

**AN
OVERVIEW
TO THE
CONCEPT OF
DIRECT
EFFECT AND
THE
APPROACH
OF THE
EUROPEAN
COURT OF
JUSTICE
CONCERNING
INDIRECT
EFFECT**



I. Introduction

The most important tenet of Community law laid down by the European Court of Justice (ECJ) is that the Community tries to constitute a new and unique legal order which confers rights on individuals.

The importance of the new legal order in separating the Community from the international organization was reiterated in the Court's *Opinion on the Draft Agreement on a European Economic Area*¹.

Certain provisions of the Community law are directly effective in that they create "individual rights that the national courts have to protect" without any implementing measure in the Member State in question².

Before going into the detail of the direct effect, we have to declare that when we use the term of direct effect, this definition refers to the rights rather than refers to the obligations and refers also rights enforceable by individuals rather than by public authorities.

The classic definition of the term derived from the *Van Gend & Loos* decision and called sometimes "subjective direct effect". According to this definition direct effect is the *capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts*.³The second definition emerged in the case law of the ECJ, called sometimes "objective direct effect" is the broader one and based on "invocability" of a EC provision before the national courts. The latter definition is broader because in this definition creation of rights is not a condition for direct effect but direct effect may be the consequence of it. For example it may be invoked in an administrative proceeding as a standard for review of the legality of the Member State's action.⁴

The question regarding direct effect first arose in 1956 in relation to the ECSC Treaty, but was later posed on a much larger scale within the framework on the EEC Treaty, when the Court passed its *ground breaking judgment*⁵ *Van Gend en Loos*.

In *Van Gend en Loos* Case the main issue was whether Article 12 EC Treaty was directly effective or not. This provision was addressed to Member State and it imposes an obligation on them. But the wording of this provision did not expressly grant any corresponding right to individuals to import goods free from any duty imposed after the establishment of the EC, nor did it state explicitly that any such duty would be invalid⁶.

In this case, the Court held that:

¹ Opinion 1/91, [1991], ECR I-6079, [1992]

² Case 26/62 **Van Gend en Loos**.

³ CRAIG, Paul, de BÚRCA, Gráinne, *EU Law Text, Cases and Materials*, Oxford University Press 2001

⁴ PRECHAL, S., *Does Direct Effect Still Matter?*, 37 CML Rev. 1047-1069, 2000

⁵ This term is used by Paul CRAIG and Gráinne de BÚRCA in order to underline the importance of the case in point of the direct effect doctrine. CRAIG, Paul and de BÚRCA, Gráinne, *EU Law: Text, Cases and Materials*, Oxford University Press, 2003, Third Edition, p. 184

⁶ HARTLEY, Traver C., *The Foundations of European Community Law*, Oxford University Press, 1998, Fourth Edition, p. 191.

“The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislation measure enacted under national law. They are very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.”

In *Internationale Handelsgesellschaft Case*⁷ the Court went further by ruling that the legal status of a conflicting national measure was not relevant to the question whether Community law should take precedence, thus not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law. It held as well that it was only for ECJ to set EC measures aside and that the national courts had no power to do so⁸.

In the *Simmenthal Case*⁹ the Court declared strongly that all national courts must directly and immediately enforce a clear and unconditional provision of Community law, even where there is a directly conflicting national law, and it did not matter how the national system worked the effect should be immediate.

The Court has since the instances cited modified and refined the test of direct effect. The test as it is currently formulated contains three conditions¹⁰:

1. The provision must be clear and precise.
2. It must be unconditional.
3. Its operation must not be dependent on further action being taken by Community or national authorities.

Clear and Precise

The ECJ has applied the criteria with a wide margin, so many provisions that are not particularly clear or precise have been found to produce direct effect.⁴⁰ In the **Firma Fink-Frucht Case**¹¹, the Court had to consider indefinite legal concepts such as “similar products” and “indirect protection” in interpreting Article 90 EC, and found out that Article 90 paragraph 2 had direct effect¹².

A provision will not have direct effect, on the other hand, if the concepts contained in a provision leave the Member States certain discretion in their application.

Unconditional

Unconditional means that the provision must not depend on something within the control of some independent authority, such as a Community institution, or a single

⁷ Case 11/70 **Internationale Handelsgesellschaft GmbH**.

⁸ See discussion in CRAIG and de BÚRCA, 1998, p. 260-262.

⁹ Case 106/77 **Simmenthal SpA**.

¹⁰ See discussion in HARTLEY, 1998, p. 191.

¹¹ Case 27/67 **Firma Fink-Frucht GmbH**.

¹² Case 27/67 **Firma Fink-Frucht GmbH**, at paragraph 3-4

Member State. It must not, in particular, be dependent on the judgment or discretion of such body.

Not Dependent on Further Action

If a provision states that the rights it grants will come into effect when further action of a legislative or executive nature has been taken by the Community or the Member States.

