BRIEFING

European Parliament

60 years of *Van Gend & Loos*

Direct effect of EU law and a 'new legal order'

SUMMARY

Sixty years ago, on 5 February 1963, the European Court of Justice handed down the first in a series of landmark judgments that laid the constitutional foundations of the EU legal order. The seminal case of *Van Gend & Loos* offered the Court an opportunity to proclaim the doctrine of the direct effect of EU law within the legal orders of the Member States. In practice, this means that individuals may claim rights directly under EU law and enforce those rights before national courts.

The *Van Gend & Loos* case was triggered by a company that claimed that Dutch customs duties on a product imported from West Germany were in violation of the standstill clause contained in Article 12 of the Treaty of Rome. The clause prohibited Member States from introducing new customs duties on products originating from other Member States, or from raising existing customs duties. In *Van Gend & Loos*, the product in question was subject to a duty of 3 % at the time of the entry into force of the Treaty of Rome, but this was later raised to 8 %.

At that time, the constitutional laws of the Member States were not consistent as regards the effects of the EU Treaties before national courts. The Dutch court asked the European Court of Justice whether the standstill clause had direct effect before national courts and, if so, whether changing the customs classification of the product in question, with the effect of making the customs duties higher, was in breach of the clause. The European Court, rejecting the opinion of the Advocate General and that of three of the six Member States, said yes to the first question, thereby inaugurating the doctrine of direct effect in EU law and empowering individuals to enforce rights derived from EU law before national courts.

Marking the 60th anniversary of *Van Gend & Loos*, this briefing takes a closer look at the landmark decision, outlines the legal background to the dispute, examines the Court's findings, analyses its reasoning and concludes with an analysis of the broader implications of the decision for EU law.

IN THIS BRIEFING

EPRS | European Parliamentary Research Service

Author: Rafał Mańko

Members' Research Service

PE 739.326 – February 2023

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Introduction

The 5 February 1963 judgment of the Court of Justice in Case 26/62 *N.V. Algemente Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (in short '*Van Gend & Loos*') is one of the **milestones of the Court's jurisprudence** and a fundamental building block of EU constitutional law, 'universally celebrated as perhaps the most important case of the Court',[1] alongside the *Costa v ENEL* ruling of 15 July1964. Joseph Weiler goes as far as to say that 'in the annals of judicial decisions of international courts and tribunals none comes even close to *Van Gend en Loos* in its profound systemic and conceptual impact'.[2] The most important legal aspect of the *Van Gend & Loos* case is the proclamation, by the Court of Justice, of the **doctrine of direct effect** whereby certain rules of EU law may be directly relied upon by individuals in disputes before national courts. The doctrine of direct effect, jointly with the doctrine of primacy of EU law, proclaimed in the *Costa v ENEL* case, determines the place of EU law within the domestic legal orders of the Member States.

Legal and factual issues in the case

Facts of the case

The dispute between the shipping company Van Gend & Loos and the Dutch tax administration concerned the **customs duties** imposed on a quantity of urea-formaldehyde that Van Gend & Loos imported from West Germany into the Netherlands on 9 September 1960. The substance was used as a glue in manufacturing wooden doors, and had been the subject of disagreement as to its classification for the purposes of customs tariffs.[3] In the case which gave rise to the *Van Gend & Loos* judgment, the Dutch revenue authorities applied a customs duty of 8 % on the basis of the Tariffs Order (*Tariefbesluit*) that had entered into force on 1 March 1960. Van Gend & Loos objected, claiming that before 1 March 1960, a lower customs duty of only 3 % was applicable to the same goods. In the context of a rule in the Treaty of Rome providing for a standstill on customs duties within the Community, this meant that the lower (3 %) rate should have been applied, rather than the higher one (8 %). Van Gend & Loos's complaint was rejected by the Inspectorate of Customs and Excise at Zaandam because it was directed against the new rate itself, rather than its application to the importation. Van Gend & Loos appealed to the tariffs tribunal (*Tariefcommissie*) in Amsterdam. The tariffs tribunal considered that the **legal question required an interpretation of the Treaty of Rome** and submitted a preliminary reference to the European Court of Justice (ECJ).

