1. CENTRAL ISSUES

i. The doctrine of ‘direct effect’ of EC law applies in principle to all binding Community law including the EC Treaties, secondary legislation, and international agreements. The most problematic issues concern EC directives and international agreements.  

ii. The meaning of direct effect remains contested. In a broad sense it means that provisions of binding EC law which are clear, precise, and unconditional enough to be considered justiciable can be invoked and relied on by individuals before national courts. There is also a ‘narrower’ or classical concept of direct effect which is defined in terms of the capacity of a provision of EC law to confer rights on individuals.

iii. While directives can be enforced directly by individuals against the State after the time limit for their implementation has expired (vertical direct effect), resulting where necessary in the disapplication of conflicting domestic law, the ECJ has ruled that they cannot of themselves impose obligations on individuals (no horizontal direct effect).

iv. However, other legal mechanisms have been developed by the Court to give effect to directives which have not properly been implemented or are not being properly applied. First, there is a broad obligation on national courts to interpret domestic law, as far as possible, in conformity with directives (indirect effect), after the time limit for their implementation has expired. Secondly, during the period after adoption of a directive but before the time limit for implementation has expired, all organs of the State, including courts, must refrain from adopting any measure or interpretation liable seriously to compromise the result prescribed by the directive. Thirdly, a directive can in certain cases be legally invoked in proceedings between private parties (incidental effect) so long as the directive does not in itself impose a legal obligation on one of the parties.

1 The legal effect of international agreements is considered in Ch. 6, 206–213.
2. THE AMBIGUOUS CONCEPT OF DIRECT EFFECT: A GUIDE

The topic dealt with in this chapter is central to the study of EU law. It has been developed by the ECJ and its jurisprudence has become more complex over the years. The discussion in this section is therefore designed to help the reader navigate through the difficult waters that lie ahead. Or, if you prefer a different metaphor, regard this section as programme notes to render the scenes of a complex play more readily understandable. This is all the more so since, as will be apparent, the story is still unfolding.

(1) The starting point is the distinction between public and private enforcement. Law can be enforced either through a public arm of government, which is accorded power to bring infringers to court, or through actions brought by private individuals, or an admixture of the two. The Treaty embodied an express mechanism for public enforcement in Article 226, allowing the Commission to sue Member States before the ECJ for breach of Community law. This compulsory jurisdiction was itself unusual, since most international treaties contained no such mechanism. There are however limits to this mode of enforcement: the Commission did not have the institutional capacity to prosecute more than a tiny fraction of all possible infringements; the remedy under Article 226 was weak; and the Article could not be used against private individuals.2

(2) The ECJ therefore took the bold step of legitimating private enforcement by holding that Treaty Articles could, subject to certain conditions, have direct effect, such that individuals could rely on them before their national courts and challenge inconsistent national action, thereby bringing individuals into the Community legal order. The domestic effect of an international treaty has traditionally been a matter to be determined in accordance with the constitutional law of each State party to that treaty. In countries which adopt a largely dualist approach to international law, international agreements do not of themselves give rise to rights or interests which citizens can invoke before national courts. Instead, the provisions of such treaties bind only the States at an intergovernmental level and, in the absence of implementation, cannot be directly domestically enforced by citizens.3 Since the texts of the EC Treaties made no reference to the effect which their provisions were to have, the original Member States may not have envisaged that the provisions of these Treaties would be treated any differently, in domestic terms, from those of other international treaties. The ECJ nonetheless held that the EEC Treaty was different from other treaties and that individuals could derive rights from its provisions that could be enforced at national level.

(3) So far so good. The development may have been bold, but it does not seem as if there is anything too complex thus far. This is not quite so, since there is academic and judicial uncertainty about the exact meaning of the term direct effect.4 It is possible on the basis of the ECJ’s

case law to adopt either a broad or a narrow definition of direct effect. The broader definition, which can arguably be derived from Van Gend en Loos, can be expressed as the capacity of a provision of EC law to be invoked before a national court. This is sometimes referred to as 'objective' direct effect. While it is true that the normal consequence of a legal provision being invoked, as in Van Gend en Loos itself, is that it confers a legal right of some kind on the individual who invokes it, this is not, on the broader definition, an essential component of the notion of direct effect. If on the other hand the narrower 'classical' definition of direct effect is adopted, it is usually expressed in terms of the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts. This is sometimes referred to as 'subjective' direct effect. The degree of difference between these formulations depends however on the definition of 'rights' being used. If what is meant is simply the right to invoke EC law in a national court to assist one's case, then there is little difference between the narrow and the broad notions of direct effect. In many other cases, however, the ECJ has gone beyond the simple reference to a right to invoke, and has indicated that an individual litigant can rely before a national court on the substantive right, such as the right to be free from discrimination based on nationality. Moreover if the 'conferral of rights on individuals' involves entitlement to a particular remedy or the imposition of a corresponding duty or liability on another party, then there may well be a relevant difference between the broad and the narrow definitions. In reality, the ECJ seems to use the language of 'conferral of rights' in the context of direct effect in several different senses. Thus even the narrow definition of direct effect in subjective terms as 'the conferral of individual rights' is not particularly precise, given the ambiguity in the notion of 'rights'. The ambiguity in the meaning of direct effect is not however of purely academic interest. It has, as will be seen below, important practical implications.

(4) We shall return to this issue in due course. Let us for the present take up the thread of the story concerning direct effect. The next stage was reasonably predictable. The ECJ, having

---


6 In Case 26/62 Van Gend en Loos [1963] ECR 13 the ECJ ruled that Art. 12 should be interpreted 'as producing direct effects and creating individual rights', thus implying that the latter followed from, but was not necessarily a condition for, the former.


10 For an early example see Case 57/65 Lütticke v. Hauptzollamt Sarrelois [1966] ECR 205 on Art. 90 EC.


12 See the arguments of Hilson and Downes, n. 5 above, who apply a Hohfeldian analysis to the language and judgments of the ECJ in this field.

13 Thus, e.g., the ECJ has held that even though dirs. do not give rise to rights between private parties they can nonetheless be invoked in certain ways before national courts: 284–300.
established that Treaty Articles could in principle have direct effect, then expanded the concept in two related ways: the conditions for direct effect were subtly loosened and direct effect thus modified was applied to regulations and decisions as well as Treaty Articles.

(5) The judicial focus then shifted to directives. Many commentators and indeed national courts doubted whether directives could have direct effect, since the very nature of directives did not meet the original conditions for direct effect laid down in Van Gend. The ECJ nonetheless held that directives were capable in principle of direct effect. It however also held that directives were only capable of vertical direct effect, meaning that they could only be raised against the State or a state entity. They were not capable of having horizontal direct effect, in the sense that they could not impose obligations on a private party. The reasons for this ruling were, as will be seen, controversial and remain so.

(6) It is from this point on that the story becomes more complex. On the one hand, the vertical/horizontal distinction required the ECJ and national courts to differentiate between state entities and non-state entities. On the other hand, the ECJ fashioned certain new ways in which provisions of Community law could impact on national law. Thus it created the doctrine of ‘indirect effect’ which meant that, even if directives did not have horizontal direct effect, national courts were under an interpretive obligation to construe national law to be in conformity with directives. It also fashioned what has been termed the concept of ‘incidental horizontal effects’, whereby a directive can preclude reliance on a provision of national law that is inconsistent with the provisions of the directive even in an action between private parties. This is premised on the primacy of Community law and entails a distinction between a directive having an ‘exclusionary’ impact, which in effect connotes the idea that the directive ‘knocks out’ or ‘excludes’ inconsistent national law; and a directive having a ‘substitution’ effect, which connotes the idea that the directive will in itself mandate certain novel EC legal consequences within the national legal order.14 The tenability of this distinction is however questionable, as will be seen from the subsequent discussion. It has in any event rendered this body of law considerably more difficult than hitherto.

(7) The story recounted in outline here and in detail in the remainder of the chapter is still continuing. The end point remains to be seen. What is apparent is that direct effect, in the classic ‘subjective’ sense of the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts, is increasingly seen as but one way for Community law to impact on national law. On this view classic direct effect, indirect effect, and incidental horizontal effect provide different ways in which Community law can impact on national legal systems.15 This development has moreover been further driven by the desire to exert judicial control over framework decisions made in the Third Pillar, which are specifically said to lack direct effect. The ECJ has nonetheless held that this does not preclude indirect effect being accorded to these measures.16

(8) We shall evaluate the overall impact of these developments at the end of this chapter. For the present we turn to the foundations of direct effect laid down in the seminal decision in Van Gend en Loos.

---

14 See, e.g., Case C–244/98 Octano Grupo, n. 9 above, paras. 26–39, Saggio AG; Case C–287/98 Luxemburg v. Linster [2000] ECR I–6917, paras. 57–90, Leger AG.


3. THE DIRECT EFFECT OF TREATY PROVISIONS

(a) FOUNDATIONS: VAN GEND EN LOOS

The ECJ first articulated its doctrine of direct effect in 1963 in what remains the most famous of all of its rulings.

Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen
[1963] ECR 1

[Note ToA renumbering: Art. 12 is now Art. 25, Art. 169 is now Art. 226, Art. 170 is now Art. 227, and Art. 177 is now Art. 234 EC]

The Van Gend en Loos company imported a quantity of chemicals from Germany into the Netherlands. It was charged with an import duty which had allegedly been increased (by changing the tariff classification from a lower to a higher tariff heading) since the coming into force of the EEC Treaty, contrary to Article 12. On appeal against payment before the Dutch Tariefcommissie, Article 12 was raised in argument and two questions were referred to the ECJ under Article 177 EC. The first was ‘whether Article 12 of the EEC Treaty 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’. Observations were submitted to the ECJ by the Belgian, German, and Netherlands governments. Belgium argued that the question was whether a national law ratifying an international Treaty would prevail over another law, and that this was a question of national constitutional law which lay within the exclusive jurisdiction of the Netherlands court. The Netherlands government argued that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who had created the Treaty.

