

EU Law

Originally, only member states of the European Union could enforce their rights under Article 12 of the European Economic Community Treaty; However, after the case of Van Gend En Loos [1964], the European Court of Justice decision conferred upon European Union citizens the ability to enforce their EU rights against member states and this became known as Direct Effect (Phelan, 2017, p.936). The provisions of the Treaty which established the EEC never mentioned explicitly the availability of EU Treaties to be enforceable by natural and legal persons before the courts of member states (Phelan, 2017, p.936). Consequently, the Court of Justice of the European Union used its judicial power and creativity in the Van Gend En Loos case in order to make a judgement which gave birth to what is now known as “New legal order of international law”; This term was designed to impose rights or obligations on member states and individuals while disregarding national law (Rasmussen, 2014, p. 137). Moreover, the court's decision in Van Gend En Loos can be viewed as one influenced by the idea of European integration, which was the EEC primary ambition along with the notion of supremacy of EU law (a different judgement would have underpinned the Treaty) (Benvenisti and Downs, 2014, p. 86). In addition, the court's highlighted that the Treaty of Rome is more than a mutual obligation between contracting states, and it would not be practical to focus on the state at large in order to protect individuals, so they focused on two important factors: the national citizens, and the national court (Benenisti and Downs, 2014, p. 86).

Furthermore, the doctrine of direct effect applies to all binding EU law including the Treaties, general principles, international agreements, the Charter of Fundamental Rights, and Secondary legislations (Craig and Burca, 2015, p. 184). To some extent, the ECJ exposed the weakness of the enforcement system created in the Treaty of Rome, by conferring rights to citizens before national courts (Direct Effect) and allowing EU law to prevail against conflicting national laws in order to protect those rights granted to individuals (Phelan, 2017, p. 938). To illustrate, Van Gend En Loos could not enjoy imports on a tax-free basis protected by the Dutch legal regime if the Treaty (Art 12 EEC treaty) offering this protection enjoyed only delusional authority (Weak) (Chalmers and Barroso, 2014, p. 106). Moreover, Article 169 of the EEC Treaty (now Art 258 TFEU) permitted the European Commission to bring forward member states before the Court of Justice in order to clarify any reasons for not fulfilling Treaty obligations (Public Enforcements); but due to the lack of private enforcement, the ECJ initiated that Treaty Articles could have Direct Effect (on certain conditions) (Craig and Burca, 2015, p. 185). In their Van Gend En Loos [1963] judgment, the ECJ gave further explanation for their decision as follows:

[...] 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 (Berski, 2016, pp. 5).

Moreover, this statement essentially details that EU law is not just some “International law” or foreign law that must first be incorporated at national levels, but rather EU law is a part of national law (this makes obvious the Community’s power) (Armin, 2017, p. 165); To clarify, it suggests that EU law is incorporated into national law through the principle of direct applicability, which is demonstrated in *Firma Molkerei* [1968]. In a subtle manner, member states who had contracted upon the Treaty of Rome had opposed to this judgement by stating that this new obligation does not align with the one that was assumed when the EEC Treaty was first created (Craig and Burca, 2015, p.189); Nevertheless, the ECJ protested that the Treaty Art 12 must be interpreted as having Direct Effect, which provides rights to citizens that must be protected by national courts (Benvenisti and Downs, 2014, p. 86). It should be noted that the *Van Gend En Loos* [1963] decision was seen necessary as it marked a turning point in the tale of European legal and political integration due to the creation of a “New legal order” (Robin-Olivier, 2014, p. 166). Consequently, this extended the enforceability of EU law because prioritising individuals and company’s self-interest, motivates them to frequently rely on the law for protection (which also reduces democratic deficit) (Armin, 2017, p. 167). Furthermore, the CJEU polished the Direct Effect doctrine by suggesting certain conditions in which EU laws can be applicable before national law and these are: 1) it must be clear and precise; 2) Unconditional; and 3) it must not be dependent on implementing measures by Member states (member state discretion) (Armin, 2017, p. 166). As a result, this allows individuals and private companies to enforce their rights and obligations more accurately and confidently, which reduces conflict and brings more unity within the Community (Nollkaemper, 2014, p.108). The reason for this test is to

make sure that the rules of Community law are fully and equally applied throughout member states (for the purpose of more consensus) from the date of their initiation and for however long they may exist according to the court in *Simmenthal SpA* [1978].