Principal juridical aspects of the case: The standstill on customs duties within the Community and the broader legal context

Article 12 of the Treaty of Rome (an article that has been superseded by the customs union in the current Treaties) provided unequivocally that 'Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other'. The product imported by Van Gend & Loos was, at the time of the entry into force of the Treaty of Rome (1 January 1958), subject to a customs duty charged at 3 %, as it was classified under heading 279-a-2 of the 1947 customs tariff. Under the 1960 tariff, the product was moved to heading 39.01-a-1, to which a **higher duty** of 8 % was attached. In the dispute before the tariffs tribunal, the Dutch administration claimed that, in fact, on the day of entry into force of the Treaty of Rome, the substance in question was not classified under heading 279-a-2 with a 3 % customs rate, but rather under heading 332-bis with a duty of 10 %. Therefore, the new tariff adopted after the entry into force of the Treaty of Rome lowered the duty from 10 % to 8 %. However, the Dutch tariff tribunal that asked the ECJ for a preliminary ruling had not, at the time of reference, reached a conclusion as to whether the original rate should have been 10 % or 3 %.

There was also an additional legal angle, namely that the 1960 tariffs were based on an international treaty between the Benelux countries, the **1959 Brussels Protocol**. The question posed was not therefore only one of a conflict between EU law and domestic law, but also between the Treaty of Rome (1957) and a later international treaty signed by some of the parties to the Treaty of Rome.

Also important on a broader scale is the **context of classic public international law**, whereby international treaties are binding on states, 'but their effect in the domestic legal order is primarily determined by the constitutional rules of the contracting parties',[4] rather than by the treaties themselves. This leads to divergences in the application of treaties in different countries, some of which consider them directly applicable under certain conditions, whereas others require national provisions to give them effect in their domestic legal systems.[5] The context of **Dutch constitutional law** is crucial to understanding the origins of the *Van Gend & Loos* case. Two constitutional reforms of 1953 and 1956 confirmed the primacy and direct effect of self-executing norms of international law within the Dutch legal order.[6] Furthermore, in a number of domestic legal cases litigated between 1958 and 1962, Dutch lawyers explored the effects of EU competition law and the customs union in the national legal order, thus paving the way for the historical reference in *Van Gend & Loos*.[7] As Karin van Leeuwen notes, 'In general, the Dutch legal order was very open to treaty obligations.'[8]

Questions of the national court: Direct effect of the standstill clause

The Dutch tribunal asked the Court of Justice two questions:

1. 'Whether Article 12 of the [Treaty of Rome] has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect';
2. 'In the event of an affirmative reply, whether the application of an import duty of 8% to the import [in the case] represented an unlawful increase within the meaning of Article 12 of the [Treaty of Rome] or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960 ... which ... is ... not to be regarded as prohibited under the terms of Article 12'.

The first question submitted by the national judge touched upon a fundamental issue of EU constitutional law, namely whether the EU Treaties confer rights upon individuals, and whether those individuals may rely directly upon such rules before national courts. Implicit in the question is whether the reliance of an individual upon a rule of the EU Treaty would lead to the conflicting national norm being over-ridden by the EU norm.

Admissibility: Can national law be analysed in the framework of the preliminary reference procedure?

The case was brought to the Court of Justice via a **preliminary reference** (then Article 177 of the Treaty of Rome, now Article 267 of the Treaty on the Functioning of the European Union – TFEU), rather than by a direct action brought by the Commission against a Member State allegedly infringing a Treaty rule. The question of the compatibility of Dutch law with EU law was brought to the Court's attention indirectly, as part of the legal background to the dispute between Van Gend & Loos and the Dutch tax office, rather than directly, by the Commission or a Member State. This was met with criticism by the Member States that submitted observations. Notably, the **Dutch government** claimed that the preliminary reference procedure should not be used to evaluate the compatibility of a provision of national law with EU law. They argued that Article 177 of the Treaty establishing the European Economic Community (TEEC) spoke of 'interpretation of the Treaties', which, in their view, did not encompass evaluating national law. The **Belgian government**, in turn, took the view that the question of whether individuals could rely on EU law was a question of domestic constitutional law rather than EU law. Such a question, went the Belgian argument, could be settled only on the basis of Dutch law and had nothing to do with EU law. The Commission, by

contrast, argued that the issue at stake was one of EU law, and that the question was therefore admissible.