THE ECJ

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their
nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. . . .

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 legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation. . . .

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three governments which have submitted observations to the court in their statements of case is misconceived . The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the court a state which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court. . . .

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

Van Gend en Loos was a ground-breaking judgment. The strong submissions made on behalf of the three governments (half of the Member States at the time) which intervened indicate that the concept of direct effect of Treaty provisions, understood as the immediate enforceability by individual applicants of those provisions in national courts, probably did not accord with the understanding of those States of the obligations they had assumed when they became parties to the EEC. They argued that international treaties were really just a compact between States and did not give rise to rights that individuals could enforce in their national courts. They also contended that the sole method of enforcing Community law was through an action under what is now Article 226, brought by the Commission. The ECJ nonetheless held that Treaty Articles could have direct effect.

It reasoned partly from the text of the Treaty. It pointed to the Preamble which makes reference to citizens as well as to States, and argued that the preliminary-ruling procedure established in what is now Article 234 envisaged that parties before national courts could plead and rely on points of EC law. The ECJ pointed also to the fact that citizens were envisaged as having a role to play under the Treaties through the medium of the European Parliament. This
textual ‘evidence’ for direct effect is not particularly strong. The ECJ’s argument based on Article 234 is nonetheless interesting and subtle. We do not have the travaux préparatoires, and hence we do not know what the Treaty framers had in mind with this provision. If however individuals could never invoke EC law in national courts through Article 234 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 234 to indicate any such limitation. The very existence of Article 234 therefore lent force to the argument that individuals could at the very least invoke Community law at national level and challenge inconsistent national action. It was therefore unsurprising that the ECJ should replay this same argument when it justified the direct effect of directives.18

The ECJ’s reasoning was however principally characterized by a vision of the kind of legal community that the Treaties seemed designed to create. The case provides an early example of the ECJ’s teleological methodology, which involves the Court reading the text—and the gaps in the text—of the Treaty in such a way as to further what it determines to be the underlying and evolving aims of the Community enterprise as a whole.19 The ECJ’s vision for the EEC was very different from that advanced by the Member States.

The ECJ held that the Community was not to be regarded as simply a compact between States; it was also concerned with the peoples of those States. The famous language of a ‘new legal order of international law’ was designed to legitimate the conclusion that the EEC was different from other international treaties, in that individuals could derive rights from the EEC Treaty, even if that was not normally the case. There was clearly an element of circularity in this argument. The very decision as to whether direct effect did or did not exist was itself of crucial importance in deciding whether the EEC Treaty really could be regarded as distinct from other international treaties. Major constitutional developments are however not infrequently characterized by such reasoning.

The ECJ also rejected the other argument of the Member States. It held that public enforcement of EEC law through the Commission via Article 226 did not preclude private enforcement via direct effect. Thus the Court developed the concept of direct effect principally in view of the kind of legal system which it considered necessary to carry through the ambitious economic and political programme outlined in the Treaties. The ECJ considered a strong enforcement method was needed to ensure that Member States complied with the provisions to which they had agreed. Automatic internalization of Treaty rules within national legal systems would clearly strengthen the effectiveness of Community norms as well as aiding the Commission in its Article 226 enforcement function by involving individuals and all levels of the national court system directly in their implementation.20 Consider in this respect the view of Pierre Pescatore, a former judge of the Court.

P. Pescatore, The Doctrine of ‘Direct Effect’: An Infant Disease of Community Law21

It appears from these considerations that in the opinion of the Court, the Treaty has created a Community not only of States but also of peoples and persons and that therefore not only Member States but also individuals must be visualised as being subjects of Community law.

18 See below, 279–281.
19 See Ch. 1.
20 Craig, n. 2 above; see also Ch. 12.
21 (1983) 8 ELRev. 155, 158.
This is the consequence of a democratic ideal, meaning that in the Community, as well as in a modern constitutional State, Governments may not say any more what they are used to doing in international law: L’Etat, c’est moi. Far from it; the Community calls for participation of everybody, with the result that private individuals are not only liable to burdens and obligations, but that they have also prerogatives and rights which must be legally protected. It was thus a highly political idea, drawn from a perception of the constitutional system of the Community, which is at the basis of Van Gend en Loos and which continues to inspire the whole doctrine flowing from it.

(b) THE CONDITIONS FOR DIRECT EFFECT: BROADENING THE CONDITIONS

The ECJ in Van Gend en Loos established the initial conditions to be met before a Treaty Article could be deemed to have direct effect. It established the requirement, familiar from international law, that a provision be essentially ‘self-executing’. Thus the criteria which were met by Article 25 EEC and which enabled it to have direct effect were that it was: clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure. The development of direct effect in subsequent years was however characterized by the broadening and loosening of these initial conditions.

The condition that the Treaty Article should be clear and unconditional, containing no reservation on the part of the Member States, was qualified within a few years of the Van Gend ruling. The ECJ made it clear that the existence of Member State discretion to, for example, prevent the free movement of goods on grounds laid down in what is now Article 30 EC did not preclude the direct effect of Article 28, since the cases coming within Article 30 were exceptional and did not undermine the force of the clear obligation contained in what is now Article 28.22 Similarly in Van Duyn23 the ECJ rejected the argument that what is now Article 39(3), which allows limitations on the free movement of workers on grounds of public policy, public security, or public health, prevented Article 39 from having direct effect, because ‘the applications of these limitations is subject to judicial control’.24 The idea that direct effect could apply even where the Member States possessed discretion, on the ground that the exercise thereof could be controlled by the courts, represented a significant juridical shift in thinking about direct effect.

The idea that direct effect was precluded where further measures were required at national level was also modified. The ECJ’s strategy was to fasten on the basic principle that governed the relevant area, and provided that this was deemed to be sufficiently certain, it would accord it direct effect, notwithstanding the absence of implementing measures at Community and national level. Thus Article 43 EC, for example, provided that restrictions on freedom of establishment of Community nationals in States other than that of their nationality were to be abolished ‘within the framework of the provisions set out below’. The framework in question was to have included a general programme and a set of directives to liberalize the activities of employed and self-employed persons, but few of these had been adopted by the time the Reyners case arose in 1973.

24 Ibid., para. 7.
Jean Reyners was a Dutch national who obtained his legal education in Belgium, but was refused admission to the Belgian Bar (as avocat) solely on the ground that he lacked Belgian nationality. He challenged the relevant Belgian legislation before the Conseil d’Etat, which referred several questions to the ECJ, including the question whether Article 52 was directly effective in the absence of implementing directives under Articles 54 and 57. The Belgian government argued that Article 52 merely laid down a principle that was to be complemented by secondary legislation, and that it was not for the Court to exercise a discretionary power reserved to the legislative institutions of the Community and the Member States.

THE ECJ

24. The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.

25. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States.

26. In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

27. The fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment. . . .

29. It is not possible to invoke against such an effect the fact that the Council has failed to issue the directive provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by Article 52.

30. After the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.

Thus the ECJ determined that, despite the slow pace of harmonization of national laws in this field, the Treaty could be directly invoked by individuals in order to challenge obvious instances of nationality discrimination against them. The basic principle of non-discrimination was deemed to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved. Whereas many cases on direct effect concern the enforcement of obligations against a Member State which has failed properly to implement Community requirements, the Reyners case shows the Court employing direct effect to compensate for insufficient action on the part of the Community legislative institutions.

A similar use of direct effect to ‘trigger’ the proper implementation of a Treaty provision can be seen in the second Defrenne judgment,25 which relaxed further the original Van Gend en Loos criteria for direct effect. While in Reyners, the terms of Article 43 seemed to envisage

---

further implementing measures, Article 141 in *Defrenne* appeared to lack sufficient precision to be directly enforced by a national court. Article 141 at that time required States to ensure ‘the application of the principle that men and women should receive equal pay for equal work’.

Unlike the Treaty provisions in *Van Gend* and *Costa*, Article 141 did not impose a very precise negative obligation on the Member States. The term ‘principle’, for example, is not very specific, nor were the terms ‘pay’ and ‘equal work’ defined. It was also evident that neither the Commission nor the States considered that provision to be directly effective or legally complete.

What the Court did, however, was to identify and isolate the principle of Article 141 at the time, that of equal pay for equal work, rather than to focus on the fact that there might be cases, unlike the one at hand, involving complex factual questions regarding ‘work of equal value’ concerning jobs which were different in nature.

The Court’s concern in such cases seems to have been to ensure that the Community’s aims were not ignored either by reluctant Member States or by sluggish Community institutions, during the years of so-called legislative sclerosis which followed the Luxembourg Accords.

If a national court was unsure of the exact meaning of the relevant provision, the ECJ was more than willing to clarify its scope in a preliminary ruling under Article 234.

The original conditions for direct effect have therefore been loosened in the years since *Van Gend en Loos*, although there are still cases where the ECJ finds that a Treaty Article does not have direct effect.

The current position can be summarized as follows: a Treaty Article will be accorded direct effect provided that it is intended to confer rights on individuals and that it is sufficiently clear, precise, and unconditional. This criterion clearly leaves the Community Courts with considerable room for manoeuvre.

**4. THE LEGAL EFFECTS OF REGULATIONS AND DECISIONS**

The principal forms of legislative action which the Community may adopt are set out in Article 249 EC. In legal terms, the most important are regulations and directives, although there are also many softer forms of law provided for in the Treaty, or which have evolved in practice. The EC—and now EU—also has competence to enter into agreements with countries outside the EU. A further important source of Community law is the ‘general principles’ of law drawn by the ECJ from the common traditions and constitutional rules of the Member States, and from international agreements and conventions to which all are party.