However the Court has sought to narrow this requirement down to its very minimum, by laying down a rule that if the Community provision gives a time-limit for its implementation, it can become directly effective if it is not implemented by the deadline¹³.

II. Direct Effect and Direct Applicability

The close relationship between the direct effect and the direct applicability initially led to a degree of confusion, exacerbated to some extent by the language used by the Court.

The need to distinguish between two notion was underlined by *Winter* in article published 1972. *Winter* spoke out that:

*“As the various notions denote different phenomena, it will readily appear that it is dangerous and unwarranted to use them indiscriminately. It is more and more acknowledged that in the framework of Community Law the term ‘direct applicability’ should be reserved for the method of incorporation of (secondary) Community Law into the municipal legal order (Art. 189). The problem as to when a Community provision is susceptible of receiving judicial enforcement is best described as the question of ‘direct effect’ ”.*¹⁴

If direct applicability was synonymous with direct effect meant that regulations conferred on individuals rights which the national courts were bound to protect, the drafting of Article 249 would suggest that directives did not possess that quality.

The case law of the Court established that the direct applicability is by no means a necessary pre-condition for direct effect.

III. Direct Effect Doctrine for Directives

The position of the Directives under the EC Treaty is a little different. According to the Article 249 EC Treaty, a directive will be binding as to the result to be achieved upon each Member State to which it is addressed, but will to the national authorities the choice of form and methods. Unlike the other secondary sources, national implementation of the directives is specially envisaged by the Treaty¹⁵.

¹³ HARTLEY, 1998, p. 195.

¹⁴ WINTER, *Direct Applicability and Direct Effect-Two Distinct and Different Concepts in Community Law*, (1972), CMLR 425

¹⁵ CRAIG and de BÚRCA, 1998, p. 202

Part of the problem lies in the fact that while a directive can be clear, precise, and unconditional, it requires by its nature further action on the part of Member States. Additionally, as Paul Craig explains, “the reluctance to admit that directives can have direct effect is also in part because while Article 249 states that regulations are directly applicable, this phraseology is not used in relation to directives.”¹⁶

Despite the importance of the instrument as a means of achieving the objectives of the Treaty, securing compliance with them by the Member State has been a perennial problem¹⁷. Therefore the following question arises: what effects, if any, can directives produce on rights and obligations of those they are intended to affect in the absence of adequate national implementing measures? Shortly, can directives produce direct effect?¹⁸

Despite these factors, the ECJ ruled that directives were capable of having direct effect, although in a limited way. In order to deal with the problem, the ECJ continued to require that a directive’s provisions be clear, precise, and unconditional as mandated by *Van Gend en Loos*.

Another issue about the direct effect of the directives shows itself in the time limit for the implementation¹⁹. A directive which has not been implemented can not become directly effective before the expiry of the deadline. It could be argued in support of such a contention that if Member State chooses to do so, it should comply with the terms of the directive.

IV. Vertical and Horizontal Direct Effect

Both the regulations and Treaty provisions are able to not only confer rights on private individuals, but also to impose obligations on them. However the Court ruled that the directives could only confer rights on individuals against the Member States. In other words, they can not impose obligations on individuals in favour of the Member States or other individuals. This means that the directives are capable of only *vertical* direct effect and they are not capable of *horizontal* direct effect²⁰.

The question whether it is possible for directives to have horizontal direct effect was controversial for many years. In *Marshall Case*²¹, the Court stated that a directive may not itself impose obligation on individual and provision of a directive may not be relied on as such against such a person²².

¹⁶ CRAIG, Paul, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation*, 22 EUR. L. REV. 519, 519 (1997)

¹⁷ CURTIN, *Directives: the Effectiveness of Judicial Protection of Individual Rights*, (1990), 27 CMLR, p. 709-711

¹⁸ *Ibid.*, p. 710

¹⁹ i.e. Case 148/78, **Ratti**.

²⁰ HARTLEY, 1998, p. 206.

²¹ Case 152/84, **Marshall**.

²² Case 152/84, **Marshall**, at paragraph 17-26

The reason, that the directives can not have horizontal direct effect, of the Court in *Marshall Case* is that according to the Article 149 the binding nature of a directive exists only in relation to “each Member State to which it is addressed”²³.

However there are some arguments against any direct effect being given to directives. By accepting vertical direct effect but not horizontal direct effect, the Court has created an anomaly²⁴. For instance, with regard to sex discrimination there is no problem if the plaintiff’s claim related to the equal pay. This situation is covered by the Treaty²⁵ which is horizontally directly effective. In other words, it can be invoked against a private person.

On the other hand where the case related to another issue other than the payment, i.e. dismissal arising from sex discrimination, the plaintiff should rely on the directive²⁶. Because of the directives have only vertical direct effect, a woman employed by the Member State could invoke it against her employer, but a woman employed by a private employer could not invoke.