The ECJ's judgment in context

The parties' arguments on the substance

The **applicant company**, Van Gend & Loos, argued in favour of a positive answer to the tribunal's first question on the possibility for private parties to rely directly on Article 12 before national courts. More specifically, they argued that Article 12 had direct effect in the Member States, without any further implementing measures. As a result, the national court should set aside the higher customs duties that infringed that Article. The **Commission** pointed out that the first question was of paramount importance for EU law as a whole. Its effects should not be determined by national laws of the Member States, but must be the same across the Community. It asked the Court to rule that national courts be obliged to ensure that the rules of EU law prevailed over conflicting national laws, even if those were adopted later. Article 12, in the Commission's view, could be applied directly, because it was a complete and self-sufficient provision that imposed an unambiguous obligation on the Member States, and its infringement directly affected individuals.

The Dutch, Belgian and German governments disagreed with this view. The **Dutch government** argued that the wording of Article 12 was such that it placed an obligation only on the Member States, but did not grant rights to individuals. It did not have internal effect and therefore it did not have direct effect before national courts. Alternatively, the Dutch government argued that the question of the direct effect of Article 12 was one of Dutch constitutional law, which did not enter into the remit of the Court's jurisdiction. The **Belgian government** argued that direct effect of Treaty provisions was an exception, and that Article 12 did not fall into this exceptional category. This is because, went the argument, Article 12 imposes duties upon Member States, but does not create directly applicable rights for individuals. The **German government** agreed with the Dutch and Belgian governments that Article 12 imposed an international obligation upon the Member States, but did not create rights for individuals.

Opinion of the Advocate General

Advocate General Karl Roemer delivered his opinion in the case on 12 December 1962. On the admissibility of the questions, he pointed out that the issue of the effects of a Treaty provision before national courts was not just a question of domestic constitutional law (as Belgium and the Netherlands had argued) but also a question of EU law. Concerning the Dutch court's second question, the Advocate General was more sceptical, pointing out that the Court of Justice 'must not apply national law' and 'may neither review nor rectify arguments based on national law, lest it be convicted of exceeding the limits of its jurisdiction' (p. 19). Therefore, it should be up to the Dutch court to decide whether the 1960 tariff in fact infringed Article 12 or not.

On the substance, the Advocate General began by drawing attention to Article 66 of the Dutch Constitution, which 'according to its interpretation in cases decided by its courts – gives international agreements precedence over national law, if the provisions of such agreements have a general binding effect, that is, when they are directly applicable ('self executing')' (p. 20). It was in this context that the Dutch court wanted to know whether Article 12 was a self-executing provision.

The Advocate General then provided an **overview of provisions of the Treaties** regarding their legal effects, noting that 'large parts of the Treaty clearly contain only obligations of Member States, and do not contain rules having a direct internal effect' (p. 21). Following that, he subjected Article 12 to a detailed analysis. On its wording, he pointed out that the rule is addressed to the Member States as such, and therefore it 'does not have in mind administrative practice' (p. 22). He also pointed out that the article is worded in a similar way as 'other provisions which appear ... beyond any doubt only to lay down obligations for Member States'. The wording of the article, in

the view of the Advocate General, did not therefore provide arguments for its direct effect. The Advocate General turned then to the content of the Article 12 rule, drawing attention to its complexity, caused by using concepts such as 'equivalent effect' or 'application' which make it 'scarcely possible for its provisions to be applied in every case without creating problems' (p. 22). The context of Community customs law, which imposed not only negative but also positive duties on the Member States, also made Article 12 difficult to apply.

