Le point de vue du praticien sur l'effet direct du droit de l'Union européenne et le droit de la concurrence

A Practioner's Perspective on Direct Effect of EU Law and Antitrust Law

Édouard Bruc, *Avocat, Wilmer Cutler Pickering Hale and Dorr LLP, Bruxelles/Londres**

EU competition law – Antitrust – Articles 101 and 102 of the TFEU – CJEU – Direct effect of EU law – Direct effect of treaty provisions – Direct effect of secondary legislation – Effectiveness principle – Principle of equivalence – Direct effect of fundamental rights

EU competition rules are crucial to the strengthening of the Union's internal market. And direct effect has long been a structuring legal principle of the Union's legal order, helping to ensure its autonomous nature. Thus, the way in which the principle of direct effect and the EU's antitrust provisions interact is of constant interest, especially in a recent context marked by the adoption of secondary legislation which has an influence on national legal regimes affecting the implementation of competition rules.

Edouard Bruc, a London and Brussels-based competition lawyer, shares his detailed analysis of the way in which direct effect has played a decisive role in the application of competition rules. He explores the concrete manifestations of the direct effect of primary law provisions relating to substantive Union law, as well as the scope of the direct effect attached to certain secondary law provisions. The (potentially unlimited?) effects of the frequent application of the principles of effectiveness and of equivalence are also discussed. Finally, as the contemporary application of EU competition law is inseparable from the necessary respect for certain fundamental guarantees resulting from the imperatives linked to the rule of law, the author examines how the direct effect of certain fundamental rights and principles also contributes to shape the implementation of competition law in the Member States. Each of these angles provides an opportunity to reflect on the place of direct effect in the day-to-day practice and litigation strategies of competition law practitioners.

'Direct Effect: A Sharp Axe in the Practitioner's Toolbox'

Alongside academics, public authorities, Union institutions, advocate generals, judges, and others, practitioners have helped to build the Union's legal order. From the seemingly farfetched ideas that pop into their heads as they try to solve their clients' problems, to the meticulous written

* Mr Bruc is a Solicitor in England and Wales & Paris Bar Avocat and works at Wilmer Cutler Pickering Hale and Dorr LLP. The views expressed are purely personal and cannot, under any circumstances, be attributed to the law firm, other lawyers, or any of its clients. The author has no conflicts to disclose.

and oral submissions they make to the courts, they have shaped and, sometimes and to a certain extent, moulded the concrete meaning of the rules to their liking. Together with other stakeholders, they set the law in motion.[1] And so it is with direct effect.

In 1960, Van Gend & Loos, a Dutch haulage company, saw its customs duty due for certain products increase by 5%. Article 12 of the EEC Treaty, which had just been signed, prohibited Member States from introducing higher duties between themselves.[2] This provision caught the attention of Van Gend & Loos' lawyers, Hendrik Gerhard Stibbe,[3] a former president of the Amsterdam Bar association, and Frans ter Kuile, a member of the Dutch Association for European Law.[4] To defend the haulage company against the Dutch tax authorities, they argued for the direct effect of this treaty provision over national tax provisions. Subsequently, in 1962, the Dutch court referred a preliminary question to the European Court of Justice on the self-executing status of this treaty obligation. The next year, the Court of Justice, by a slim majority, agreed with the lawyers, greatly supported by the European Commission's Legal Service,[5] and ruled that the Community, now the Union, constituted '*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*'.[6]

That judgment is regarded as the foundation of the direct effect concept. It is direct in that it enables '*nationals*' to directly assert their Union-based rights. It can be described as a theoretical bridge between EU law and national law. This assertion may sound trite; yet it rightly draws attention to the fact that the European Union is a multilayered constitutional legal order with two substantially different levels. Each Member State has its own, often long-standing, legal order. To this must be added the Union's legal order, which is juxtaposed to that of the Member State and takes precedence in the event of conflict. So understood, as by the two Dutch *advocaten* and as confirmed in *Costa v ENEL*, this primacy over national law gives another dimension to the question of applicability of EU law.[7] It is against this backdrop that the autonomous concept of direct effect is best grasped.