It will be seen in the discussion which follows that virtually all binding forms of Community law have been deemed by the ECJ to be capable of direct effect, and that, while

---

26 See further Ch. 24 on Equal Treatment for the inclusion of ‘work of equal value’ in the amended Art. 141.
27 See Trabucchi AG in Case 43/75 *Defrenne*, n. 25 above, 485.
28 See Ch. 1.
29 Case T–191/99 *Petrie v. ALLS I/CDFL* [2001] ECR II–3677, paras. 34–35; Art. 255 was not unconditional and required further implementation before it could be relied upon for a precise result; Case 126/86 *Zaera v. Instituita Nacionale de la Seguridad Social* [1987] ECR 3697, paras. 10–11, the promotion of accelerated living standards in Art. 2 did not confer rights on individuals.
30 Subject to the preceding discussion, at 269–271.
31 Pescatore, n. 21 above, 176–177; Van Gerven AG suggested that the test for direct effect is whether a provision of Community law is ‘sufficiently operational’ to be applied by a court: Case C–128/92 *Banks v. British Coal* [1994] ECR I–1209, 1237; Lenaerts and Corthaut, n. 15 above, 311.
32 See Ch. 15.
other types of non-binding or soft law are not said to have direct effect, they are influential in other ways and may have what has become known as indirect or interpretative effects.34

(a) REGULATIONS

We saw in Van Gend that the textual basis in the EC Treaty for the conclusion that Treaty provisions could have direct effect was not compelling. However, Article 249 of the Treaty provides that a regulation ‘shall be binding in its entirety and directly applicable in all Member States’. Policy considerations aside, this language seems to envisage that regulations, at least, will immediately become part of the domestic law of Member States, without needing transposition. If they are immediately part of the domestic law of Member States there is no reason why, so long as their provisions are sufficiently clear, precise, and relevant to the situation of an individual litigant,35 they should not be capable of being relied upon and enforced by individuals before their national courts.36

The direct effect of regulations was affirmed in the Slaughtered Cow case, where the ECJ chastised the Italian government for choosing a method of implementing a regulation which cast doubt on the legal nature and direct applicability of that measure. It held that all methods of implementation were contrary to the Treaty, ‘which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community’.37 More recently in Muñoz38 the ECJ stated that ‘owing to their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect’.39

A national measure enacted with the intention of giving effect to a regulation will however not necessarily be invalid. In Amsterdam Bulb, the ECJ ruled that it is only if a national measure alters, obstructs, or obscures the direct effect or nature of the Community regulation that it will constitute a breach of Community law.40 The concern seems to be that if a Member State’s implementation of a regulation conceals the fact that it is indeed a Community regulation, it could have adverse consequences for the EC since the particular qualities of Community law, for example that it takes priority over conflicting national law, that there must be adequate remedies for breach, that it may be subject to different methods of interpretation, may be ignored. Further, the ECJ was clearly concerned that Member States might adversely affect the content of the regulation through their implementing measures. Nonetheless, in Amsterdam Bulb the ECJ accepted that States could provide in national legislation for appropriate sanctions which were not provided for in the regulation, and could continue to regulate various related issues which were not covered in the regulation. Indeed, in some cases a regulation may positively require national implementing measures.41

---

36 See Geelhoed AG’s discussion of the relationship between the direct applicability of provisions of a reg. and their direct effect in terms of the capacity of individuals to invoke and derive rights from those provisions in Case C–253/00 Muñoz, n. 4 above.
38 In Case C–253/00 Muñoz, n. 4 above, para. 27.
(b) DECISIONS

Under Article 249 EC a decision is to be ‘binding in its entirety upon those to whom it is addressed’. Unlike a regulation, a decision will not normally be a general measure but an individual one which is directed to a specific addressee or addressees.41

The ECJ in Grad had little hesitation in holding that decisions, too, could be directly effective, despite the fact that Article 249, unlike in the case of regulations, made no reference to their ‘direct applicability’.42 In an often-repeated phrase, the Court ruled that it did not follow from this ‘that other categories of legal measures mentioned in that Article can never produce similar effects’, and it relied on the principle of effet utile or effectiveness to conclude that decisions could in suitable cases be invoked by individuals before national courts.43

Returning to our earlier discussion of the narrower and the broader conceptions of direct effect, the ECJ in this judgment discussed direct effect in terms of the right of an individual to ‘invoke the obligation’ created by a decision before a national court (the broad notion of invocability), but also spelt out in some detail the substance of that obligation (the more precise notion of conferral of rights).

5. THE LEGAL EFFECTS OF DIRECTIVES

(a) DIRECT EFFECT OF DIRECTIVES

(i) The Foundations: Van Duyn and Ratti

The key reason given by the Court for the direct effect of Treaty provisions was that the fundamental aims of the Treaty and the nature of the system it was designed to create would be seriously hampered if its clear provisions could not be domestically enforced by those they affected. The explanation for the direct effect of regulations was more straightforwardly textual: Article 249 specifically provided for their direct applicability, from which the Court deduced that they had the capacity to be invoked by individuals before national courts and to confer rights on them. In the case of decisions, the ECJ took the view that, since they were intended to be binding upon addressees, there was no reason why they should not be directly enforced before a national court where their provisions were sufficiently clear.

The position of directives under the Treaty is somewhat different. Under Article 249, a directive ‘shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. Unlike that of regulations or decisions, national implementation of directives is specifically envisaged by the Treaty. Its rationale may be explained as follows.

The directive is one of the main ‘instruments of harmonization’ used by the Community institutions to bring together or co-ordinate the disparate laws of the Member States in various fields. Sometimes the provisions of a directive represent a compromise between Member States on a complex or sensitive matter and in respect of which certain discretionary options are left open to States. Eventual implementation need not be uniform in every Member State, although the actual aim of the directive must be properly secured in each.

41 See the discussion in Ch. 3, indicating the various types of EC dec. which are used, some of which are individual in nature and addressed to particular parties, but others of which are general in nature and without addressees.
43 Ibid., para. 5.
From this description, it appears that some of the criteria for direct effect laid down in the early case law are missing. A directive may well leave some discretion to the Member States; it will always require further implementing measures; and if it sets out its aim only in general terms, it may not be sufficiently precise to allow for proper national judicial enforcement. It was therefore difficult to reconcile the original criteria for direct effect—precision, unconditionality, the absence of discretion, and the absence of a need for implementing measures—with the particular nature of directives.

However, the aims of legal integration and effectiveness which underpinned the ECJ’s original articulation of the notion of the direct effect of Treaty provisions can be equally applied to the case of directives. Many important areas of Community policy rely, in accordance with the Treaty, for their practical realization on the proper implementation of Community directives. If States fail or refuse to implement or apply such measures properly, those Community policies will suffer. The ECJ therefore sought to promote the legal effectiveness of directives even in the absence of their implementation. It held that directives could in principle have direct effect. It gave three reasons for this, two in Van Duyn, and the third in Ratti.

Case 41/74 Van Duyn v. Home Office
[1974] ECR 1337

[Note ToA renumbering: Arts. 48, 177, and 189 are now Arts. 39, 234, and 249 respectively]

THE ECJ

12. [I]t would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

The first reason given by the ECJ is functional: directives are binding and will be more effectively enforced if individuals can rely on them than if they cannot.

The second reason is textual: Article 177, now Article 234, allows national courts to refer questions concerning any Community measure to the ECJ, including directives, and this implied that such acts could be invoked by individuals before national courts.

The third rationale, articulated in the Ratti case,44 is the estoppel argument: Member States were precluded by their failure to implement a directive properly from refusing to recognize its binding effect in cases where it was pleaded against them. The idea here is that the Member State should have implemented the directive, and that if it had done so then the individual would

have been able to rely on the national implementing law. Given that the Member State had in that sense committed a wrong by failing to implement the directive, it could not therefore rely on that wrongdoing so as to deny the binding effect of the directive itself after the date for implementation had passed. Where necessary, a conflicting national law should be disapplied.\(^{45}\)

(ii) Subsequent Application: Sufficiently Clear and Precise Provisions of a Directive

The net effect of these rulings was that directives were capable in principle of having direct effect. The key issue was whether the particular provision of the directive relied on was sufficiently clear and exact to be capable of being applied directly by a national court, and this could vary as between different provisions of a directive.

In *Van Duyn* itself, Directive 64/221 allowed Member States to take measures restricting the movement of non-nationals on grounds such as public policy, without defining the permissible range of public-policy concerns. The ECJ ruled that by providing that measures taken on public-policy grounds had to be based on the personal conduct of the individual, the directive had limited the discretionary power conferred on States. The obligation imposed was clear, precise, and legally complete.\(^{46}\)

In most, though not all,\(^{47}\) later cases the ECJ ruled that the existence of discretion would not necessarily prevent a directive from being directly relied upon by an individual. This would be true for example where a Member State has fully exercised its discretion on implementation,\(^{48}\) or where the State has chosen not to exercise a particular discretionary option,\(^{49}\) or where a clear and precise obligation can be separated out from other parts of a directive,\(^{50}\) or a clear obligation of result can be identified.\(^{51}\) Occasionally, a provision initially held by the ECJ to be incapable of direct effect has been held in a later case to be sufficiently clear to impose an obligation on the Member State.\(^{52}\)

More controversially, in *Kortas*, the ECJ ruled that the possibility for a Member State to derogate from a harmonizing directive under Article 95(4) EC did not prevent the directive having direct effect, nor preclude an individual from relying directly on its provisions, *even in the situation where* a Member State had sought permission for such a derogation and the Commission had unreasonably failed to respond to its request.\(^{53}\)

---


\(^{46}\) See also Case C–72/95 *Kraaijveld*, n. 9 above, para. 59; Case C–287/98 *Linster*, n. 14 above, paras. 37–39, where the existence of discretion in a dir. did not preclude a national court from examining whether the discretion had been exceeded. Contrast Case C–365/98 *Brinkmann* [2000] ECR I–4619.