The Advocate General corroborated his argument with an **overview of the national constitutions** of the Member States, noting that they were not in agreement as regarded the relationship between international law and national law. He concluded that primacy of international law was provided for in the Netherlands and that it might possibly also be inferred in France. In the case of Belgium, however, international treaties were probably on the same level as national laws, and in Italy there was no provision in the Constitution on this, and the courts did not accord superiority to international law. Likewise, in German law, despite the possibility to transfer part of national sovereignty to an international organisation, and the incorporation of the fundamental principles of international law into federal law, the Advocate General concluded that 'it cannot be inferred from case law that international treaties have supremacy over later national law' (pp. 23-24). Indeed, the nexus between direct effect, the doctrine at stake in *Van Gend & Loos*, and supremacy or primacy of EU law was understood from the outset.[9]

The Advocate General pointed out that the drafters of the Treaty of Rome were well aware of this discrepancy between constitutions of the Member States and therefore, he considered it 'doubtful whether the authors [of the Treaty], when dealing with a provision of such importance to customs law, intended to produce consequences of an uneven development of the law involved in the principle of direct application' (p. 24).

Roemer **agreed with the arguments of the Netherlands and Belgium** concerning the functions of the preliminary reference procedure, pointing out that 'Article 177 only provides for a right and a duty to refer a question concerning the *interpretation* of the Treaty to the Court, but not on the other hand a question concerning the *compatibility* of national [law] with Community law' (p. 24).

In conclusion, Roemer **called upon the court to answer the first question of the Dutch tribunal in the negative**, because the rule produced only obligations for the Member States but 'excludes direct internal effect' (p. 24). As a consequence, he also asked the Court not to deal with the second question, although, should the court accept it, he provided his interpretation of Article 12 as having 'an absolute effect in respect of each individual product', and allowing 'no exception either for the elimination of difficulties connected with a rearrangement of nomenclature, or for the benefit of regional unions within the Community' (p. 30).

Principal findings of the Court of Justice

The Court of Justice handed down its judgment on 5 February 1963. In contrast to the submissions of the national governments and the opinion of the Advocate General, it found both questions admissible and answered them both. Concerning the **direct effect** of Article 12, the ECJ found that it 'produces direct effects and creates individual rights which national courts must protect' (p. 16). On the second question on the interpretation of Article 12, the ECJ did not pronounce on the legal issue directly. It did however give the national court **guidance**, requiring it to take into account 'duties and charges actually applicable at the date of entry into force' of the Treaty of Rome (p. 16), adding that a re-arrangement of a tariff was also covered, rather than excluded from Article 12.

As well as answering the Dutch tribunal's two questions in the operative part of the judgment, the Court also made a number of **important statements on the nature of EU law** within the grounds of the judgment. Firstly, the Court found 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' (p. 12). Thus, the Court explicitly considered that the subjects of Community law are not just the

Member States, but also individuals. This idea was further developed to highlight that individuals, as subjects of Community law, have rights and duties held directly under that legal order: 'Independently of the legislation of Member States, Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights and which become part of their legal heritage' (p. 12). As Horsley points out, in speaking of the transfer of sovereignty from the Member States to the EU, the Court implicitly considers that 'the Union itself is now the holder of sovereign rights', a status which international organisations under public international law do not enjoy.[10] Considering individuals as subjects of EU law is also an innovation in comparison to classical international law, where individuals 'generally feature only as the beneficiaries of specific rights, the enforcement of which typically remains entirely conditional on municipal law'.[11] This is precisely the element of **legal innovation** in the celebrated '**new** legal order'.

The Court also made an important general finding concerning the **direct effect of Treaty provisions**. In the words of the Court, the rights of individuals under Community law '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 upon the institutions of the Community' (p. 12).

On the **scope of the preliminary reference procedure**, the Court disagreed with the three governments, finding that the procedure may well be used, on top of the action for failure to fulfil Community obligations, to safeguard the compliance of Member States with the Treaties (p. 13).