All the foregoing is to say that within the scope of EU law, direct effect is most useful when counsels need to find solutions and supply answers for their clients that their national legal system is unable to provide. In such difficult cases, EU principles, fundamental rights, and rules provide a gateway to new possibilities. Roughly speaking, one could attempt to classify these opportunities into different groups: (I) direct effect of treaty provisions; (II) regulatory direct effect of clear provisions included in regulations and directives that overrule national law; and (III) direct effect of EU fundamental rights and principles that override national law and/or give self-standing rights. It is through these prisms that recent developments of the concept of direct effect will be scrutinised, although not encyclopaedically and with a strong focus on competition law.

I. | Direct Effect of Treaty Provisions

Most treaty provisions dealing with competition law lay down clear, precise, and unconditional rules and therefore have a direct effect. What is a prescriptive rule but for its applicability? For instance, Articles 101, 102 and 106 TFEU are directly applicable, and companies must comply with them.[8] That seems quite simple.[9]

[1] In that respect, lawyers are not only representatives of their clients' interests but also independent collaborators in the interests of justice (see Opinion of Advocate General Kokott in Case C-432/23, *F, Ordre des Avocats du Barreau de Luxembourg*, ECLI:EU:C:2024:446, paras 24, 58-61).

[2] '*Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other*' (Treaty establishing the European Economic Community (EEC), signed in Rome in 1957).

[3] In 1959, he had been involved in the effort to organise a Europe-wide association for European law associations. See M. Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65' (2012) 21(3) *Contemporary European History* 375, p. 389.

[4] In Dutch, the *Nederlandse Vereniging voor Europees Recht*.

[5] See M. Rasmussen, 'Revolutionizing European law: A History of the *Van Gend en Loos* Judgment' (2014) 12(1) *International Journal of Constitutional Law* 136.

[6] Case C-26/62, *Expeditie Onderneming van Gend & Loos*, ECLI:EU:C:1963:1, p. 12.

[7] Case 6-64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

[8] The nullity established by Article 101(2) TFEU is typical example of a clear self-executing rule. See Case 48/72, *SA Brasserie de Haecht v Wilkin-Janssen*, ECLI:EU:C:1973:11, paras 11-14, 24-26; Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 36.

[9] Before Regulation No. 1/2003, Regulation No 17/62 withheld from national competition authorities the power to apply Article 101(3)

And yet, the extent to which the direct effect of treaty provisions can play a role has been a source of controversy. Are these treaty provisions horizontally applicable between companies? Early on, in the *SABAM* case, the Court noted that competition law creates direct rights in respect of the individuals concerned which the national courts must safeguard.[10] What about private damages litigations? In case of infringement arising from a contract, do they imply a right to claim damages for loss even if the claimant is a party to the contract? Despite no express and clear constitutional language to this effect, seasoned English barristers thought so and argued that such a right to compensation flowed directly from the Treaty. The Court of Justice agreed in the landmark *Courage* judgment.[11] Article 101 TFEU '*precludes a rule of national law under which a party* […] *is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract*'.[12] For many reasons, *Courage* can be described as the blueprint for the wave of private litigation that has filled the EU Court's docket over the past two decades. It exhibits all the features that have fed, and continue to feed, practitioners' minds when articulating a solution to overcome a domestic issue: direct effect combined with full effectiveness of competition law or direct effect and equivalence.[13] Very often, these legal concepts go hand in hand.

As importantly, *Courage* laid the groundwork for further claims based on this judge-made right to compensation.

A. *Effectiveness of Competition Law*

To begin with, the Court justifies its intrusion into national procedural systems by the full effectiveness principle. For the '*practical effect*' of the prohibition laid down in Article 101(1) TFEU '*would be put at risk*' if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[14] This full effectiveness principle has become, and rightly so, the mantra of any litigator wishing to secure a claimant-friendly position from the EU Courts.

