THE DIRECT EFFECT OF TREATY PROVISIONS

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Abstract

The purpose of the paper is to analyze the direct effect of Treaty provisions, starting from the moment when the doctrine of direct effect of Community law was created by ECJ up to the present time. To this end, the first objective is to define the concept of "direct effect", by revealing the broad and the narrow sense of the notion, and the relation between two different notions: direct effect and direct applicability.

Following to the definition of the concept, the next objective is to point out the importance of analysing the matter – both as a major difference from international treaties, and as one of the most important characteristics which define the relation between European law (with focus to the Treaties) and domestic law.

In this context, the main objective of the paper is to present the evolution of the notion and conditions under which Treaty provisions can achieve direct effect, as they derive from European ECJ' decisions, starting from vertical effect (negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level), to horizontal effect, and finally to the indirect effect (duty of consistent interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

At the same time, in close relation to the presentation of ECJ' decisions, the paper also intends to present the main academic debates on the same issues (evolution of the notion and conditions for achieving direct effect), consequent to creation and evolution of the doctrine of "direct effect".

As a final objective, the paper will summarize the meaning of the notion of "direct effect" and the actual conditions required for incidence in the case of Treaty provisions, and also the practical implications of the expansion direct effect of Treaty provisions, both socially, and financially.

Key words: *direct effect, direct applicability, vertical direct effect, horizontal direct effect, indirect effect*

Introduction

The purpose of the paper is to analyze the direct effect of Treaty provisions, starting from the moment when the doctrine of direct effect of Community law was created by ECJ up to the present time.

When the EC Treaty was drafted, the primary means by which Community law was thought to be enforced against the Member States was represented by the procedure set out in what is now article 226 EC; from its earliest case law until the present day, the Court has engaged in a prolonged and radical programme that has resulted in the judicial creation of a series of ways in which national courts, rather than the Court of Justice, are expected to play the main role in the enforcement of Community law against the Member States, national authorities and private parties.

Three principal means have been established: 1. the creation and subsequent expansion of the doctrine of direct effect; 2. the creation and subsequent expansion of the duty of consistent interpretation (also known as "indirect effect"); 3. the creation and subsequent expansion of the principle of states liability.

As pointed out before, this paper will analyze the doctrine of direct effect, focused on the direct effect of Treaty provisions; the importance of analysing the matter resides in the fact that the

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topic dealt with is central to the study of EU law - it has been developed by the ECJ and it's jurisprudence has become more complex over the years.

Thus, on the one hand, the doctrine of direct effect of EC law (which applies in principle to all binding Community law) presents major differences compared to the same notion in international law (notably referring to international treaties), and, on the other hand, the direct effect of EC law is one of the most important characteristics which define the relation between European law and domestic law and also the basis for supremacy of EC law.

In this context, the paper will analyze the meaning of the notion of "direct effect" (also making references to other close, but different notions – direct applicability, immediate applicability, invocability), will present the evolution of the notion and conditions under which Treaty provisions can achieve direct effect, as they derive from ECJ' decisions, starting from vertical effect (raising EC law against the Member State or a state entity - in case of negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level), to horizontal effect (invoking EC law among private parties), and finally to the indirect effect (duty of consistent interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

The paper will also summarize, consequent to the presentation of the aspects indicated above, the meaning of the notion of "direct effect", the actual conditions required for incidence in case of Treaty provisions, and the practical implications of the direct effect of Treaty provisions, both socially, and financially.

At the same time, in close relation to the presentation of ECJ' decisions, the paper intends to present the main academic debates on the same issues (evolution of the notion and conditions for achieving direct effect), consequent to creation and evolution of the doctrine of "direct effect".

Literature review

The juridical literature relevant on the matter (1) emphasized that the starting point was 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 kind of enforcement: on the one hand, the Commission did not have the institutional capacity to prosecute more than a tiny fraction of all possible infringements and therefore the remedy under article 226 was weak; on the other hand, the article could not be used against private individuals (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, so that individuals could rely on them before their national courts and challenge inconsistent national action, thereby bringing individuals into the Community-legal order (this step had to be taken since the texts of the EC Treaties made no reference to the effect which their provisions were to imply, and thus the original Member States may not have thought that the provisions of these Treaties would be treated any differently from those of other international treaties).