Legal reasoning of the Court of Justice

Methods of interpretation applied

The questions addressed by the ECJ required an **interpretation** of the Treaty of Rome, given that its text was silent both on direct effect in general, and on direct effect of individual provisions, such as its Article 12. The Court could not, therefore, infer the doctrine of direct effect from any single provision, but had to resort to a global interpretation of the Treaty, in its own words considering it 'necessary to consider the spirit, the general scheme and the wording' of the Treaty provisions (p. 12). This implied resorting to **teleological** methods of interpretation ('spirit' denoting purpose or objective, the *telos* of a legal norm),[12] to **systemic** methods of interpretation ('general scheme') and, finally, to **linguistic** methods of interpretation ('wording'). It is notable that the Court provided for these arguments in this very order (teleological, then systemic, and only in the third place linguistic), which 'sums up neatly the Court's interpretive method' and 'clearly demonstrates its unwillingness to stick to a literal interpretation of the treaty'.[13] As Joxerramon Bengoetxea points out, this order was reversed in the later *Costa v ENEL* case, where the order was: (1) text; (2) context; and (3) objectives of the Treaty.[14] Furthermore, the Court does not explain what the relationship between these three methods is.[15] In general, however, it has been noted that the Court usually gives preference 'to systemic-functional criteria', which means in fact that it follows 'a second-degree directive of preference in favour of systemic-cum-dynamic interpretation'.[16] Gerard Conway considers that *Van Gend & Loos* stands for a method of interpretation when an argument based on effectiveness (teleological) is linked 'with a lack of textual contradiction was adopted, which is to invert the normal priority given in textual interpretation in that it is enough that the text does not expressly contradict a particular conclusion'.[17]

Justification of the doctrine of direct effect in general

Starting with the **objective of the Treaty**, the Court found that it was 'to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community' (p. 12). From this, the Court inferred that the Treaty was 'more than an agreement which merely creates mutual obligations between the contracting states'. The Court corroborated this teleological argument with a **linguistic** one, noting that the preamble to the Treaty 'refers not only to governments but to peoples' (p. 12). A **systemic argument** was then also invoked, namely 'the

establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens' (p. 12). The **existence of the European Parliament** (at that time still called the Assembly, although the Court used the term 'Parliament') and of the Economic and Social Committee was also mentioned as an argument supporting the proposition that 'the nationals of the [Member States] are called upon to cooperate in the functioning of this Community' (p. 12). Renaud Dehousse comments that these arguments 'are rather vague' because at that time Parliament was not yet directly elected, and the members of the European Economic and Social Committee are appointed by national governments.[18] Joseph Weiler, in turn, points out that Parliament at that time had only opinion-giving powers, and only when asked, which makes the Court's argument an instance of 'a serious "dumbing down" of democracy and its meaning'.[19]

In order to support the proposition that individuals may rely directly on EU law, the Court referred to the preliminary reference procedure, the existence of which 'confirms that the states have acknowledged that Community law has an authority which can be invoked' before national courts (p. 12). All these arguments, considered jointly, allowed the Court to conclude that the Community was **'a new legal order of international law'** and that its subjects, endowed with rights and duties, were 'not only Member States but also their nationals'. Joxerramon Bengoetxea describes this as an instance of using 'teleological-cum-systemic criteria', because the 'Court draws the conceptual inference (or juridical implication) that if the Treaty imposes obligations on individuals and Member States, it must also confer right on individuals.'[20] This type of interpretation is considered to be a form of **dynamic interpretation**.[21]

Justification of the direct effect of Article 12

Having set out the ground for a general doctrine of direct effect of EU law, the Court then turned to the concrete issue of Article 12 and its application. Starting from linguistic methods of interpretation, the Court noted that the 'wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation' (p. 13). The Court added that this 'obligation ... is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law' (p. 13). Therefore, being an **unconditionally applicable prohibition**, the standstill clause of Article 12 'makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects' (p. 13).