On this basis, the Court in *Manfredi* gave companies the indisputable right to claim damages not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*) plus interest.[15] Likewise, in *Kone*, victims of umbrella pricing were granted the constitutional right to claim compensation, even if they did not have contractual links with cartelists.[16] The Court of Justice, however, did not include punitive damages in the minimum core of mandatory remedies directly arising from Article 101 TFEU.[17]

Later, in *Skanska*, notwithstanding national rules on liability and the corporate veil, the treaty-based concept of 'undertaking' was also directly imposed in the domestic context of private enforcement.[18] Why? Because if infringers could escape liability by simply changing their identity through restructurings, sales or other legal or organisational changes, then the objective of punishment and deterrence pursued by competition law rules and their effectiveness would be jeopardised.[19]

From a more procedural standpoint, effectiveness was also invoked to justify the encroachment on national rules on limitation periods. National legislation laying down '*the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that*

TFEU. Interestingly, whereas Article 101(3) was mentioned in 60% of the Commission's decisions prior to 2004, it had dropped to only 22% of the decisions after 2004 (O. Brook, 'The Disappearance of Article 101(3) in the Realm of Regulation 1/2003: An Empirical Coding' (2016) 4 *Pázmány Law Review*, p. 271).

[10] Case 127-73, *BRT v SV SABAM*, ECLI:EU:C:1974:6, para. 16.

[11] Case C-453/99, *Courage Ltd v Bernard Crehan*, ECLI:EU:C:2001:465.

[12] Case C-453/99, *Courage Ltd v Bernard Crehan*, ECLI:EU:C:2001:465, para. 23.

[13] For the avoidance of doubt, the said principles are equally applicable to other EU rights, such as those included in regulations or directives.

[14] Case C-453/99, *Courage Ltd v Bernard Crehan*, ECLI:EU:C:2001:465, para. 27: '*existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*'.

[15] Joined Cases C-295-298/04, *Manfredi*, ECLI:EU:C:2006:461, para. 95.

[16] Case C-557/12, *Kone*, ECLI:EU:C:2014:1317, paras 34-36.

[17] Joined Cases C-295-298/04, *Manfredi*, ECLI:EU:C:2006:461, paras 92-93.

[18] Case C-724/17, *Skanska*, ECLI:EU:C:2019:204.

[19] Case C-724/17, *Skanska*, ECLI:EU:C:2019:204, paras 44-47. In *Sumal*, while confirming the incorporation of the notion of undertaking into private enforcement, the Court added one important caveat: there must a '*specific link*' between the activity of the subsidiary and the subject matter of the infringement for which the parent company has been held responsible (Case C-882/19, *Sumal SL v Mercedes Benz Trucks España SL*, ECLI:EU:C:2021:800, paras 50-53).

period' must be tailored to the specificities of competition law.[20] Given those specificities, limitation periods cannot begin to run '*before the infringement has ceased*' and '*the injured party knows, or can reasonably be expected to know*' the information necessary to bring an action, including the fact that it had suffered harm as a result of the infringement and the perpetrator's identity.[21] Put simply, they must fulfil two requirements: cessation and knowledge. Strikingly, in *Mastercard*, the UK Competition Appeal Tribunal ruled against the need for a mandatory cessation requirement.[22] The English judges considered that the knowledge requirement is in itself sufficient to ensure effectiveness.

Turning back to the EU, the Court of Justice ruled in *Cogeco* that EU law precludes national legislation which, firstly, provides for a three-year limitation period starting from the date on which the injured party became aware of its right to compensation, even if unaware of the infringer's identity, and secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.[23] Similarly, in *Heureka v Google*, as the cessation requirement was not complied with, Czech law was deemed to violate EU law.[24]

The effective application of competition law can even dictate the weight that must be given to a final decision of a competition authority in civil actions,[25] the rules surrounding the disclosure of leniency documents,[26] the jurisdictional remit of specialised courts,[27] or who has the right to appear before national courts.[28] Needless to say, the foregoing examples illustrate the vast opportunities offered by the concept to redefine, or even completely rewrite, the rules of the game and hence the dynamics of proceedings.

Recently, in *Traficos Manuel Ferrer*,[29] a resourceful *abogado* used the principle of effectiveness to challenge a Spanish provision on the allocation of costs.[30] Article 394(2) of the Code of Civil Procedure provides that in case of a partial upholding or partial dismissal of claims, each party shall bear its own costs as well as half of the common costs unless one of the parties is found to have litigated frivolously. The key question put to the Court was whether this cost-splitting rule renders the exercise of the right to compensation practically impossible or excessively difficult.[31] In her non-binding opinion, Advocate General Kokott argued that cartel victims, like consumers, are in a '*situation of structural inferiority*' in relation to their contractual partner.[32] She concluded that the case law prohibiting such rules[33] under the Unfair Contract Terms Directive should apply by analogy.[34] But the Court disagreed. It underlined the corrective mechanisms provided for in the Damages Directive.[35] They mitigate such a potential imbalance between the parties, notably by addressing the information asymmetry, through disclosure rules, the possibility for judicial estimation, and claimant-friendly

[20] Case C-637/17, *Cogeco*, ECLI:EU:C:2019:263, paras 44-47.