In the same line of reasoning, other authors (3) pointed out that, when the EC Treaty was drafted, it was envisaged that the procedure as set out in what is now article 226 EC would be the primary means by which Community law is enforced against the Member States; still, the Court

judicially created a series of ways in which national courts, rather than the Court of Justice, are expected to enforce Community law against the Member States, national authorities and private parties.

Three principal means established were: the creation and subsequent expansion of the law of direct effect (Van Gend en Loos and its progeny); the creation and subsequent expansion of the duty of consistent interpretation (also known as “indirect effect” - Von Colson and Marleasing); the creation and subsequent expansion of the principle of states liability (Francovich and Brasserie du Pêcheur/Factortame III).

The cases that have established and developed these principles are among the most important - and the most revolutionary - ever decided by the Court of Justice. The law that has been created in these decisions is, to a large extent, what marks the European Union out as being so different from other international organizations.

As for terminology, The ECJ used interchangeably the terms of “direct effect”, “direct applicability” and “immediate applicability”, which started a debate in juridical literature on whether they were synonyms or not and the meaning of each notion apart.

The English literature preferred the terminology of “direct effect” (4) and underlined a distinction between a broader and a narrower sense of the notion - in a broad sense, it means that provisions of binding EC law which are clear, precise, and unconditional enough to be considered justifiable can be invoked and relied on by individuals before national courts, and in the narrower (or classical) concept direct effect is defined in terms of the capacity of a provision of EC law to confer rights on individuals.

A part of French literature (5) opted for the term “direct applicability”, which meant that the European provision is unconditional and complete (it needs no transposition measures), pointing out that “direct effect” (in the narrow sense of the notion adopted by English literature) consisted in obtaining on the part of the national judge the application of the European norm in the case; therefore, concluded that the term “direct applicability” was preferable.

Also, they came to the conclusion that, at the present time, the criteria for recognizing direct effect reduce to a simple functional exigency, respectively a European provision has direct effect on the condition that it had characteristics to make it susceptible of jurisdictional application.

Connected to the “justiciability” of Community law, they stressed that a European provision fulfilled this condition even when the judge was called to appreciate upon it (which was not the case for legislative or executive appreciation); also, the “justiciability” depends on the type of application made by the national judge (in case of application of European law as a consequence of lack of national law relevant on the matter or in case of substitution of domestic law, the Community provision in discussion must be unconditional and sufficiently precise; in case that the national judge must appreciate upon compatibility between domestic and Community law, the latter was ”justiciable” even if domestic authorities possessed discretion on the matter, on the condition that it’s limits should be unconditional and sufficiently precise); finally, all Community law is ”justiciable” if it serves to interpretation of domestic law by a national judge.

Other French authors (6) made a difference between “invocability”, on the one hand, and “direct effect”, “direct applicability”, on the other hand, underlining that the expression “invocability” seemed to be preferred by the Court in case of certain secondary European law provisions (especially directives) in order to make a difference form other European law provisions (in case of which were generally used the expressions “direct effect”, “direct applicability”).

Others (7), using the expressions “direct effect”, “direct applicability” as ECJ did (interchangeably), mentioned generally that they referred to every individual’s right to ask the

national judge to apply treaties, regulations, directives and European decisions, irrespective of the domestic legislation.

Romanian literature (8) also made a clear distinction between “direct effect” and “direct applicability” - “direct applicability” means that the European law is unconditional and complete (it needs no transposition measures) and “direct effect” means that a provision of EC law confers rights on individuals, which can be invoked and relied on before national courts.

This distinction has also been agreed by other authors (9), who pointed out that direct applicability automatically implies that the norm has direct effect, whereas a provision that has direct effect is not automatically directly applicable (the case of directives, for example).

Other authors (10) emphasized the distinction between direct applicability and immediate applicability – the first expression refers to the normative content of European law, and the second to the temporal relation between Community law and the obligation to apply it by those to whom it addresses.

Apart from the debates presented above, all literature agrees on the incontestable fact that the doctrine of direct effect is a creation of the European Court of Justice and generally present the same evolution of the doctrine and conditions for direct effect, as they come out from the Court’s jurisprudence, starting from vertical direct effect (recognized in three steps - negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level) to horizontal effect, and finally to indirect effect, as will be presented in the next sections of the paper.