Relationship between the preliminary reference procedure and action for failure to fulfil obligations: Refuting the arguments of the three Member States

The Court **refuted the argument of the three Member States' governments** that claimed that Member States may not rely on the infringement of Community law before national courts because that issue may be addressed exclusively through direct actions (brought by the Commission or by a different Member State). The Court considered that this would be a 'restriction of the guarantees against an infringement of Article 12', which 'would remove all direct legal protection of the individual rights of their nationals' (p. 13). In this way, the Court resorted to a consequentialist argument,[22] pointing out that the possibility to rely on the TEEC directly before national courts strengthened the legal position of individuals (desired consequence), whereas the restriction of such questions only to direct actions would weaken that position (undesirable consequence). The Court pointed specifically out that limiting the policing of compliance with European Economic Community (EEC) law only to direct actions would risk being 'ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty' (p. 13).

This finding was corroborated by a systemic argument, to the effect that the 'vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Article 169 and 170 to the diligence of the Commission and of the Member States' (p. 13). This gave individuals the right to rely on Treaty provisions, complementing the direct actions

for failure to fulfil Community obligations, rather than being inconsistent with them, as the three Member States argued.

Analysis: Broader implications of *Van Gend & Loos*

Landmark judgment underpinning the EU's constitutional order

The judgment in *Van Gend & Loos*, where the Court 'first articulated its doctrine of direct effect' is considered 'the most famous of all' judgments of the ECJ.[23] The doctrine of direct effect, alongside that of primacy, considered 'transformational doctrines',[24] are undoubtedly the **pillars of the EU constitutional order**.[25] As Thomas Horsley notes, '[e]xercising its interpretive functions, the Court of Justice has radically recast the nature of the EU legal order and, in particular, the relationship between EU and Member State law'.[26] Renaud Dehousse does not hesitate to describe the *Van Gend & Loos* judgment as 'assum[ing] a truly revolutionary character,'[27] and Morten Rasmussen takes the view that it 'should be understood as a decisive turning point in the history of the ECJ and of European law in general'.[28] Karin van Leeuwen notes that, in the *Van Gend & Loos* ruling, the Court 'took a decisive step away from an international public law interpretation of the EEC treaty and towards a constitutional interpretation',[29] which would soon afterwards be supplemented by the doctrine of primacy of Community law.

In effect, the doctrines of direct effect and primacy are described as 'a clear break with the normative framework of international law',[30] in favour of a ***sui generis* approach** to the relationship between the EU and its Member States, rather than one based on the Vienna Convention on the Law of Treaties. The notion of EU law representing a '**new legal order**' an expression used for the first time in *Van Gend & Loos* captures the essence of this approach, which entails a 'robust defence' of the autonomy of EU law vis-a-vis the Member States.[31] Initially, the 'new legal order' was one 'of international law', but in later case law 'the concept of 'international law was dropped, and there was said to be simply a new order, or an order *sui generis*'.[32] Rasmussen underlines that the *Van Gend & Loos* decision 'constituted at the most fundamental level and attempt to differentiate European law from what was perceived as traditional international public law'.[33] Horsley points to the key phrase 'independently of the legislation of Member States', used in *Van Gend & Loos*, whereby the Court 'made a powerful and innovative claim to manage the internal application of EU treaty norms *as a matter of Union law*'.[34]

Ultimately, *Van Gend & Loos* was not merely about the direct effect of Article 12 TEEC as a rule of an international aw, but about the **relation between EU law and Member States' law**, and the autonomy of the former vis-a-vis the latter.[35] Direct effect was a logical first step before the proclamation of primacy of EU law in the 1964 *Costa v ENEL case*.[36] Sabine Saurugger and Fabien Terpan point to the **broader political context** of the *Van Gend & Loos* and *Costa* rulings, noting that they were given 'at a time when the European integration project was itself coming under pressure due to the debate over national "sovereignty" that culminated in the 'empty chair' crisis in 1965-66', and therefore they 'were by no means neutral when it came to debates over national sovereignty'.[37]