[21] Case C-267/20, *Volvo/DAF Trucks Spain*, ECLI:EU:C:2022:494, paras 56 and 61.

[22] *Walter Hugh Merricks v Mastercard* [2023] CAT 49, paras 28, 73 and 96 (bearing in mind that permission to appeal to the Court of Appeal has been granted): '*introducing a Cessation Requirement into the limitation scheme that operates in England would do such violence to a well worked-out scheme that we regard this as inappropriate and unnecessary*'.

[23] Case C-637/17, *Cogeco*, ECLI:EU:C:2019:263, para. 55. This is because this would render the exercise of the right to compensation practically impossible or excessively difficult.

[24] Case C-605/21, *Heureka Group a.s. v Google LLC*, ECLI:EU:C:2024:324.

[25] Case C-25/21, *Repsol*, ECLI:EU:C:2023:298.

[26] Case C-536/11, *Donau Chemie*, ECLI:EU:C:2013:366, paras 47-49.

[27] Case C-268/06, *Impact*, ECLI:EU:C:2008:223, para. 51: '*where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70, the obligation which would be placed on individuals* […] *to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, would be contrary to the principle of effectiveness if – which is for the referring court to ascertain – it would result in procedural disadvantages for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive*'.

[28] For example, in *VEBIC*, it was held that national competition authorities must be able to participate, as a defendant or respondent, in proceedings before a national court challenging a decision that the authority itself has taken (Case C-439/08, *VEBIC*, ECLI:EU:C:2010:739, para. 59).

[29] Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:C:2023:99, paras 39-40.

[30] See to that effect, F. Louis, A. Vallery, C. O'Daly and E. Bruc, 'Private Enforcement of EU Competition Law: Recent Developments' (2023) *ICLG – Competition Litigation 2024*, p. 20.

[31] *Ibid*., para. 40.

[32] Opinion of Advocate General Kokott in Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:C:2022:712, paras 52-59.

[33] Joined Cases C-224/19 and C-259/18, *CY*, ECLI:EU:C:2020:578.

[34] That suggestion is an interesting example of cross-pollination between different legal fields. See Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] *OJ* L 95.

[35] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] *OJ* L 349/1.

presumptions.[36] That implies that, conversely, the outcome might have been different without the intervention of the EU legislator.[37] In that context, the Spanish rule was deemed to respect the principle of effectiveness.[38]

All these cases show that, in essence, the principle of effectiveness requires national rules to provide remedies sufficient to ensure '*effective legal protection in the fields covered by Union law*'.[39] Where appropriate, this case-by-case analysis of a national legal framework can, implicitly or explicitly, be benchmarked against the rules set out in the Damages Directive, which has become an easy and practical point of reference. Certain comparisons can also be made with consumer protection law, as suggested by Advocate General Kokott, or some *ex-ante* regulatory fields. In any event, claimants must explain how national rules – if any – including legal precedents, work in practice, and how they fall short of providing the effective legal protection needed by the rule in question.[40]

Outside the ambit of this broad formulation, this judicially-fashioned concept has apparently no rigorous and strict limit. That is to say that the principle of (full) effectiveness goes beyond a strict 'excessively difficult' or 'practically impossible' threshold, and sometimes involves a more flexible hermeneutical application.[41] However, given its conceptual plasticity, the notion tends to lack judicial predictability. Commentators have even gone so far as to describe it as a '*kind of jack-in-the-box instrument*' that allows the court to justify almost any result.[42] That being so, practitioners with a little imagination can relish '*the almost unlimited hermeneutical potential of this construction*'.[43]

B. *Principle of Equivalence*

Another principle that operates as a structural framework limiting and directing the procedural autonomy of the Member State is the principle of equivalence. Theoretically, it is the general EU law principle of equality applied to the law of remedies.[44] It is intended to prohibit national rules of procedure from discriminating against actions brought to enforce an EU right, including those based on regulations or directives.[45] As the Court puts it in *Courage*:

"in the absence of Community 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 [Union] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence).[46]*"*

In *Manfredi*, the Court held that it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Union competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.[47] More recently, the adoption of the Digital Markets Act might raise new questions as to the applicability of the equivalence principle to the said regulation based on national digital regulations.[48]

---

[36] Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:C:2023:99, para. 44.