\(^{51}\) Case C–476/01 *Criminal proceedings against Felix Kapper* [2004] ECR I–5205, for the example of the obligation of mutual recognition of driving licences.


\(^{53}\) Case C–319/97 *Kortas* [1999] ECR I–3143. The ECJ held that an action against the Commission for breach of its obligations under Art. 232 EC was the appropriate remedy.
(iii) Direct Effect: Time Limits for Implementation

The result of Van Duyn, Ratti, and subsequent case law is that although Article 249 does not declare directives to be directly applicable, so that they do not automatically become part of national law upon adoption, they may produce ‘similar effects’ to regulations after the time limit for their implementation has expired and the State has not properly implemented them.\(^{54}\)

The ECJ has however made clear that directives may have an impact even before the implementation period has passed. Thus in *Inter-Environnement Wallonie* it held that although States are not obliged to implement a directive before the period for its transposition has expired, they must, during that period, refrain from adopting any measures liable to compromise seriously the result prescribed by the directive.\(^{55}\) Moreover in the curious *Mangold* case,\(^{56}\) discussed below,\(^{57}\) the ECJ told the national court that it must ‘set aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.’\(^{58}\)

The vertical direct effect of directives has also been bolstered by the ruling in *Marks & Spencer*, which declared that even after a Member State has implemented a directive correctly into national law, an individual can continue to rely directly on the provisions of the directive against the State so long as it is not being properly applied in practice.\(^{59}\)

(b) THE VERTICAL/HORIZONTAL DISTINCTION

The ECJ had thus far expanded the ambit of direct effect. In the *Marshall* case it however held that the direct effect of a directive could not be pleaded against an *individual*, but only against the State.\(^{60}\)

**Case 152/84 Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723**

[Helen Marshall was dismissed after 14 years’ employment by the respondent health authority on the ground that she had passed 60, and the Authority’s policy required female employees to retire at 60 and male employees at 65. National legislation imposed no obligation on women to retire at 60 but neither did it prohibit employers from discriminating on grounds of sex in retirement matters. Marshall argued however that her dismissal violated the 1976 Equal


\(^{57}\) See below, 291, 411–412.

\(^{58}\) Case C–144/04 *Mangold*, n. 56 above, paras. 76–78.


\(^{60}\) Moreover, a dir. even if pleaded by an individual only against the State, cannot of itself result in the imposition of a civil obligation on another individual: Case C–201/02 *Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–723, paras. 57–58.
Treatment Directive, and the Court of Appeal referred to the ECJ for a ruling as to whether she could rely on the provisions of the Directive against the Health Authority. Advocate General Slynn suggested in his opinion that to give ‘horizontal effect’ to directives by allowing them to impose obligations directly on an individual would ‘totally blur the distinction between directives and regulations’ established by the Treaty.61

A number of differing rationales have been suggested as to why directives should only have vertical and not horizontal direct effect.

The reason given by the ECJ in Marshall was textual: Article 249 stipulates that the binding effect of a directive is to exist only as against the State(s) to which it is addressed. There are however two difficulties with this argument.

On the one hand, it is debatable in textual terms. The wording of Article 249 merely signifies that a Member State is only bound by a directive if mentioned therein as being bound, by way of contrast to regulations that bind all Member States. It says nothing one way or the other as to whether, if a particular Member State is bound by a directive, it may also impose an obligation on a private individual.

On the other hand, the Court’s unusual textual faithfulness in this context and its emphasis on the addressee of directives contrasts with its approach to the direct effectiveness of certain Treaty Articles which, like directives, are also explicitly addressed only to the Member State. Article 141, for example, is addressed only to the Member States, providing that States are to ensure the application of the principle of equal pay for male and female workers. In the first Defrenne case, however, the ECJ dismissed the argument that Article 141 could be relied upon only as against the State. It held that since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.62

A rule of law argument has also been put against the horizontal direct effect of directives. Thus Advocate General Slynn in Marshall was concerned about the fact that directives were not at that time required, until after the Maastricht Treaty, to be notified or published in the Official Journal.63 The great majority of directives were however published and the requirement of publication is now contained in Article 254 EC. Moreover, all directives contain a time limit for their implementation, thus reducing the basic rule-of-law concern.

A third argument is that horizontal direct of directives would erode the distinction between regulations and directives. This is, so the argument goes, because directives would thereby have legal impact even though they had not been implemented in the Member States, thereby eroding

the distinction between regulations, which are directly applicable, and directives, which are not. The argument is however problematic. In so far as it has force it is equally true of vertical direct effect of directives. To accord direct effect to directives does not however in reality erode the distinction between regulations and directives. The key distinction between the two instruments is that Member States are intended to have choice as to form and methods of implementation for directives. Giving direct effect to directives, whether vertical or horizontal, is not intended to undermine this. It is not intended to take away this choice. It is merely expressive of the fundamental proposition that if such implementing measures have not been enacted within the required time then the binding ends stipulated in the directive can still be enforced, provided that they are sufficiently certain, precise, etc.

The final argument adduced against horizontal direct effect is legal certainty. Directives, even where their core aim or principle is clear and susceptible to judicial enforcement, often leave much to be fleshed out in national implementing measures. However, the counter-argument is that this may equally be true of the ‘vertical’ direct effect of directives, and it may also be true of Treaty Articles which share similar characteristics of breadth and flexibility, yet it has not prevented the ECJ from pursuing a strategy of maximum legal effectiveness in respect of the latter. Moreover, even if directives were to be capable of horizontal direct effect this would only apply if the relevant provisions really were sufficiently clear, precise, and unconditional.

The ‘doctrinal rule’ that directives cannot have horizontal direct effect necessarily leads to discrimination between the private and public sectors.64 The ECJ has nonetheless continued to insist on the formal requirement that directives should have vertical direct effect only, and not horizontal direct effect, despite widespread academic criticism and numerous opinions given by Advocates General in favour of full horizontal direct effect. The ruling in Marshall was confirmed ten years afterwards in the Dori case, with the support of all but one of the Member States which intervened before the Court.65

The ECJ has at the same time developed a number of doctrinal devices which have reduced the impact of there not being horizontal direct effect of directives. This strategy of seeking to enhance the domestic enforcement of directives in a range of different ways, despite its formal insistence on the ‘no horizontal direct effect for directives’ rule, has been evident in the Court’s rulings ever since the Marshall case. It is to these strategies that we now turn.

(c) EXPANDING VERTICAL DIRECT EFFECT: A BROAD CONCEPT OF THE STATE

The first strategy was to expand the notion of a ‘public body’ against which directives could be enforced. In Marshall itself, having ruled out the direct enforceability of a directive against an individual, the Court concluded that the complainant could nevertheless rely on the provisions of this Directive as against the Health Authority, since it could be regarded as an organ of the State:66

49. In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in

which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law. . . .

51. The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent qua organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive into national law.67

The Court’s justification for allowing the ‘vertical’ direct effect of directives against organs of the State is not based upon the responsibility of the particular state organ (such as a Health Authority) for failure to implement the directive pleaded. Further, the Court has held that not only courts, but even state organs and domestic administrations which play no part in the formal implementation of European legislation, are bound to apply the provisions of directives in practice, something which has been referred to as ‘administrative direct effect’.68 The extent to which this takes place in practice is difficult to determine, since the relative paucity of litigation on the question could be interpreted as evidence in either direction. In Costanzo, which involved the tendering procedure for award of public contracts, the question was whether a regional authority, the Municipality of Milan, was bound directly by the provisions of a directive where the relevant national legislation was incompatible with the Directive.

---

Case 103/88 Fratelli Costanzo SpA v. Comune di Milano
[1989] ECR 1839

THE ECJ

30. It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31. It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

The broad interpretation of what constitutes an organ of the State for the purposes of enforcement of directives seems at odds with the refusal to extend their direct enforceability to relations between non-state entities and individuals. Further, although the ECJ elaborated somewhat on the Community meaning of the State or public body for the purposes of the

67 Case 152/84 Marshall, n. 63 above.
enforceability of directives, it has been criticized for failing in key decisions to provide adequate guidance on a complex issue.69 The Foster case, decided in 1990, remains the primary ruling on the matter.

**Case C–188/89 A. Foster and Others v. British Gas plc**

[1990] ECR I–3313

The plaintiffs were employed by British Gas, whose policy it was to require women to retire at 60 and men at 65. British Gas was at the time a nationalized industry with responsibility for and a monopoly of the gas-supply system in Great Britain. The plaintiffs sought to rely on the provisions of the 1976 Equal Treatment Directive, and the House of Lords asked the ECJ whether British Gas was a body of the kind against which the provisions of the Directive could be invoked.

**THE ECJ**

18. On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable between individuals.


20. It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

It is evident from paragraph 20 of Foster that the Court considered a company in the position of British Gas to be an organ of the State. However, it is not entirely clear what kind of control the State must have over a body in order for it to be one which, constitutionally speaking, represents the power of the State.70 Foster provides no authoritative definition, but merely indicates that a body which has been made responsible for providing a public service under the control of the State is included within the Community definition of a public body. Subsequent case law initially left it in the hands of national courts to apply the loose criteria

---


70 In Case C–419/92 Scholz v. Opera Universitaria di Cagliari [1994] ECR I–505, the case proceeded on the ‘common ground’ that the University of Cagliari was an emanation of the State. See R. White, ‘Equality in the Canteen’ (1994) 19 ELRev. 308.
articulated in Foster, but the ECJ in a number of recent cases ruled that a particular body clearly satisfies those criteria for the purposes of invoking a directive against it.

(d) ‘INDIRECT EFFECT’: DEVELOPMENT OF THE PRINCIPLE OF HARMONIOUS INTERPRETATION

(i) The Principle of Harmonious Interpretation: The Obligation to Interpret National Law in Conformity with Directives

The second way in which the ECJ encouraged the application and effectiveness of directives, despite denying the possibility of direct horizontal enforcement, was by developing a principle of harmonious interpretation which requires national law to be interpreted ‘in the light of’ directives. The Court thereby sought to ensure that directives would be given some effect despite the absence of proper implementation. The Von Colson case is a leading authority.

Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen
[1984] ECR 1891

The ECJ ruled that the Equal Treatment Directive on which the plaintiffs relied in their claim of unlawful sex discrimination was not sufficiently precise to guarantee them a specific remedy of appointment to a post, but it went on to rule on what effect the directive’s aims might nonetheless have on the interpretation of national law.

[Note ToA renumbering: Art. 189 is now Art. 249]

THE ECJ

26. However, the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189.

... 28. ... 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.


The Court in *Von Colson* expressly identified the national courts as organs of the State which are responsible for the fulfillment of Community obligations, and encouraged the German court in question to supplement the domestic legislation, which did not on its face seem to provide an adequate remedy, by reading it in conformity with the Directive’s requirement to provide a real and effective remedy. The case also makes clear that the doctrine of harmonious interpretation, or ‘indirect effect’, does not require the provisions of a directive to satisfy the specific justiciability criteria (clarity, precision, unconditionality) for direct effect. The principle has been strengthened over time in various ways, with the Court declaring it to be ‘inherent in the system of the Treaty’, derived from the obligation in Article 10 EC, and an aspect of the requirement of full effectiveness of EC law, which applies not only to national courts, but to all competent authorities called upon to interpret and apply national law.

(ii) *The Obligation applies even in a ‘Horizontal’ Case between Private Parties*

*Von Colson* concerned a directive which had been inadequately implemented, and the case was brought against a state employer. Later cases however established that the obligation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive *even in a case against an individual*, thus side-stepping in a certain way the prohibition on horizontal direct effect.

The *Marleasing* case concerned a ‘horizontal’ situation involving two private parties before a domestic court, where the interpretation of national law in the light of an unimplemented directive would not impose penal liability on any party, but was likely to affect its legal position in a disadvantageous way.

---

**Case C–106/89 Marleasing SA v. La Comercial Internacionale de Alimentacion SA**

*[1990] ECR I–4135*

(Note ToA renumbering: Arts. 5 and 189 EC are now Arts. 10 and 249)

The plaintiff company brought proceedings against La Comercial to have the defendant company’s articles of association declared void as the company was created for the sole purpose of defrauding and evading creditors, including itself. The provisions of the relevant Council Directive did not include this ‘lack of cause’ as a ground for the nullity of a company, whereas certain provisions of the Spanish Civil Code provided for the ineffectiveness of contracts for lack of cause. The Spanish court referred the case to the ECJ, asking whether the Council Directive could have direct effect between individuals so as to preclude the declaration of nullity of a company on grounds other than those set out in the Directive. Advocate General Van

---


Gerven’s opinion argued that the obligation to interpret a provision of national law in conformity with a directive applied whenever the provision in question was to any extent open to interpretation in accordance with methods recognized by national law.77

THE ECJ

7. However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

8. In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26, the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

This judgment confirmed that an unimplemented directive could indeed be relied on to influence the interpretation of national law in a case between individuals.

(iii) **The Obligation applies to all National Law, and not only to Legislation Implementing a Directive**

A second point which Marleasing clarified, which had been implicit but not explicit in Von Colson, was that the obligation of harmonious interpretation applies even in a case where the national law predates the directive and has no specific connection with the directive. In Marleasing itself there was no domestic implementing legislation which could be interpreted in the light of the Directive, but only domestic law which pre-dated the Directive and was not intended to implement it. This point was confirmed and extended in subsequent cases, most recently in Pfeiffer where the ECJ ruled that the obligation of interpretation applies to the national legal system as a whole, and not only to specific legislation.78

(iv) **The Obligation of Interpretation is Strong, but does not require a Contra Legem Interpretation of National Law**

Debate has continued over the question how strongly national courts are being encouraged to interpret otherwise clear provisions of national law so as to comply with the terms of a directive.79

---

77 Ibid., 4146.
78 Cases C–397–403/01 Pfeiffer, n. 73 above, para. 115.
Even if, as Advocate General Van Gerven suggested in *Marleasing*, it remains essentially a matter for resolution in accordance with national principles of interpretation, the Treaty-derived obligation on national courts to take all measures possible to comply with Community law clearly alters and constrains the interpretive discretion they would otherwise have under national law alone. After *Marleasing*, the ECJ did not noticeably retreat from its strong encouragement to interpret domestic law in conformity with directives, but in general left it to national courts (and other relevant authorities) to decide whether an interpretation in conformity with a directive was possible, or whether it would result in a *contra legem* reading.

In *Wagner-Miret*, the Court accepted that the Spanish legislation in question could not be interpreted in such a way as to give effect to the result sought by the applicants, and similarly in *Dori*, *El Corte Inglés*, *Evobus Austria*, and *Alcatel Austria* the limits of interpretation articulated by the national court or apparent in the terms of the legislation were accepted by the ECJ.

However by way of contrast, on occasion, as in *Pupino*, even though the ECJ defers to the ultimate assessment of the national court, the judgment expressly suggests that an interpretation in conformity with the directive or framework decision seems possible. The *Coote* ruling equally demonstrates the ECJ’s readiness to articulate a strong interpretation obligation and to provide firm guidance to the national court. While the Court in *Coote* did not specify exactly how the British court should interpret domestic sex discrimination legislation, it gave a clear indication that when interpreting that law in the light of the Equal Treatment Directive, the national court should read it in the light of the obligation imposed by the Directive to introduce measures to protect workers who are victimized after the employment relationship has ended, by the refusal of the employer to provide a reference.

80 In the case itself, despite declaring that national courts must read national law in conformity with a relevant dir. only ‘in so far as possible’, the ECJ went on to rule that the Spanish court was *precluded* from interpreting national law in a way which did not comply with the provisions of the dir.

81 In the *Connect Austria* case, which involved litigation between a company and a State regulatory authority (i.e. a vertical situation), the ECJ ruled that since it was impossible to construe the national implementing legislation in conformity with the dir., the dir. should be directly enforced against the State by means of disapplying conflicting national law: *Case C–462/99 Connect Austria*, n. 45 above, paras. 38–42.

82 See *Case C–365/98 Brinkmann* [2000] ECR I–4619, para. 41; *Betlem*, n. 76 above, suggests that the ECJ gave a *Marleasing*-style mandatory ruling also in *Case C–177/88 Dekker v. Stichting Vormingscentrum voor Jong Vóówassenen* [1990] ECR I–3941 which came close to requiring an interpretation of national law *contra legem*. See also the ECJ’s comment in *Case C–300/95 Commission v. United Kingdom* [1997] ECR I–2649, in effect dismissing the Commission’s argument that the UK courts should not interpret domestic law *contra legem* in order to comply with Community law.


84 Case C–91/92 *Dori*, n. 65 above, para. 27.


88 See also Case C–105/93 *Papino*, n. 16 above, paras. 47–49.


90 *Ibid.*, paras. 18–27. Note that the Sex Discrimination Act in question, although it predated the Dir., was nonetheless intended to implement it, but the industrial tribunal had ruled that the provisions of the Act did not regulate behaviour after the contract of employment had ended.
More generally, even if the Court has left the application of the interpretive obligation in particular factual circumstances largely to the national courts, it has regularly emphasized the strength of the obligation in general. Thus in Pfeiffer, which concerned the application of the Working Time Directive to emergency medical services, the ECJ ruled that ‘the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law’ to ensure that a directive is effective.

(v) The Positive Obligation of Harmonious Interpretation applies only after the Time Limit for Implementation of the Directive has Expired

It was for some time unclear whether the obligation to interpret national law in conformity with a directive arose before the time limit for implementation of the directive expired. The Ratti case indicated that a directive can only be directly enforced (i.e. can only have vertical direct effect) when the time limit for implementation has expired. However, the ECJ in Inter-Environnement Wallonie had also ruled that Member States are under a negative obligation to refrain, during the period after adoption of a directive but before the time limit for implementation has expired, ‘from taking any measures liable seriously to compromise the result prescribed by the directive’, even though (apart from the circumstances of the curious ruling in Mangold) they are under no positive obligation to disapply conflicting national law before the expiry of the time limit.

A number of Advocates General had argued that the obligation of harmonious interpretation should apply before the expiry of the time limit for implementation, and this also seemed to be implicit in the ECJ’s ruling in Pupino. However, in Adeneler, the ECJ finally addressed the point directly and ruled that:

Where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.

91 See, however, Case C–408/01 Adidas-Salomon AG and Adidas Benelux BV v. Fitnessworld Trading Ltd. [2003] ECR I–12537, paras. 15–22, which suggests that the obligation of interpretation may be stronger where the national court is interpreting legislation which was specifically intended to implement the dir.
92 Cases C–397–403/01 Pfeiffer, n. 73 above, para. 118; S. Prechal [2005] 42 CMLRev. 1445.
93 M. Klamert, ‘Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots’ (2006) 43 CMLRev. 1251, arguing that prior to the expiry of the implementation period the interpretation obligation should be considered to be based only on Art. 10 EC, whereas after the period has expired it should be based on the legal supremacy of the dir. itself pursuant to Art. 249 EC, with different legal consequences flowing from each.
95 Case C–129/96 Inter-Environnement Wallonie, n. 55 above, para. 45, Case C–157/02 Rieser, n. 47 above, para. 66.
96 Case C–144/04 Mangold, n. 56 above.
99 Case C–105/03 Pupino, n. 16 above.
However, the Court went on to rule that the general *Inter-Environnement Wallonie* obligation on the State to refrain, even before expiry of the time-limit, from any measures liable to compromise the result sought by the directive includes a corresponding negative interpretative obligation on national courts as organs of the State:

It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.101

(vi) **The Obligation of Harmonious Interpretation and Criminal Liability**

The obligation of harmonious interpretation cannot result in the imposition or aggravation of criminal liability on an individual, but it may result in other adverse repercussions for the individual.