PAPER CONTENT

Definition

As shown above, a part of juridical literature made a clear distinction between a broader and a narrower sense of the notion of direct effect.

They pointed out that 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 referred to as “objective” direct effect - (11); on the other hand, the narrower “classical” definition of direct effect is usually expressed in terms of the capacity of a provision of EC law to confer subjective 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 an 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.

Independent of the adoption of the broad or the narrow definition of direct effect, the notion of direct effect should be clearly differentiated from the notion of direct applicability, which means that the European law is unconditional and complete (it needs no transposition measures).

Finally, focused on direct effect of Treaties (which have complete and conditional direct effect), it should be pointed out that complete direct effect means that the provision in discussion has both vertical and horizontal direct effect, and conditional direct effect imposes fulfillment of certain conditions (sufficiently precise, clear and unconditional); vertical direct effect allows

Community law to be invoked against a Member state or national authorities and horizontal direct effect refers to legal proceedings against a private party - the vertical/horizontal distinction requires the ECJ and national courts to differentiate between state entities and non-state entities.

Relevance of the matter

The importance of analysing the direct effect (of Treaties provisions) resides in the fact that the topic is central to the study of EU law and presents clear distinctions from the same notion, as it appears in international law.

Thus, on the one hand, the doctrine of direct effect of EC law (which applies in principle to all binding Community law, in the sense that confers rights on individuals, which can be invoked and relied on before national courts) presents major differences compared to the same notion in international law (notably referring to international treaties), as in the Danzing case the International Court of Justice stipulated that, as a general rule, an international treaty cannot give birth to rights and obligations on individuals (12).

The conclusion is justified on the fact that 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; therefore, in countries which adopt a 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 (13).

Since the texts of the EC Treaties made no reference to the effect which their provisions, the original Member States may not have envisaged that the provisions of these Treaties would be treated any differently from those of other international treaties - the ECJ nonetheless held that the EEC Treaty was different from other international treaties and that individuals could derive rights from its provisions that could be enforced at national level.

Still, the theory of direct effect formulated by the European Court is not absolute novelty, as international law acknowledged it, but only in the case of self-executing treaties (14) – in these conditions, the originality of the doctrine in European law consists rather in the area of action of the notion of direct effect. As some authors remarked (15), in international law operates the presumption that provisions do not have direct effect, but for the exception underlined before; on the contrary, in Community law the presumption is reversed, in the sense that, as a general rule, all European law has direct effect, but for exceptions regarding individual qualities of each provision apart (and not concerning the category of normative instruments to which the provision belongs).

On the other hand, the direct effect of EC law is one of the most important characteristics which define, along with the supremacy and immediate application of Community law, the relation between European law and domestic law (as Community legal system is independent of each national legal system).

Finally, after the ECJ had set out the doctrine of direct effect in case Van Gend and Loos, giving rights to individuals to invoke Community law in their national courts, and thus providing for Member States the possibility of making Community law as effective as possible, it next moved to the next question of what happens in a situation of conflict between national law and Community law – therefore, the development of the doctrine of supremacy of Community law over national law was a logical sequel to the doctrine of direct effect.

Evolution of the concept in case of Treaty provisions

Article 249 (ex article 189) of the EC Treaty provides that regulations are "directly applicable in all Member States"; thus, regulations become automatically part of national legislation and do not require any further implementation.

Article 249 stipulates that directives are "binding as to the result to be achieved", but the Member States are left to choose how they implement them.

The EC Treaty is silent on the subject of Treaty articles.

If the situation had been left at that, and the Community rules had simply been regarded as similar to international law, this would have meant that the only way in which individuals could challenge European Law was where it had been incorporated into national law in the form of regulations (directly applicable in all Member States).

The ECJ changed matters by means of it's jurisprudence over the years, in a series of well known cases - literature (16) pointed out that there were 3 main steps in case of Treaty provisions - starting from acknowledging vertical direct effect for Treaty provisions (raising EC law against the Member State or a state entity) in case of negative obligations, positive obligations and incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level, to admitting horizontal direct effect (invoking EC law among private parties), and finally to recognizing the indirect effect (duty of consistent interpretation or the principle of harmonious interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

Having established that Treaty Articles could have in principle direct effect, the ECJ then moved on to expanding the concept in two related ways: on the one hand, the conditions for direct effect were subtly loosened, and on the other hand, direct effect thus modified applied to regulations and decisions, as well as Treaty Articles.