[37] *Ibid*., para. 47. Moreover, this cost-splitting rule may be justified because the claimant made excessive claims or had not behaved properly.

[38] *Ibid*., paras 46-49.

[39] Article 19(1) of the Treaty on European Union.

[40] See, by analogy, Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, paras 41-42: '[i]*t would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law* […] *Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection*'.

[41] I. Lianos, 'The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication', in P. Lowe, M. Marquis and G. Monti (eds), *European Competition Law Annual 2014*, Oxford, Hart Publishing, 2015, Section II.

[42] H.-W. Micklitz, 'The CJEU between the Individual Citizen and the Member States – A Plea for a Judge Made European Law on Remedies' in H. Micklitz and B. de Witte (eds), *The CJEU and the Autonomy of Member States*, Cambridge, Intersentia, 2012, p. 397.

[43] I. Lianos, 'The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication', in P. Lowe, M. Marquis and G. Monti (eds), *European Competition Law Annual 2014*, Oxford, Hart Publishing, 2015, p. 7.

[44] See K. Lenaerts, 'The Decentralised Enforcement of EU Law: the Principle of Equivalence and Effectiveness', in *Scritti in onore di Giuseppe Tesauro*, Vol. 2, Naples, Editoriale Scientifica, 2014, p. 1060.

[45] The national court must consider the role played by the provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.

[46] Case C-453/99, *Courage Ltd v Bernard Crehan*, ECLI:EU:C:2001:465, para. 29.

[47] Joined Cases C-295-298/04, *Manfredi*, ECLI:EU:C:2006:461, para. 99. See, however, Article 3 of the Damages Directive: '*full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*'.

[48] See A. P. Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement', in N. Charbit and S. Gachot (eds), *Liber Amicorum Eleanor M. Fox,*

Nonetheless, in stark contrast to the effectiveness principle, there is a paucity of competition cases in which this principle has played a pivotal role. Nowadays, in fact, it is quite unusual to encounter national rules that distinguish or discriminate between Union law and national law. Moreover, an increasing number of procedural rights pertaining to competition law are fleshed out at the EU level, as in the Damages Directive, and not at the national level. As such, internal and genuine discrimination with a pertinent national rule is less likely.

II. Overriding Domestic Rules with Regulations and Directives

Higher-ranking rules provide an immaculate way of disposing of contradictory lower-ranking national rules. That is perhaps one of the most thrilling, yet at times intellectually undemanding, moments for practitioners who delve into the relevant legal framework in search of a loophole.[49] And Union law offers countless opportunities to be thrilled, subject to one caveat: its applicability.

Direct effect of regulations is fairly straightforward. Clear and unconditional provisions set forth in regulations are directly applicable by whoever can justify that they are applicable to them, be it vertically against the State or horizontally between individuals.[50] They override contradictory national rules, unless they are part and parcel of the State's constitutional national identity.[51] For example, Articles 5 and 6 of the Digital Markets Act are considered by some commentators to be directly applicable before national courts.[52]

Directives, such as the Damages and the ECN+ Directives, have a more limited effect as they are solely addressed to the State.[53] The Court of Justice has hitherto been adamant in denying them a horizontal effect. At the same time, the Court has furnished flexible and powerful ways to bypass this issue to lawyers involved in private disputes. That is indirect effect. Under this canon of interpretation, national courts must interpret national laws as far as possible in a manner that is consistent with the provisions of Union law, even if they do not have direct effect. The extent to which this consistent interpretation is operative remains contingent on the fabric of national law. Soft and malleable domestic rules present easy opportunities for indirect effect.[54] On the other end of the spectrum, in rare cases, it is not possible to make EU law fit into national law.[55]

In the same vein, there is a so-called incidental horizontal effect: when a directive does not in itself impose obligations on individuals, litigants can use the directive, after the transposition deadline, to 'exclude' national rules against public authorities.[56] Member States must also refrain from taking measures liable to compromise the result prescribed by a directive before the transposition deadline.[57] More fundamentally, individuals can also challenge the implementation of a directive by the national legislature. The question being whether the legislature, in exercising its choice as to the form and methods for implementing the directive, kept within the limits of its discretion set by the directive.[58] As a result, there are many ways in which EU provisions can be applied to put forward new legal arguments.

