Union and constitutes a democratic imperative to ensure respect for the rule of law.

For practitioners (normally acquainted with national law and legal systems) **and members of national judiciaries** (usually primarily appointed based on their knowledge of their own national law, not of EU law), **to apply EU law** as they would apply national law **is a challenge**.

Application of EU law to specific cases is sometimes complicated by the **quantitative and quality aspect of EU law**.

The drafting of EU legislation is often the **product of compromises** and its application by national judges in concrete situations may highlight **ambiguities or inconsistencies**. The **expansion of EU** law in terms of its volume and the fields covered has also translated into an accumulation of layers of legislative acts, making their **application more complex**.

I. Precedence of European law

- Guarantees the superiority of European law over national laws and applies to all European acts with a binding force.
- Was enshrined in the Costa versus Enel case of 15 July 1964.
- Is to be applied to all national acts, whether they were adopted before or after the European act in question.

Why this principle?

The principle of precedence ensures that citizens are uniformly protected by a EU law assured across all EU territories.

What is the scope of the principle?

The precedence of European law over national laws is **absolute**.

The following are subject to this principle:

- All European acts (from primary or secondary legislation)
- All national acts (irrespective of their nature, issued by the executive or legislative powers)
- Member State case-law
- National constitutions

Who is responsible for ensuring compliance with the principle?

The Court of Justice is responsible and its rulings impose penalties in case of infringement, on the basis of the various remedies provided for by the founding Treaties (e.g. proceedings for failure to fulfil an obligation).

National judges are responsible too. In case of any doubt, they may make use of the reference for a preliminary ruling procedure.

II. The direct effect of European law

This principle enables individuals to **immediately invoke a European provision before a national or European court**. This principle **only relates to certain European acts** and is subject to **several conditions** and is a fundamental principle of European law.

The direct effect principle ensures the **application and effectiveness** of European law in EU countries. However, the CJEU defined several conditions in order for a European legal act to be immediately applicable.

The direct effect may only relate to relations **between an individual and an EU country** or be extended to relations **between individuals**.

Definition

- Enshrined by the Court of Justice in the **judgement of Van Gend en Loos** of 05/02/1963
- The Court states that European law not only engenders **obligations for EU countries, but also rights for** individuals, who may take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system.
- **The CJEU identified three situations necessary to establish the direct effect of primary EU law:**
 - the provision must be sufficiently clear and precisely stated;
 - it must be unconditional and not dependent on any other legal provision;
 - it must confer a specific right upon which a citizen can base a claim
- In the Becker judgment (19 January 1982), the Court of Justice rejected the direct effect where the countries have a **margin of discretion** regarding the implementation of the provision in question (Judgment of 12 December 1990, Kaefer & Procacci).

Horizontal and vertical direct effect

- **Vertical direct effect** is of consequence in relations between individuals and the country. This means that individuals can invoke a European provision in relation to the country.
- **Horizontal direct effect** is consequential in relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

Direct effect and secondary legislation

The principle of direct effect also relates to **acts from secondary legislation**, but depends on the type of act:

- **A Regulation** always has direct effect;
- **A Directive** is an act addressed to EU countries and must be transposed by them into their national laws. However, in certain cases the Court of Justice recognises the direct effect of directives in order to protect the rights of individuals and when its provisions are unconditional, sufficiently clear and precise and when the EU country has not transposed the directive by the deadline. However, it can only have direct vertical effect;
- **A Decision** may have direct effect when they refer to an EU country as the addressee. The Court of Justice therefore recognises only a direct vertical effect;
- **International agreements**: the Court of Justice recognised the direct effect of certain agreements in accordance with the same criteria identified in the Judgement Van Gend en Loos;
- **Opinions and Recommendations** do not have legal binding force and consequently not provided with direct effect.

III. The indirect effect of European law

Its doctrine of indirect effect **requires national courts to interpret domestic law** consistently with directives.

This doctrine achieves indirectly the result obtainable through the **doctrine of direct effect of directives**.

The indirect effect is an addition to and a corollary of the doctrine of direct effect.

In the case of provisions of directives having direct effect, national courts must disregard domestic law where there is a conflict between the directive and domestic law. **In the case of a directive lacking direct effect**, the national courts must make every effort to interpret domestic law consistently with the directive.

The doctrine of indirect effect is of **vital importance to the enforcement of EU rights against private persons** (horizontal direct effect). As directives have only vertical direct effect in claims based on directives against private persons, domestic law may be the only legal basis for a claim. However, this result is obtainable insofar as the national law is not wholly inconsistent with EU law.

Directives are binding upon any or all of the Member States to whom they are addressed, but leave to the national authorities the **choice of form and methods**.

National legislators must adopt a **transposing act or 'national implementing measure'** to transpose directives and bring national law into line with their objectives. Individual citizens are then given rights and bound by the legal act.

Member States are given **some discretion**, in transposing directives, to take account of specific national circumstances. Transposition must be **effected within the period** laid down in the directive. In transposing directives, Member States **guarantee the effectiveness of EU law**, in accordance with the **principle of sincere cooperation** established in Article 4(3) TEU.