Vertical direct effect – negative obligations

The foundations of direct effect were laid down by ECJ in the decision Van Gend en Loos, in 1963, a decision which remains the most famous of all of its rulings.

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 entering into force of the EEC Treaty, contrary to Article 12 of the Treaty.

The company contested the import duty and, on appeal against payment before the domestic courts (Dutch Tariefcommissie) and raised in argument article 12 mentioned before; in this context, two questions were referred to the ECJ under Article 177 EC, respectively 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, claim individual rights which the courts must protect); the second question was whether the charged duty was an unlawful increase (only the answer to the first question is important for the topic dealt with by the present paper).

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 was within the exclusive jurisdiction of each Member State's domestic court; The Netherlands government appreciated that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of the authors of the Treaties.

The ECJ pointed out though that, in order to answer the question raised and establish whether the provisions of a founding Treaty had the same effect as those of an international treaty, it was necessary, first of all, to consider the goal of having created the Communities and also the spirit, the general scheme and the wording of those provisions.

Thus, the objective of the EEC Treaty, which was to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies more than an agreement which merely creates mutual obligations between the contracting states; ECJ stressed that this view was confirmed by the preamble to the Treaty, which referred not only to governments, but also to peoples, the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens; also, noted that the nationals of the states brought together in the Community were called upon to cooperate in the functioning of the Communities (through the intermediary of the European Parliament and the Economic and Social Committee).

Secondly, ECJ also made reference to article 177 (actual 234) of EEC Treaty, respectively the task assigned to the Court of Justice under Article 177, the object of which was to secure uniform interpretation of the Treaty by national courts and tribunals, and concluded that the states had acknowledged that community law had an authority which could be invoked by their nationals before those courts and tribunals.

In these conditions, ECJ underlined that the conclusion to be drawn 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 obligation 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".

The ECJ established thus in Van Gend en Loos the initial conditions to be met so that a Treaty article could have direct effect; starting from the requirement, familiar from international law, that a provision should be essentially self-executing, the criteria which were to be met were as follows: negative, clear and precise, unconditional, containing no reservation on the part of the Member State, an not dependent on any national implementing measure (but the development of direct effect in subsequent years was characterized by the broadening and loosening of these initial conditions).

These criteria imply a restrictive vision of the range of Treaty provisions that may be invoked before national courts; in practice, however, they have been interpreted liberally over the years, ECJ's jurisprudence emerging to the idea of liberalization and expansion of direct effect.

As for the first condition (the Treaty article must contain a negative obligation), it was to be dropped, as it will be presented, altogether, as ECJ later also recognized direct effect for Treaty provisions containing positive obligations and even in the case of incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level.

The conditions 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; they were explained in literature (17) as follows: "clear and precise" is a necessary condition for a correct interpretation of the norm by he national judge, "unconditional" refers to a special category of EEC provisions, which stipulated transitory obligations during the transition period that lasted until 1970 (at the end of this period, this kind of obligations would become unconditional).

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 ECJ did not preclude the direct effect of article 28, since the cases coming within article 30 were exception and did not undermine the force of the clear obligation contained in what is now article 28. Similarly, in Van Duyn, 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 application of these limitations is subject to judicial control".

The idea that direct effect could apply even where the Member States possessed discretion, on the ground that the exercise thereof controlled by the courts, represented a significant juridical shift in thinking about direct effect.

Finally, the idea that direct effect was precluded where further measures were required at national level was also modified, as the ECJ's strategy was to fasten on the basic principle that governed the relevant area; therefore, should the treaty article 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 Community national establishment nationals in States, other than that of their nationality, were to be abolished "within the freedom 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 – the case is to be presented bellow).

Vertical direct effect – positive obligations

As exposed above, ECJ first acknowledged direct effect for Treaty provisions containing negative obligations and therefore a natural question appeared – the doctrine of direct effect only concerned negative obligations?