Antitrust Ambassador to the World, Paris, Concurrences, 2021, p. 434. That said, if so, this would raise fundamental questions as to the DMA's coordination with national laws and the legality of its shaky legal basis, Article 114 TFEU.

49 Who does not like to pull a killer argument out of his hat?

50 Article 288 TFEU; Case C-403/98, *Monte Arcosu*, ECLI:EU:C:2001:6, para. 28.

51 Article 4(2) TEU.

52 See Articles 39, 42 and Recitals 92 and 104 of the DMA (see A. P. Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement', in N. Charbit and S. Gachot (eds), *Liber Amicorum Eleanor M. Fox, Antitrust Ambassador to the World*, Paris, Concurrences, 2021, pp. 426 *et seq.*; G. Rurali and M. Seegers, 'Private Enforcement of the EU Digital Markets Act: The Way Ahead After Going Live', *Kluwer Competition Law Blog*, 20 June 2023. Among other examples, Article 3 of Regulation No. 1/2003 enables undertakings and their counsel to challenge too strict national rules on cartels (see O. Brook and M. Eben, 'Article 3 of Regulation 1/2003: a Historical and Empirical Account of an Unworkable Compromise' (2024) 12(1) *Journal of Antitrust Enforcement* 45).

53 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] *OJ* L 11/3.

54 See, to that effect, Case C-212/04, *Adeneler*, ECLI:EU:C:2006:443, para. 115, and Case C-267/20, *Volvo and DAF Trucks*, ECLI:EU:C:2022:494, paras 33 and 77.

55 Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33, paras 25, 30-31.

56 This is sometimes described as the estoppel principle. See Case C-152/07, *Arcor*, ECLI:EU:C:2008:426, para. 36; Case C-201/02, *Wells*, ECLI:EU:C:2004:12, para. 57; Case C-91/92, *Faccini Dori*, ECLI:EU:C:1994:292, paras 22-23.

57 Case C-129/96, *Inter-Environnement Wallonie*, ECLI:EU:C:1997:628, para. 45.

58 Case 51/76, *Verbond van Nederlandse Ondernemingen*, ECLI:EU:C:1977:12, paras 22, 23 and 24; Case C-435/97, *WWF*, ECLI:EU:C:1999:418, para. 69

III. | Interplay with EU Fundamental Rights

The applicability of fundamental rights, as particularly embedded in the EU Charter of Fundamental Rights, and EU general principles, such as proportionality and duty of sincere cooperation,[59] has generated a wealth of literature.[60] As Sacha Prechal observed, accepting the direct effect of certain Charter provisions is '*nothing revolutionary*'.[61] Rather, it fits into a line of cases dating back to *Defrenne II* on sex discrimination.[62] Nonetheless, the quasi-criminalisation of competition law has led outside counsels and judges to pay increased attention to fundamental rights, be it under the Charter or the European Convention of Human Rights.[63]

Against this backdrop, the Charter provides remarkable opportunities for practitioners to advance new pleas in law examining the compatibility of national legislations – or Union law – with the Charter. As to its general applicability, the Court of Justice has given a wide scope to the Charter so that fundamental rights guaranteed in the legal order of the European Union '*are applicable in all situations governed by European Union law*', including under a directive.[64]

Its vertical enforcement against public authorities, which is unquestionable for competition law, entails examining the compliance of national law with Union laws regarding, among others, the protection of personal data (Article 8), the freedom to conduct a business (Article 16), the right to an effective remedy and to a fair trial (Article 47),[65] right to good administration (Article 41), right to access to documents (Article 42), presumption of innocence and rights of defence (Article 48), and *ne bis in idem* (Article 49). Not all these provisions have, however, the same purpose and legal effect. The Charter distinguishes between rights and principles. Principles can only be used as an aid to interpretation or as a standard for judicial review of implementing measures.[66] For the time being, the concrete practical meaning of this distinction remains uncertain.[67]