In principle, **directives are not directly applicable**. The Court of Justice of the European Union, however, has ruled that certain provisions of a directive **may, exceptionally, have direct effect** in a Member State even if the latter has not yet adopted a transposing act in cases where:

- the directive has not been transposed into national law or has been transposed incorrectly;
- the provisions of the directive are imperative and sufficiently clear and precise; and
- the provisions of the directive confer rights on individuals.

If these conditions have been met, individuals may invoke the provision in question in their dealings with the public authorities. Even when the provision does not confer any rights on the individual, and only the first and second conditions have been met, **Member State authorities are required to take account of the untransposed directive**.

On the other hand, an individual may not rely on the direct effect of an untransposed directive in dealings with other individuals.

According to the case-law of the Court (*Francovich case, joined cases C-6/90 and C-9/90*), an **individual citizen** is entitled to seek **compensation from a Member State which is not complying with Union law**. This is possible, in the case of a directive which has not been transposed or which has been transposed inadequately, where:

- the directive is intended to confer rights on individuals;
- the content of the rights can be identified on the basis of the provisions of the directive; and
- there is a causal link between the breach of the obligation to transpose the directive and the loss and damage suffered by the injured parties. Fault on the part of the Member State does not then have to be demonstrated in order to establish liability.

The Directives do not create new systems.

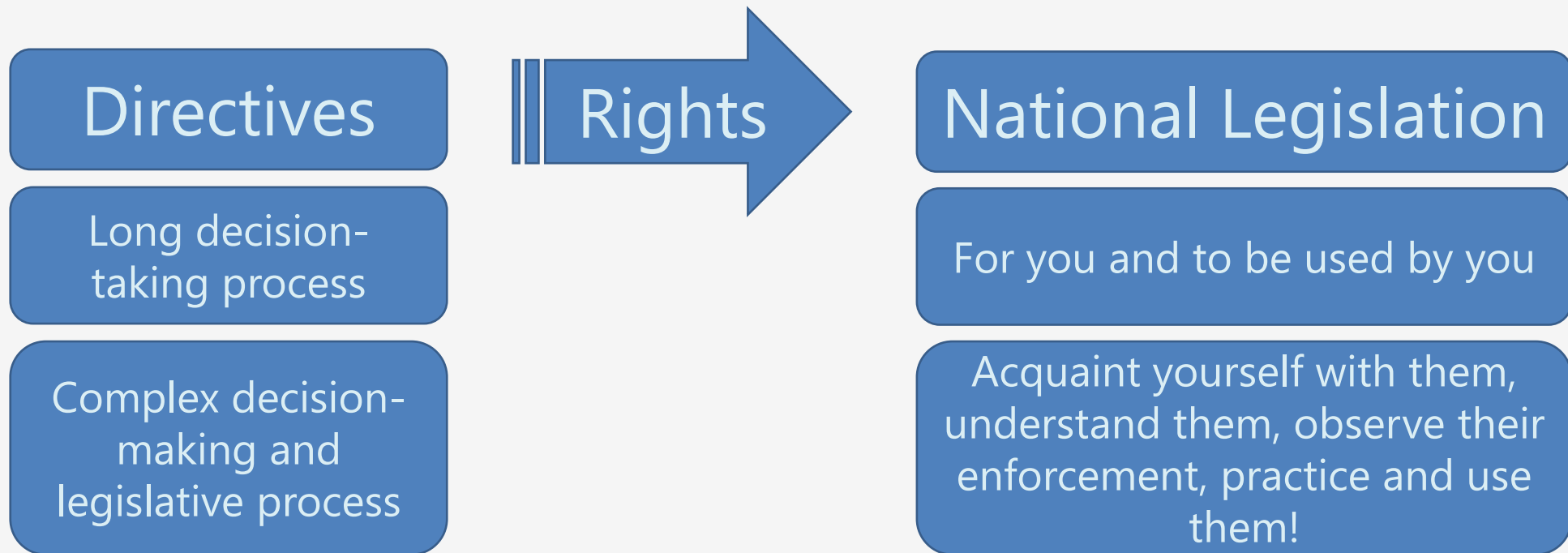
EU law tends to leave procedures to the Member States to organise, under a principle known as '**national procedural autonomy**'. Whilst the Directives actually regulate procedure, and so go further than this, they **impose only minimum standards** and the legal basis, Article 82(2)(b), TFEU specifies that they should 'take into account the **differences between the legal traditions**' of the Member States' justice systems.

There is no 'harmonization' and the fundamental structures of justice systems are not altered.

The effective application of EU law in national courtrooms and of Union rights in particular ultimately depend on the existence of corresponding remedies. **Without a remedy, there is no right.** The failure to transpose a directive in due time exposes the infringing State to an action for damages before the relevant national court. The Court of Justice has thus also contributed to the creation of a **decentralised system of remedies**.

More generally, *"in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)"*

The Court of Justice has pushed the logic of the effective application of EU law to its end by stating the **obligation for national judges to create a new remedy when it is the only possible way to enforce Union rights**.



THANK YOU

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