Apart from the *contra legem* limit, the other main restriction on the interpretive obligation is the principle of non-retroactivity of penal liability articulated by the ECJ in *Kolpinghuis Nijmegen*.102 In this case, the Dutch prosecution authorities sought to use the provisions of an unimplemented EC Directive against the defendant.103 The ECJ, after reiterating the principle of interpretation in paragraph 26 of *Von Colson*, declared that:

[(T)he obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity ... a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.](#)

(vii) **The Obligation of Harmonious Interpretation and Non-criminal Liability**

There has however been more debate about the relationship between the duty of harmonious interpretation and non-criminal liability. Consider the ruling in the *Arcaro* case.105 The ECJ, having reiterated the obligation of harmonious interpretation, ruled:

However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation

101 Ibid., para. 123.
102 Case 80/86 *Kolpinghuis Nijmegen*, n. 98 above.
103 This principle was later extended by the ECJ to the case of regs., despite the fact that regs. as a general matter do not require implementation: Case C–60/02 *Criminal proceedings against X* [2004] ECR I–651, paras. 54–64.
104 Ibid., paras. 13–14. The ruling was confirmed in subsequent cases including Cases C–74 and 129/95 *Criminal Proceedings against X* [1996] ECR I–6609. It was also applied in the context of the criminal proceedings against the Italian prime minister in Cases C–387, 391, and 403/02 *Criminal proceedings against Silvio Berlusconi et al.* [2005] ECR I–3565, which was not a case about harmonious interpretation, but about disapplication of conflicting national law and direct reliance by the State on the dir. against the defendant. See however the opinion of Kokott AG, in which she reached a different conclusion from the ECJ.
leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed, or, more especially, where it has the effect of determining or aggravating, on the basis of the Directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive’s provisions (see *Kolpinghuis Nijmegen*, cited above).106

The case was concerned with criminal liability. The Court seemed however to suggest a narrowing of the principle of interpretation by reference to its impact on an individual, even if that impact does not amount to the imposition or aggravation of criminal liability. The *Arcaro* ruling suggests that where an interpretation of national law in the light of a directive amounts to ‘the imposition on an individual of an obligation laid down in the directive’,107 it goes too far and is neither permitted nor required by EC law.108 This implies that a distinction has to be made between the ‘imposition of an obligation’ on an individual party, which is not permitted, and the creation of other kinds of legal disadvantage or detriment for that party falling short of a legal obligation, which is permitted.109

However in *Centrosteel*, Advocate General Jacobs suggested that the ruling in *Arcaro* should be read in the context of the criminal proceedings in which the case had arisen.110 He argued:

In summary, I am of the opinion that the Court’s case law establishes two rules: (1) a directive cannot of itself impose obligations on individuals in the absence of proper implementation in national law; (2) the national courts must nevertheless interpret national law, as far as possible, in the light of the wording and purpose of relevant directives. While that process of interpretation cannot, of itself and independently of a national law implementing the directive, have the effect of determining or aggravating criminal liability, it may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed.

His first point reiterates the ban on direct horizontal effect, and the second point, while ruling out the interpretation of non-implementing national law in such a way as to aggravate or determine an individual’s criminal liability, does not rule out an obligation on national courts to interpret non-implementing national law in such a way as to aggravate or determine an individual’s civil liability, or to impose a legal obligation on such an individual. While the ECJ in *Centrosteel* did not refer to *Arcaro* or to the debate about the limits of the interpretation obligation, it gave a strong ruling directing the Italian court to interpret national law in conformity the directive.

---

106 *Ibid.*, para. 42. See also Case C–105/03 *Pupino*, n. 16 above, paras. 45–47.

107 For various possible interpretations of this phrase see P. Craig, ‘Directives: Direct Effect, Indirect Effect and the Construction of National Legislation’ (1997) 22 ELRev. 519.

108 In Case C–106/89 *Marleasing*, n. 76 above, Van Gerven AG argued that an interpretation of national law in the light of a dir. in a way which would impose a ‘civil penalty’ upon an individual would contravene the principles of legal certainty and non-retroactivity, but the ECJ did not discuss the question.

109 Hilson and Downes, n. 5 above, use Hohfeld’s conceptual scheme, and contrast the notion of legal obligation with that of legal disability. Others suggest a notion of ‘passive’ horizontal direct effect which does not amount to a ‘positive obligation’. J. Stuyck and P. Wytinck (1991) 28 CMLRev. 205. See further below for the idea of ‘exclusionary effect’ which does not amount to ‘substitution’.

Centrosteel (an Italian company) claimed for payment of money under a commercial agency contract with the defendant Adipol (an Austrian company). The latter argued that the contract was void because of Centrosteel’s failure to comply with the Italian legal requirement of compulsory registration of commercial agents. Centrosteel relied on Directive 86/653 on self-employed commercial agents, the only requirement of which for the validity of an agency contract was that a written document be drawn up, and which had been interpreted in the earlier *Bellone* case\(^1\) as precluding a law such as the Italian registration requirement. Since Centrosteel and Adipol were private parties, and the directive had not been implemented at the time their dispute arose, to permit Centrosteel to rely directly on the Directive against Adipol would have amounted to giving it a form of horizontal effect. After noting that certain Italian courts had already, following the *Bellone* ruling, begun to change their case law relating to the invalidity of agency contracts in the light of the EC Directive in order to conform with the Directive’s requirements, the ECJ continued:

**THE ECJ**

19. In those circumstances, the answer to be given to the questions referred must be that the Directive precludes national legislation which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register. The national court is bound, when applying the provisions of domestic law predating or post-dating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

The implications of the ECJ’s ruling were that Adipol would be under a legal obligation to pay the amount due under the contract with Centrosteel. If Italian law were not read in the light of the Directive, however, and if the agency contract were rendered void for violation of Italian registration law, Adipol would not be under this obligation. This kind of effect has been referred to as the ‘exclusionary effect’ of a directive: i.e., it prevents conflicting national law from being enforced, but it does not amount to a ‘substitution effect’ since it is the commercial contract and not the Directive itself which imposes obligations on the parties.

In the *Océano* case decided the same year,\(^12\) the Court did not follow the more radical suggestion of Advocate General Saggio to give this kind of ‘exclusionary effect’ to directives in all cases by means of a duty on national courts to ‘invoke’ unimplemented directives and to ‘disapply’ conflicting national law without necessarily substituting provisions of EC law.\(^13\) Instead, the ECJ focused on the obligation of harmonious interpretation.

---


\(^3\) The Advocate General was proposing something close to horizontal direct effect, which he argued was already implicit in ECJ case law such as *CLA Security* and *Ruiz Bernádez*, discussed below, namely a duty on national courts to give effect to unimplemented dirs. by refusing to apply any conflicting rules of national law, even in cases concerning disputes between individuals. He referred to this in para. 37 of his opinion in *Océano* as the ‘exclusionary effect’ of unimplemented dirs.—i.e. the fact that they are a superior source of EC law means that national courts are obliged to give them precedence over conflicting national law. For similar arguments see Lenz, Tynes, and Young, n. 5 above.
The case involved proceedings between two private parties—an action brought by Océano before a Barcelona court for payment owed to it under a contract by the defendant Murciano Quintero. The question was whether the Barcelona court had jurisdiction over the case according to a jurisdiction clause in the contract. While Spanish law was not entirely clear as to whether such a jurisdiction clause should be treated as unfair or not, the EC Unfair Contract Terms Directive—which had not at the time been implemented into Spanish law—regarded it as unfair. Having cited Marleasing and Dor, the ECJ continued as follows.

THE ECJ

31. Since the court making the reference is seised of a case falling within the scope of the Directive and the facts giving rise to the case postdate the expiry of the period allowed for transposing the Directive, it therefore falls to that court, when it applies the provisions of national law outlined in paragraphs 10 and 11 above which were in force at the material time, to interpret them, as far as possible, in accordance with the Directive and in such a way that they are applied of the court’s own motion.

32. It is apparent from the above considerations that the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

This ruling does not declare that the Spanish court must decline jurisdiction by reading national law in the light of the Directive’s requirements, but indicates that it should ‘favour’ that interpretation if it is possible. While such an interpretation of national law would not impose a legal obligation on Océano, it would deprive that company of any existing right under national law to enforce the consumer contract before the Barcelona court. Thus the defendant would benefit from the terms of the Directive even though it had not been implemented, and the plaintiff company would suffer a legal disadvantage or disability, albeit not in the form of a legal obligation directly imposed by the Directive.

The Coote, Océano, Centrosteel, and Pfeiffer judgments indicate that the harmonious interpretation requirement is alive and well, and that when the circumstances are suitable, the ECJ will give firm guidance to a national court about how it should ‘harmoniously’ interpret national law even when this results in the imposition on a private party of civil liability under national law.

It remains unclear, however, whether the ECJ shares the view expressed by Advocate General Jacobs in Centrosteel that an interpretation of national law in the light of a directive may indeed result in the imposition of a legal obligation on an individual which would not otherwise have existed, or whether the Court prefers the more limited approach which it adopted in Wells in relation to the direct effect of a directive, rather than its indirect interpretative effect. The position of the ECJ in Wells was that, while an unimplemented directive may

114 See n. 110 above.
result in 'adverse repercussions' for an individual, it cannot result in the imposition of any legal obligation on him or her.\textsuperscript{115} While Advocate General Jacobs in \textit{Centrosteel} shared this view as to the limits on the direct effect of a directive, he took a different approach to indirect effect, arguing that the interpretation of national law in the light of a directive may well result in the imposition of a legal obligation on an individual. It remains to be seen whether or not the ECJ adopts this stronger formulation for indirect effect.