Equally, regarding the horizontal enforcement of the Charter, this is not black-letter law. Undeniably, general principles of EU law have horizontal direct effect,[68] and recent case law appears to suggest that the same holds true for fundamental rights.[69] In particular, if a Charter provision is sufficient in itself and does not need to be made more specific by other provisions of EU or national law to confer on individuals a right on which they may rely, it may produce horizontal direct effect.[70] This remains, however, a matter of debate; consequently, how and when

---

[59] In *DB Station & Service*, the Court of Justice was asked to rule on the role of a regulatory authority with exclusive competence in relation to the legality of fees charged by a railway operator pursuant to a directive. The question was whether a national judge, who must apply competition law (under primary law), could rule on the legality of the fees before the national authority with exclusive competence (under secondary law) had ruled on the matter. The Court held that no competition action regarding the fees should be brought before a national court before the railway regulator had had an opportunity to rule on their legality. This prerequisite was a mandatory procedural step and part of the duty of national courts to cooperate sincerely with regulators (Case C-721/20, ECLI:EU:C:2022:288). See F. Louis, A. Vallery, C. O'Daly and E. Bruc, 'Private Enforcement of EU Competition Law: Recent Developments' (2023) *ICLG – Competition Litigation 2024*, p. 23.

[60] See, among others, E. Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) 22 *Cambridge Yearbook of European Legal Studies* 208; X. Groussot, 'Direct Horizontal Effect in EU Law after Lisbon – The Impact of the EU Charter of Fundamental Rights on Private Parties', in P. Lindskoug *et al.* (eds), *Essays in Honour of Michael Bogdan*, Lund, Juristförlaget, 2013; T. Mast and C. Ollig, 'The Lazy Legislature: Incorporating and Horizontalising the Charter of Fundamental Rights through Secondary Union Law' (2023) 19(3) *European Constitutional Law Review* 462.

[61] S. Prechal, 'Horizontal direct effect of the Charter of Fundamental Rights of the EU' (2020) 66 *Revista de Derecho Comunitario Europeo* 407, p. 411.

[62] Case 43/75, *Defrenne II*, ECLI:EU:C:1976:56, para. 39.

[63] Article 52(3) of the Charter and ECtHR, 27 September 2011, *Menarini s.r.l. v Republic of Italy*, No. 43509/08.

[64] Case C-617/10, *Åkerberg*, ECLI:EU:C:2013:10519, paras 19-20.

[65] The Explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter, and which the courts are required to consider when interpreting the Charter pursuant to Article 52(7), state that the Court of Justice has '*enshrined*' the right to an effective remedy '*as a general principle of Union law*'.

[66] Article 52(5) of the Charter.

[67] See, however, Opinion of Advocate General Cruz Villalón in Case C-176/12, *AMS*, ECLI:EU:C:2013:491, para. 50: '[t]*he wording of the Charter shows that 'principles' contain obligations upon the public authorities, thus contrasting with "rights", whose purpose is the protection of directly defined individual legal situations, though the specific expression of 'principles' at lower levels of the legal order is also possible. Public authorities must respect the individual legal situation guaranteed by "rights", but in the case of a 'principle' the obligation is much more general: its wording determines not an individual legal situation, but general matters and ones which govern the actions of all public authorities. In other words, the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable reality, while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of the Charter establishing the "principle"*'.

[68] Case C-555/07, *Kücükdeveci v Swedex*, ECLI:EU:C:2010:21.

[69] Case C-68/17, *IR v JQ*, ECLI:EU:C:2018:696; Case C-414/16, *Vera Egenberger*, ECLI:EU:C:2018:257; Case C-193/17, *Cresco Investigation*, ECLI:EU:C:2019:43. See S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) 66 *Revista de Derecho Comunitario Europeo* 407.

[70] See Case C-176/12, *AMS*, ECLI:EU:C:2014:2, para. 45. See K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20(6) *German Law Journal* 779, p. 788.

those rights interact with national law seems far from settled.[71]

Be that as it may, if deemed directly applicable, those Charter provisions, like long-established general principles,[72] seem to be able to steer the interpretation of some norms towards a certain outcome and fill in gaps left by the legislator.[73] Or they can simply override national rules.[74] Just to give one example concerning the legal professional privilege, the rights of defence and to privacy (Articles 7 and 47), as interpreted by the Court of Justice, protect the secrecy of both the content and the very existence of legal advice and provide for an *AKZO*-like recourse to the judge.[75] Accordingly, national procedural rules and case law infringing these fundamental rights, as interpreted by the EU Courts, are to be discarded in situations governed by EU law.