In accordance with the strategy of European Community concerning horizontal direct effect of the directives, *Hartley* said that:

*“European Court’s acceptance of the principle that directives can not impose obligations on individuals may be viewed as a tactical retreat occasioned by the adverse reaction in certain quarters to the whole concept of granting direct effect to directives. In view of the Court’s deep commitment to the policy of promoting the effectiveness of Community Law, it was inevitable that it seek other means of recovering the loss ground. The wide meaning given to the concept of the state is part of this strategy”*²⁷.

V. The Concept of Indirect Effect

The term of *indirect effect* does not exist in any legislative act but it is used by doctrine in that Community provision, even if not directly effective, should be taken into account by national courts when interpreting national legislation.

The indirect effect doctrine is applied mainly in directives and can not directly impose obligations on individuals. Thus a directive can have indirect effect even if it is not vertically directly effective²⁸.

The indirect effect doctrine originated in *Von Colson Case*²⁹. This case is concerning the sex discrimination. In the case judgment the Court held that:

²³ Case 152/84, **Marshall**, at paragraph 148

²⁴ OJANEN, t., *The Changing Concept of Direct Effect of European Community Law*, ERPL/REDP, vol.12, no.4, winter/hiver 2000

²⁵ Article 141 EC Treaty

²⁶ Directive 76/207, OJ 1976, L 39/40

²⁷ HARTLEY, 1998, p. 211.

²⁸ ARNULL, Anthony, *The European Union and Its Court of Justice*, Oxford University EC Law Library, 2006, Second Edition, p.185 et seq.

²⁹ Case 14/83, **Von Colson and Kaman**.

“It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law”³⁰.

Subsequently, the same doctrine was applied to the national legislation not adopted to implement the directive in question³¹ indeed which was passed before the directive.

In *Marleasing Case*³², there was a potential conflict between the provisions of the Spanish Civil Code and a Community Directive which had not been implemented in Spanish national law. The Spanish Court asked the ECJ whether the Directive was directly effective. Since the parties of this case were all private person, the question of the Spanish Court is concerning whether a directive has horizontal direct effect.

In respond to Spanish Court, ECJ reaffirmed the ruling in *Marshall Case* that a directive can not impose an obligation on individuals. Then, however, it went on to consider the doctrine of indirect effect. It expended the principle made in *Von Colson Case* to apply to national legislation passed before the Directive. Then it said that the national law had to be interpreted so as to preclude the declaration of nullity of a company other on the grounds permitted by the Directive, therefore the national court had no option but to reach that result³³.

In this context, we have to eventually declare a point about the criminal proceedings that the Court held that a directive can not have a direct effect in criminal proceedings³⁴.

³⁰ Case 14/83, **Von Colson and Kaman**, at paragraph 28.

³¹ Case 14/83, **Von Colson and Kaman**, at paragraph 28, Case 80/86, **Kolpinghuis Nijmegen**, Case 152/84, **Marshal**.

³² Case C-106/89, **Marleasing**.

³³ HARTLEY, 1998, p. 213.

³⁴ Case 80/86, **Kolpinghuis Nijmegen**.

Bibliography

Books

- CRAIG, Paul & DE BÚRCA, Gráinne, *EU LAW. Text, Cases, and materials*. Oxford University Press, 2003, Third Edition
- HARTLEY, Trevor C., *The Foundations of European Community Law*, Oxford University Press, 1998, Fourth Edition
- ARNULL, Anthony, *The European Union and Its Court of Justice*, Oxford University EC Law Library, 2006, Second Edition

Articles

- PRECHAL, S., *Does Direct Effect Still Matter?*, 37 CML Rev. 1047-1069, 2000
- WINTER, *Direct Applicability and Direct Effect-Two Distinct and Different Concepts in Community Law*, (1972), CMLR 425
- CRAIG, Paul, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation*, 22 EUR. L. REV. 519, 519 (1997)
- CURTIN, *Directives: the Effectiveness of Judicial Protection of Individual Rights*, (1990), 27 CMLR,
- OJANEN, t., *The Changing Concept of Direct Effect of European Community Law*, ERPL/REDP, vol.12, no.4, winter/hiver 2000

Cases

- Case 26/62 **Van Gend en Loos**.
- Case 11/70 **Internationale Handelsgesellschaft GmbH**.
- Case 106/77 **Simmenthal SpA**.
- Case 27/67 **Firma Fink-Frucht GmbH**.
- Case 148/78, **Ratti**.
- Case 152/84, **Marshall**.
- Case 14/83, **Von Colson and Kaman**.
- Case C-106/89, **Marleasing**.
- Case 80/86, **Kolpinghuis Nijmegen**.

Treaties and the Official Documents

- Opinion 1/91, [1991], ECR I-6079, [1992]
- Directive 76/207, OJ 1976, L 39/40
- EC Treaty