Moreover, the conditions for the direct effect of Treaty Articles was further loosened in the case of *Defrenne v Sabena (No.2)* [1976], which concerned the provision of Art 141 EC (currently Art 157 TFEU) for the application of Men and Women to receive equal pay for equal work; Although the provision lacked sufficient precision to be directly effective (the terms “pay” and “work” was not defined), the court however, held that the principle of Art 141 for equal pay and work could have direct effect. Importantly, further protection was given to individuals’ Community rights in *Defrenne v Sabena (No.2)* [1976] after the court added that the provision of Art 119 (now 141) of the EEC Treaty on equal pay for equal rights, could be invoked against private employers (Horizontal effect). In general, claimants will look to utilize Direct effect against the state or emanation of the state (Vertical Direct effect), however, this principle was again broadened by permitting Treaty articles to confer rights on individuals, and allowing them to be enforceable against other individuals (if it meets the necessary conditions) such as private companies, employers, or even citizens through the enactment of Horizontal Direct effect (according to the court’s comments) (Craig and Burca, 2015, p. 192). Moreover, although Treaty Articles are considered to be the foundation of community law, the CJEU has ruled on the direct effectiveness of other forms of secondary legislations such as Regulations, Decisions, Directives, Recommendation and opinions (further expanding the new legal order) (Armin, 2017, p. 170).

The Direct effectiveness of Regulations was seen as reasonable and necessary (unlike the Treaty Art) because Article 288 of TFEU states that a regulation 'shall be binding in its entirety and directly applicable in all Member states' (Craig and Burca, 2015, p.198); This implies that, because regulations immediately become a part of national law, it would contradict the 'New legal order' if it could not be relied upon by individuals in members states and subject to enforcement (if they meet the conditions) (Thai, 2002, p.11). Furthermore, the courts confirmed the direct effect of regulations in *Commission v Italy* [1973], and criticized Italy's attempt to alter the specification of a community law (which would have undermined direct effect) by slaughtering cows in order to reduce milk surplus in Europe. Moreover, despite the reality that Art 249 EC never mentioned the 'direct applicability' of Decisions, the ECJ concluded in *Grad* [1970] that Decisions could indeed have Direct Effect. In an attempt to create fairness between Member states, the ECJ seems to rely on their creativity to enhance the doctrine of direct effect in order for it to be equally applied in every legislation if possible; Although the court has not mentioned specifically the horizontal direct effect of Decisions, they are however, capable of having direct effect to anyone to whomever they are addressed to (notwithstanding private parties) (Varner, 2001, p. 463). Furthermore, the most problematic area for the "new legal order of international" was the concerns over whether direct effect should apply to Directives; While Article 288 (2) states that Regulations are directly applicable, Directives are binding as to the result to be achieved and it requires further implementation by member states until the time period for the directive has passed (Johannson and Lindstrom, 2017, p. 7). Normally, Directives should not have direct effect because they require further implementation

(and are addressed to member states not individuals), but nonetheless, the court held in *Van Duyn v Home Office* [1974] that Directives could have direct effect and they provided further requirements for its direct effectiveness. Recent research has argued that to give direct effect to directives would weaken the difference between Regulations and Directives which could lead to legal uncertainty and discompose the regime of various types of community acts set down in the EC Treaty (Oberg, 2007, p. 18); However, allowing directives to have direct effect supports the Community's ambition to have legal integration and supremacy of EU law in national courts (Craig and Burca, 2015, p. 201). Moreover, because member states are permitted to implement Directives within their own legal order, individuals can rely on national laws' implementing the provision and not the directive itself (Armin, 2017, p. 171). However, according to further rationale in *Van Duyn v Home Office* [1974], national courts can not rely (as an excuse) on the failure to fulfill the obligations to implement directives properly and on time for not having binding effect once it has been pleaded (vertically) against them and this is known as the "Estoppel reasoning" (Thai, 2002, p. 15). In *Marshall* [1986], a controversial decision transpired after the court held that Direct effect could only be pleaded against the state (vertical effect) and not against individuals (Horizontal effect); *Marshall* tried to sue her employer for her dismissal (she was over 60), claiming that this violated the 1976 Equal Treatment Directive. The ECJ reasoned that if Directives were capable of having horizontal effect, then it would render the distinction between regulations and directives established by the Treaty (Oberg, 2007, p. 20). Consequently, the denial of horizontal effect for directives formed a gap in the legal protection of individuals and the effectiveness of Community law (Emilija, 2019, p. 32);