Paul Craig and Grainne de Bùrca argue that the 'strong interventions' of Belgium, the Netherlands and Germany in the case 'indicated that the concept of direct effect ... probably did not accord with the understanding of those states of the obligations they assumed when they created the EEC'.[38] As Dehousse points out, the views expressed by half the founding members of the Community would be '[a]t first sight ... a weighty argument, as in international law the determination of whether the provisions of a treaty are directly effective is essentially carried out by reference to the intention of the parties'.[39]

Commenting on the **methods of interpretation** applied by the Court, Craig and de Bùrca remark that the 'textual "evidence" for direct effect is not particularly strong', although they consider the argument based on an interpretation of the preliminary reference procedure (Article 177 TEEC, now

Article 267 TFEU) as 'nonetheless interesting', because '[i]f (...) individuals could not invoke EU law in national courts through Article 267 then it could only ever be used if the parties to the case were both public bodies, and there is nothing in the wording of Article 267 to indicate any such limitations'.[40] They concede, however, that **teleological arguments** played a crucial role, with the Court's argumentation being 'characterized by a vision of the kind of legal community that the Treaties seemed designed to create', with the Court 'reading the text, and gaps therein, to further what it determines to be the underlying aims of the Community enterprise'.[41] Conway notes that direct effect, as found in *Van Gend & Loos*, 'was not obviously supported by the wording of the Treaty, which appeared only to attribute such effect to Regulations'.[42]

Further development of the direct effect doctrine

While *Van Gend & Loos* **laid the foundations for the doctrine of direct effect**, it had still to be fully developed by the Court in its later case law. Whereas the doctrine as proclaimed in *Van Gend & Loos* required the rule in question to be (1) clear; (2) negative; (3) unconditional; (4) 'containing no reservation on the part of the Member State'; and (5) 'not dependent on any national implementing measures',[43] **later case law qualified these requirements**, effectively **broadening the scope of direct effect** which, initially, had 'a limited effect on the member states because of the relatively few treaty articles that in this early period were granted direct effect'.[44] In this way, direct effect was also allowed if Member States had discretion to limit a certain right (41/74 *Van Duyn*), and if the provision in question, such as the principle of non-discrimination, was designed to be implemented by Community action (2/74 *Reyners*).[45] Even positive (not merely negative) obligations could give rise to direct effect (57/65 *Lütticke*).[46]

The initial idea of direct effect being vertical (an individual invoking it against the public administration) was broadened to include, in the case of some Treaty rules, also horizontal direct effect, i.e. allowing individuals to invoke certain Treaty provisions also in disputes with other individuals (43/75 *Defrenne*).[47] Whereas *Van Gend & Loos* was concerned only with the direct effect of Treaty provisions, i.e. of primary law, it was later extended to **secondary law** – initially regulations (39/72 *Commission v Italy*), then decisions (9/70 *Franz Grad*), and even directives (41/74 *Van Duyn*).[48] Furthermore, direct effect is also accorded to general principles of EU law (C-144/04 *Mangold*) and to the Charter of Fundamental Rights, including both vertical (C-293 and 594/12 *Digital Rights Ireland*) and horizontal direct effect (C-414/16 *Egenberger*).[49]

Implications for the ECJ's place in the EU's institutional setup

The landmark judgment of *Van Gend & Loos* not only inaugurated the doctrine of direct effect and paved the way for primacy, it also **framed the function of the Court of Justice** into one that 'more closely reflects those of a constitutional court in the European continental tradition rather than those of an international tribunal'.[50] On a more general level, this landmark judgment brought the EU legal order 'closer to the situation which exists in most federal states, where supreme courts have the power to review the compatibility of legislative rules of the member states with federal law'.[51]

Van Gend & Loos therefore inaugurated an **important function of the preliminary reference procedure** and made it a proper instrument of 'indirect control of the application' of EU law, triggered by individuals and decentralised.[52] It is now the case that 'more than 80 percent' of cases brought under this procedure are meant to allow the Court to perform 'judicial review of member state compliance with their obligations under the Treaties'.[53]

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