(e) INCIDENTAL HORIZONTAL EFFECTS

The third and closely related development which has lessened the impact of the \textit{Marshall/Dori} non-horizontal-direct-effect-of-directives rule is a line of case law which permits the use of unimplemented directives in certain cases between private parties. This development, which is most strikingly evident in the \textit{CIA Security}\textsuperscript{116} and \textit{Unilever Italia}\textsuperscript{117} cases, is complex and confusing.

Like the cases concerning indirect interpretive effect discussed above, it is often difficult to distinguish these cases, in convincing conceptual terms, from direct horizontal effect. It brings us back also to the distinction suggested at the outset of the Chapter between the broader concept of direct effect which entails the invocability of EC law, and a narrower concept which relates to the conferral of subjective rights on individuals. The following cases suggest that directives can have a limited form of horizontal effect when they do not directly impose legal obligations on individuals.

**Case C–194/94 CIA Security International SA v. Signalson SA and Securitel SPRL**

[1996] ECR I–2201

CIA Security brought proceedings against the defendants before the Belgian commercial courts asking for orders requiring them to cease unfair trading practices. CIA argued that the two companies had libelled it by claiming that the alarm system which it marketed had not been approved as required under Belgian legislation. CIA agreed that it had not sought approval but argued that the Belgian legislation was in breach of Article 28 EC and had not been notified to the Commission as required by Directive 83/189 on technical standards and regulations. The national court asked the ECJ whether the Directive was sufficiently clear and precise to be directly effective before the national court, and whether a national court should refuse to apply a national measure which had not been communicated as required by the Directive. The ECJ began by ruling that the national regulation should indeed have been notified under the Directive.

**THE ECJ**

44. [A]rticles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in their content, those articles may be relied on by individuals before national courts.

\textsuperscript{115} Case C–201/02 Wells, n. 60 above, paras. 56–57.
45. It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

The Court ruled that part of the aim of the Directive was to protect the free movement of goods by preventive control, and that it would enhance the effectiveness of that control to provide that a breach of the obligation to notify would render the un-notified domestic regulation inapplicable to individuals. The ECJ did not mention Dori or Marshall and did not (unlike the Advocate General) directly advert to the fact that this was a case between private parties.

However, although CIA would rely on the Directive primarily as against the application of the State’s technical regulation on the requirement of approval of alarm systems, the outcome of such reliance in the proceedings against the two defendants before the national court could presumably be that the defendants may be found liable for unfair trading. Thus, the case gives some effect to the provisions of a directive in proceedings between individuals, and it may have relieved the plaintiff of a domestic legal obligation. Further, although it did not of itself impose a legal obligation on the defendants, it removed from them the protection of the national technical regulation and exposed them to potential liability under other provisions of national law.

In other words, this is the kind of ‘exclusionary’ effect referred to by Advocate General Saggio in the Océano case: the directive is invoked in a case between individuals to preclude the application of a conflicting provision of national law, and the result is that one of the parties to the case is subject to a legal liability or disadvantage to which it would not have been subject had the offending national law been applied.

The issue of indirect horizontal reliance on directives in disputes involving private parties is also apparent in other cases. The crucial factor in these horizontal cases is that one party suffers a legal detriment and the other party gains a legal advantage from the terms of an unimplemented directive. The common factor, shared also by the Océano, Centrosteel, and Pfeiffer cases on indirect effect discussed above, seems to be that the directive does not of itself impose an obligation on another individual, and that the obligation is imposed by some other provision of national or private law. This is evident in the following cases.

---

118 This factor was used to limit the application of the CIA Security ruling in the later case of Case C–226/97 Lemmens [2000] ECR I–3711.


120 See also Case C–244/98 Océano Grupo, n. 14 above.

121 One explanation offered for what was at the time a surprising outcome in the case was that it concerned an action to enforce a public-law obligation under Belgian trade practices legislation, to prevent a breach of statutory duty by the defendants, rather than merely resolving a private-law dispute. See J. Stuyck (1996) 33 CMLRev 1261 and J. Coppel (1997) 26 ILJ69. See also P.J. Slot (1996) 33 CMLRev. 1035, 1049, suggesting something similar to Saggio AG’s ‘exclusionary effect’ distinction.


123 For a somewhat different view, which sees the cases as being about ‘disguised vertical direct effect’ in which a private party is precluded from benefiting from the State’s substantive breach of an EC dir., see M. Dougan, ‘The “Disguised” Vertical Direct Effect of Directives’ (2000) 59 CLJ.586.
Ruiz Bernaldez\textsuperscript{124} concerned criminal proceedings against the defendant for causing an accident while driving drunk, in which he was ordered to pay reparation for the damage to property caused. The Spanish criminal court referred to the ECJ the question whether the national insurance rules, which absolved the insurance company from any obligation to pay, were compatible with Directive 72/166 on motor vehicle insurance. The ECJ ruled that the Directive required an insurer to compensate third-party victims of car accidents, and that an insurer could not rely on national statutory provisions or contractual clauses to refuse to compensate such victims.\textsuperscript{125} Thus a legal obligation to compensate the third party, which may not have existed under domestic law alone, could be derived from the Directive and imposed directly on the insurer. The enforcement of the Directive therefore removed or ‘excluded’ an exemption provided under national law for the insurance company, and it was national law rather than the Directive which imposed the obligation to pay.\textsuperscript{126}

In the case of Smithkline Beecham,\textsuperscript{127} in which a private party sought an injunction under national law to restrain the defendant from marketing its toothpaste, the ECJ ruled that Directive 76/768 on cosmetics precluded the application of national law restricting certain forms of toothpaste marketing. This resulted in the enforcement between private parties of a directive containing substantive rules on the marketing of cosmetics so as to remove a conflicting national law. The plaintiff was disabled from relying on national law and the defendant thereby gained the benefit of the prohibition in the directive.

The same general pattern is apparent in the Unilever Italia case, which also involved Directive 83/189.\textsuperscript{128}

---

Case C–443/98 Unilever Italia SpA v. Central Food SpA

[2000] ECR I–7535

The Directive was invoked to prevent the enforcement of a national regulation which, although properly notified, had been adopted in breach of a standstill clause under the Directive. The contract was for delivery of a quantity of olive oil, and the olive oil delivered by the plaintiff was labelled in a way which complied with EC law, but not with the contested Italian labelling legislation. Thus it was a case where reliance by one party on the terms of the Directive in order to have national law disapplied would result in the imposition of contractual obligations on the defendant, which would not have been imposed had the national law been applied. Jacobs AG, having discussed the CIA Security ruling, argued that the offending national legislation should not be rendered unenforceable in private contractual proceedings of this kind. He contended that such unenforceability would give rise to considerable legal uncertainty, and that it would

\textsuperscript{124} Case C–129/94 Criminal Proceedings Against Rafael Ruiz Bernaldez [1996] ECR I–1829. It has been argued that this case is better understood as one on indirect effect: S. Drake, ‘Twenty Years after Von Colson’ (2005) 30 ELRev. 329.

\textsuperscript{125} Note that the insurer was not actually party to the case: Stuyck, n. 121 above, 1272 argues that, because proceedings were brought by the State, the Court permitted a dir. to confer rights on an individual which would generate obligations for other individuals.

\textsuperscript{126} See n. 124 above for an argument that the case really involved indirect interpretative effect.


be unjust since it would penalize individuals for the State’s failure. He argued further that breach of the Directive’s standstill clause was different from a breach of the notification requirement and should not lead to the unenforceability of national regulations. It seems that the AG had doubts about the CIA Security ruling itself, and was seeking to narrow the relevance and applicability of the ruling. The ECJ however disagreed and did not address the arguments of the Advocate General. Having recalled in paragraphs 40–43 its reasoning in CIA Security about the aim of Directive 83/189 and why it should render unenforceable any national regulations adopted in breach thereof, the Court continued:

THE ECJ

45. It is therefore necessary to consider, secondly, whether the inapplicability of technical regulations adopted in breach of Article 9 of Directive 83/189 can be invoked in civil proceedings between private individuals concerning contractual rights and obligations.

46. First, in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

47. That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

48. Next, it must be borne in mind that, in CIA Security, the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.

49. Thus, it follows from the case-law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the CIA Security case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.

50. Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C–91/92 Facchin Dori [1994] ECR I–3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.

51. In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

52. In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

The ‘public law’ rationale suggested to explain earlier cases does not help in this case, which concerned a dispute between private parties where one sought to impose contractual obligations

on another. True, the labelling legislation challenged here was a public regulation, but the plaintiff was seeking to have that set aside rather than enforced against the defendant.

The ECJ attempted in two ways to distinguish this case from the prohibited ‘horizontal direct effect’ cases such as Dori and Marshall. The first was by emphasizing the particular nature and aims of Directive 83/189 and the rationale outlined in CIA Security for declaring national rules which breach this Directive to be unenforceable.131 Its second and more important argument, for general purposes, was that the Directive itself creates no individual rights and imposes no obligations on individuals.132 This is the now familiar ‘exclusionary effect’ argument: that the Directive can be invoked in cases between individuals in order to have national law disapplied, so long as the Directive does not create new law, new rights, or new obligations to be applied. Rather it leaves a ‘void’ which is filled by other provisions of national law—and, in this case, of national contract law. We shall evaluate this argument in more detail below.

(f) STATE LIABILITY IN DAMAGES FOR NON-IMPLEMENTATION OF A DIRECTIVE

One final and important way for an individual to enforce the provisions of a directive despite the prohibition on horizontal direct effect is to sue the State in damages, pursuant to the famous Francovich ruling of the ECJ, for loss caused by the State’s failure to implement a directive.133 Rather than attempting to enforce the directive against the private party on whom the obligation would be imposed if the directive were properly implemented, the individual instead can bring proceedings for damages against the State. The significance of Francovich will be discussed in fuller detail in the next chapter. Suffice it to say in this context that the ruling has provided a further incentive for Member States to implement directives properly and on time.