For instance, If a member state fails to implement a directive on consumers protection, then a consumer (individual) can not enforce their rights against the private party violating these rights as seen in Dillenkofer v Germany [1996]. As an attempt to diminish this gap, the ECJ adopted certain principles in which Directives could be directly effective as possible (slightly given horizontal effect) and these are: i) The adoption of a broader understanding of the “State” to expand the use of vertical effect; and most importantly ii) the development of harmonious interpretation of national laws ‘in the light of’ directives or otherwise known as Indirect effect (Llorens-Albors, 2010, p. 456). In Marshall [1986], the impact of the lack of horizontal effect for directives was lessened by the ECJ after they considered that the Health Authority is an organ of the state (or emanation of the state) as they are controlled by the state. Additionally, the emanation of the state concept was qualified in Foster v British Gas [1990], and it is an extension which precludes certain administration from not implementing directives properly with the unconsciousness belief that it can not be pleaded against them by individuals (which provides further protection and increases the effectiveness of Community provision) (Bakhtina, 2018, p. 244).

Indirect effect was established due to the setback from the denial of horizontal effect for Directives, and the principle originated in a case dealing with gender discrimination to obtain employment (Von Colson [1984]). The term refers to the requirement of Community laws (even it lacks direct effect) to be taken into account when national courts are interpreting national legislation (Armin, 2017, p. 173). Surprisingly, the court in Von Colson [1984] allowed the indirect effect doctrine to be used on a directive that does not meet the justiciability criteria to be directly effective

(precision, unconditional, and clear); Consequently, by allowing national courts to interpret national norms in light of the directive, the ECJ accorded effect to a directive that could not have been enforced against the state by individuals (Varner, 2001, p.469). Moreover, Article 4(3) of TEU supported the court with strengthening Indirect effect, as the court decided that it should be “Inherent in the system of the Treaty” and a feature of the requirement of full effectiveness of Community law, which applies to domestic courts and all emanation of the state required to interpret national law (Craig and Burca, 2015, p.210). Consequently, this forced member states to disregard their own interpretation of domestic norms in order to avoid implementing any measures that would alter the effectiveness of directives, which as result, heightened the supremacy of EU law and their “new order of international law” (Klamert, 2014, p. 133). Furthermore, Marleasing [1990] extended the idea of harmonious interpretation further by allowing non implemented directives to guide the interpretation of national law ‘as far as possible’ in disputes between individuals (avoiding horizontal effect); This affected its legal position in an unfavourable way because the court's power to use public international law indirectly, must be first determined by the scope for interpretation permitted by the wording of the national law (Betlem and Nollkaemper, 2003, p. 576). However, the Indirect effect doctrine has proven to be a powerful enforcement tool in the “New legal order of international” (because it is supported by the effective judicial protection), notwithstanding the doubts that national courts occasionally has when applying national enforcement regime, nor is it free from uncertainties of giving access to it against individuals (Marson and Ferris, 2015, p. 9).

Nevertheless, the ECJ provided another way in which a directive could be enforced (Despite sidestepping horizontal effect) by individuals and this is through suing Member States for damages due to failure of implementing a directive (Member State Liability) (Craig and Burca, 2015, p.222). The ECJ used their creativity to establish this doctrine in Francovich [1991] with an attempt to protect the rights of employees (individuals) with regards to EU law. Importantly, direct effect nor indirect effect were available in this case because firstly, the directive did not fulfill the direct effect criteria (Clear, precise, unconditional) and Secondly, the directive had not been implemented by the national court (Italy); As a result, the court used state liability as a remedy that gives for the right to compensation for damages triggered by Member state's breach of Community law (This makes individuals feel more secure) (Johannson and Lindstrom, 2017, p. 35). Furthermore, the claim against Italy in Francovich [1991] was permitted mainly to satisfy the need for the full effectiveness of EU law, the provision of Article 4 (3) of TEU, as well as the requirement to act in good faith; These principles forms obligation on Member States to be penalised for losses and damages to individuals from a breach of Community law, which places pressure on Member States (Johannson and Lindstrom, 2017, p.36). The criteria for which Member State Liability can be used was highlighted in Brasserie du Pêcheur [1996] and these are: 1)The provision infringed must have intended to give rights to individuals; 2) The breach of the Community law must be sufficiently serious; and 3) the link between the breach and the damages suffered by the claimant must not be too remote (Marson and Ferris, 2015, p. 14). The ECJ slightly gave more protection to states by expressing that a breach of a Directive or EC law, will not be considered as a 'sufficiently serious' breach if the member states

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have attempted (taken discretion) to implement a directive but genuinely fails;

Undoubtedly, this statement is problematic because it provides a legitimate defence for member states under state liability which limits the ability for individuals to enforce their rights under EU law, thus contradicting the 'New legal order of international law'

(Marson, 2014, p. 8).

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