In many instances, in particular if no case law exists, applying those rights requires undertaking a delicate balancing exercise to opposing interests.[76] Such a balancing exercise is not purely academic and often depends on the ability of lawyers to explain what it means in practice in the light of the factual and legal context. In that regard, Article 52 of the Charter states that:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

In his academic writings, Koen Lenearts elevates essential rights to the status of Kelsenian pillars underpinning the '*legal structure*' of the Union's constitutional order.[77] He emphasises that respect for the essence of fundamental rights is one of the conditions that must be fulfilled in order for a limitation on the exercise of a right to be justified.[78] Likewise, where a national measure implementing EU law fails to respect the essence of a fundamental right, that measure is to be set aside. This is so without the need for a balancing exercise of competing interests.[79] He adds that one must distinguish fundamental rights whose essence may produce horizontal direct effect, but whose non-essential elements may not. This is because, unlike their essence, the non-essential elements require action by the national or EU legislator in order to be fully effective. Accordingly, only measures compromising the essence of those rights may be set aside. Indirectly, but with no less significance, that represents another limitation of national autonomy through the notion of direct effect.

IV. | Conclusion

Direct effect and supremacy are the cornerstones of the EU legal order.[80] Like an axe, they cut through national law. They permit a vertical implementation of common values throughout the Union, thereby harmonising disparate national legal systems. A diligent lawyer can ill afford to ignore or overlook those elementary precepts which are, sometimes, better used in

[71] As explained below, some authors distinguish the essence of the right from its non-essential features. See also the Opinion of Advocate General Trstenjak in Case C-282/10, *Dominguez*, ECLI:EU:C:2011:559, paras 80 *et seq*.

[72] For example, according to the settled case law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives (see, to that effect, Case C-343/09, *Afton Chemical*, ECLI:EU:C:2010:419, para. 45; Case C-92/09, *Volker und Markus Schecke and Eifert*, ECLI:EU:C:2010:662, para. 74).

[73] Case C-455/06, *Heemskerk BV*, ECLI:EU:C:2008:650, para. 47; Case C-580/13, *Coty Germany*, ECLI:EU:C:2015:485, paras 28-43.

[74] See, by analogy, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238, paras 46-47.

[75] Case C-694/20, *Orde van Vlaamse Balies*, ECLI:EU:C:2022:963, para. 27; Case T-125/03, *Akzo*, ECLI:EU:T:2007:287, para. 85.

[76] Where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238, para. 47).

[77] Opinion 2/13 of the Court (Full Court) of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454, para. 169: '*at the heart of that legal structure are the fundamental rights recognised by the Charter*'.

[78] See K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20(6) *German Law Journal* 779.

[79] In *Tele2 Sverige*, the Court held that, whilst the Swedish legislation at issue did not compromise the essence of the right to respect for private life, it exceeded the limits of what was strictly necessary to attain the legitimate objective of fighting serious crime (Joined Cases C-203/15 and C-698/15, ECLI:EU:C:2016:970).

[80] See the Opinion of the Court of 14 December 1991, Draft agreement between the Community and the countries of the EFTA, ECLI:EU:C:1991:490, para. 21.

conjunction with other rules, principles, or fundamental rights. This is all the more true in view of the quasi-criminalisation of competition law, which has increased the need to ensure rigorous respect for the latter rights. Also, from a sociological point of view, feeding the Court of Justice with some direct-effect-based arguments plays on the court's natural proclivity towards its own law, EU law, over national law. Beginning with *Van Gend en Loos*, the judicial trend has been towards broadening the scope of direct effect, be it procedurally or substantively, particularly as regards the right to compensation. That entails two antagonistic and interrelated effects: the elimination of unwarranted national rules, if any, and the creation of a body of supranational rules or overarching principles. But these are not binary options. Some Union rules have a life of their own and simply exist, self-standing in the legal order, even where no national rule governs the matter. They are just waiting to be found by imaginative and foresighted practitioners.