6. DIRECTIVES AND THE EFFECT OF COMMUNITY LAW: AN EVALUATION

The ECJ’s jurisprudence concerning the nature and impact of EC law on national law has become increasingly complex over the years, more especially in relation to directives. The Court’s rationalization of the tension between the no-horizontal-direct-effect rule on the one hand, and the Marleasing-Centrosteel-Mangold and CIA Security-Unilever lines of case law on the other, relies on highly refined and questionable distinctions. If the ECJ is determined to promote the effectiveness of directives in a variety of extremely complex legal ways regardless of their proper domestic implementation, the prohibition on horizontal direct effect looks somewhat hollow.134 It is therefore all the more important to stand back and evaluate the central precepts underlying this case law.


132 The ECJ here may have been seeking to avoid acknowledging rights for individuals which they could use in seeking damages from the State under the Francovich doctrine. See n. 133 below and Ch. 9 for further discussion.


134 Dougan, n. 123 above; Weatherill, n. 130 above.
(a) **LEGAL CERTAINTY, HORIZONTAL DIRECT EFFECT, AND INDIRECT EFFECT**

It may be helpful to ground the subsequent discussion by having the following simple paradigm in mind. The Chief Executive Officer, CEO, of a company consults the in-house legal counsel about what the company should do in the following circumstances. There is a Community directive on some aspect of equality, which either has not been implemented by the relevant State, or there are doubts as to whether the implementation is properly in accord with the demands of the directive. The CEO wishes to know whether the company should follow the relevant national law or the directive. She wishes to do what is legally correct and to avoid litigation with employees.

If directives had horizontal direct effect the task of the in-house legal counsel would be relatively straightforward. The lawyer would compare the relevant national law and the directive. He would identify inconsistencies. In so far as there were any, he would decide whether the provisions of the directive were sufficiently precise, clear, and unconditional to give rise to direct effect. Assuming that they were, he would then advise the CEO to follow the directive, and tell her that the supremacy of Community law meant that inconsistent national law would be trumped by the directive.

Consider by way of contrast the task facing the in-house legal counsel under the present law. Directives do not have horizontal direct effect. He would nonetheless still have to identify any possible inconsistencies between national law and the directive, but having done so the best answer that he could give to the CEO as to which law the company should follow is that this would depend on whether a national court would feel able to interpret the national law to be compatible with the directive. It is unlikely that he could give more than a rough guess in this respect, depending on the nature of the inconsistencies that exist.

There is a certain tension and paradox in all this. The ECJ has tended in the post-*Marshall* case law to deny horizontal direct effect to directives on grounds of legal certainty for defendants. It is however arguable that indirect effect creates considerably greater problems for courts and litigants alike.

The national court has to tread the ever-difficult line of deciding how far it can ‘interpret’ national law to be in conformity with the directive, without thereby crossing the line between interpretation and judicial re-writing of legislation. The potential private defendant will often simply not know the answer to this without resort to litigation. The legal uncertainty facing the legal adviser to the CEO has been made more difficult by developments within the doctrine of indirect effect. Remember in this respect that: the provision of the directive does not need to be precise and unconditional in order to be subject to the doctrine of indirect effect; the duty of harmonious interpretation now demands that national courts consider all national law in deciding whether compatibility with the provisions of the directive can be attained; and the extent to which indirect effect can lead to the imposition of non-criminal obligations, as opposed to ‘adverse repercussions’, on defendants is still unclear, as is the line betwixt the two. The reality at present is that legal uncertainty about the effectiveness and applicability of an unimplemented directive—and correspondingly about the validity of conflicting national law—in any given situation is extremely high.

---

135 See, e.g., *Case C–201/02 Wells*, n. 60 above, para. 56.
(b) PRIMACY, EXCLUSION, AND SUBSTITUTION

The ECJ has consistently refused to depart from the clear Marshall/Dori rulings that a directive cannot be invoked by an individual so as to impose a direct obligation on another individual. Yet cases such as CIA Security, Unilever Italia, Panagis Paﬁtis, and Smithkline Beecham demonstrate that directives which contain substantive rules and requirements directly affecting the legal position of the parties can be enforced horizontally between the parties, provided that this can rationalized in terms of an exclusionary, rather than substitutionary, effect. This argument must be carefully evaluated. The distinction has thus far been articulated principally in the Opinions of Advocates General and in the academic literature, but it seems to underlie the ECJ’s jurisprudence on incidental horizontal effect.

Let us recall the central idea. Directives can, even in actions between private parties, have an ‘exclusionary’ impact, excluding inconsistent national law. This is said to flow from the primacy of Community law. The result in the instant case is then said to be justified on the basis of the national law that subsists in the absence of that part of national law that has been excluded by the directive. This is distinguished from a ‘substitution’ effect, which connotes the idea that the directive will in itself mandate certain novel legal consequences within the national legal order, where it contains no such provisions. This can, so the argument goes, occur in actions against the State only where the conditions for direct effect have been met. This distinction is however problematic in conceptual terms, since it at one and the same time ‘proves too little’ and ‘proves too much.’ This is so for four reasons.

First, the very determination of whether a case is to be regarded as one of ‘exclusion’ or ‘substitution’ can be problematic. The characterization of a case as being one of ‘exclusion’ and not ‘substitution’ is dependent on the identification of some ‘default rule’ of the national legal system that will govern the matter, once the provision that is inconsistent with the directive is excluded. Whether such a default rule exists and its content may be contentious, depending upon the level of abstraction at which the issue is framed.136 The more broadly the issue is framed the more likely you are to find some national default rule, but the more difficult it becomes to mask the reality that a new rule is being substituted within the national legal system.

Secondly, the argument ‘proves too little’ when considered from the perspective of the parties to the case, and especially the private defendant, since the distinction between ‘exclusion’, combined with the residual application of national law, and ‘substitution’, entailing the application of ‘new’ rules derived from the directive, conceals more than it reveals. The reality is that in both instances it is the directive that mandates the outcome, and this constitutes a new legal status quo within the national legal system. From the perspective of the private party it matters not whether this is conceptualized in terms of ‘modiﬁcation’ of national rules or imposition of ‘new’ EC rules.

Thirdly, the argument ‘proves too little’ when considered from the perspective of the national legal system. It is premised on the unspoken assumption that to ‘exclude’ that part of a national law that is inconsistent with a directive is somehow less intrusive or less dramatic than ‘substitution’ of something new within the national legal order. There is no reason why this has to be so. Consider the structure of legal rules. They will normally contain a core provision that will then be qualiﬁed or conditioned by other provisions. Contract rules may, for example, be premised on a core idea of freedom to contract, which is then qualiﬁed in a variety of ways by more speciﬁc rules concerning unfair consumer terms, illegality, 

136 See, e.g., Cases C–240–244/98 Océano Grupo, n. 9 above, para. 39, Saggio AG who talks of the exclusion of the incompatible rule being ﬁlled by application by ‘analogy or recourse to general principles of national law if those national provisions comply with the principles on which the directive is based.’
misrepresentation, and the like. It cannot be assumed that the impact of exclusion of one such rule for inconsistency with a directive, coupled with the application of the remainder of national contract law, will be any less far-reaching for that legal system than the substitution/introduction of a legal concept which that system did not hitherto possess. It might be, but it equally well might not, depending on the nature and importance of the rules respectively excluded or substituted.

Fourthly, the argument also 'proves too much.' The exclusionary effect of a directive is, as we have seen, said to be based on the primacy of Community law. It is however unclear why, if this is the foundational premise, it should not also demand the substitution/introduction of rules from the directive, even where no relevant provisions currently exist within the national legal order. This is of course precisely what direct effect, including vertical direct effect, of directives coupled with primacy does demand. If primacy really is the driving imperative then it is unclear why it should not also demand substitution even in horizontal cases. The essential thrust behind the primacy argument, and the way it is commonly put, is in terms of hierarchy: the superiority of EC law is said to demand exclusion. Yet if it is normative hierarchy that drives the argument, it is unclear why it should not also demand substitution, where this is required to effectuate the directive in the national legal order. This is more especially so because it may be fortuitous, depending on the structure of rules within a legal system, whether the case should be characterized as one of exclusion or substitution.

7. GENERAL CONCLUSIONS

i. While some have argued that EC law should simply be applicable law, capable of use in national courts as the 'law of the land,' it remains the case that different kinds of EC law enjoy different kinds of domestic legal effect.

ii. Most provisions of EC law can be invoked by individuals before national courts when they satisfy basic conditions of justiciability: this is known as 'direct effect.' Normally, though not always, this means that they are capable of conferring rights on individuals.

iii. The position of directives is very complicated. They can be directly invoked by individuals before national courts against a state body, or indirectly invoked against a State or private party in order to secure an interpretation of national law in conformity with their provisions. And they can be directly invoked in proceedings against other individuals (horizontally) only in circumstances where they do not of themselves impose an obligation on a private party.

iv. The principle that national law should be interpreted in the light of EC law is a broad one. It applies not only to directives, but also to EC Treaty provisions, to general principles of EC law, to international agreements entered by the EC, and to other forms of non-binding EC law.

8. FURTHER READING

(a) Books
(b) Articles
—— ‘The Doctrine of Consistent Interpretation: Managing Legal Uncertainty’ (2002) 22 OJLS 397
Coppel, J., ‘Rights, Duties and the End of Marshall’ (1994) 57 MLR 859
—— ‘Horizontal Direct Effect of Directives’ (1997) 28 ILJ 69
Griller, S., ‘Judicial Enforceability of WTO Law in the EU’ (2000) 3 JIEL 441
Ross, M., ‘Effectiveness in the EU Legal Order: Beyond Supremacy to Constitutional Proportionality’ (2006) 31 ELRev. 476
Winter, T., ‘Direct Applicability and Direct Effects’ (1972) 9 CMLRev. 425
Wyatt, D., ‘New Legal Order or Old’ (1982) 7 ELRev. 147