This aspect was soon to be clarified, on the occasion of a preliminary ruling on the basis of the reference made by a German court, in the Lutticke case, which concerned the direct effect of article 95 (3) of the EEC Treaty – a transitory provision which no longer is in force today.

The ECJ found that article 95 (3), which imposed a positive obligation to abolish any discriminatory taxation was directly effective; individuals could, therefore, rely on this provision before their national courts from that time.

Vertical direct effect - incomplete implementation of principles

The third step into liberalizing the direct effect of Treaty provisions had its starting point in the Reyners v. Belgium case.

Jean Reyners was a Dutch national who obtained his legal education in Belgium, but was refused admission to the Belgian Bar (as lawyer) solely on the ground that he lacked Belgian nationality, a condition imposed by domestic law. He challenged the relevant Belgian legislation before the Conseil d'Etat, which referred several questions to the ECJ, including the question whether article 52 of the Treaty was directly effective, in the absence of implementing directives under articles 54 and 51 of the Treaty.

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, which was reserved to the legislative institutions of the Community and the Member States.

The ECJ rejected the argument, starting from the idea that the rule on equal treatment of nationals was one of the fundamental legal provisions of the Community, which was, by its essence, capable of being directly invoked by nationals of all the other Member States.

In order to support this conclusion, ECJ pointed out that, "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 fulfillment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures…the fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfillment…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; 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 harmonization of national laws in this field, the Treaty could be directly invoked by individuals in order to challenge obvious discrimination based on nationality; the basic principle of non-discrimination was established to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved.

Connected to the case presented above, an important remark is to be made, respectively the idea that, 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.

The Defrenne judgment relaxed further the original Van Gend en Loos criteria for direct effect.

In this case (Defrenne v. Sabena), under Belgian law, female air stewards were required to retire at the age of forty, unlike their male counterparts. Gabrielle Defrenne had been forced to retire from the Belgian national carrier as stewardess on this ground in 1968. She brought an action against the former employer, Sabena, claiming that the lower pension payments this entailed breached the principle in article 141 EC that 'each Member States shall ensure and maintain the principle that men and women shou1d receive equal pay for work of equal value'.

On this point, there appeared to be a number of obstacles to Article 141 being directly effective - the principle seemed to be neither clear, nor unconditional, as complete implementation of the principle would require elaboration of further criteria for recognizing discrimination and implementing measures to abolish it.

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 (the first obstacle, concerning the lack of implementation of the principle, had already been overcome in Reyners).

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, 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 stipulated by article 141, that of equal pay for equal work, rather than to focus on the fact that there might be cases (unlike the one under discussion) involving complex factual questions regarding "work of equal value", concerning jobs which were different in nature.

Horizontal direct effect

Defrenne v. Sabena marked a significant liberalization of the doctrine of direct effect, in that it brought provisions of Community law that were less than "clear and unconditional" within the scope of the doctrine.

The case is important, in addition to this, for a second reason. In Van Gend en Loos, the party against whom the trader wished to have EC law enforced was the Dutch customs authorities, respectively a part of the Dutch state; in the Lutticke case, also, European law was enforced on an official authority of the state – these cases both concerned actions of individuals against official authorities, involving vertical direct effect.

In Defrenne, by contrast, the applicant had taken action against a private company – the Belgian airline, Sabena – a specific aspect which brought in the distinction between vertical direct effect and horizontal direct effect (direct effect in the context of legal proceedings against a Member State is known as "vertical direct effect", whereas direct effect in the context of legal proceedings against a private party is known as "horizontal direct effect" - the vertical/horizontal distinction imposes the ECJ and national courts to differentiate between state entities and non-state entities).

The importance of the Court's ruling in Defrenne was its recognition that Treaty provisions (such as article 141) were capable of bearing both vertical and horizontal direct effect; therefore,

they may be invoked, relied on and enforced in domestic legal proceedings whether the party proceeded against is the state or a private party.

The same conclusion was underlined in the Walrave case, concerning employment in case of organization of cyclism contests (in discussion was the compatibility between the provisions stipulated in the rules of the Union Cycliste Internationale, which imposed that the pacemaker must be of the same nationality as the stayer and EC law), where the Court stipulated that the prohibition on discrimination based on nationality contained in articles 7, 48 and 59 of the EEC Treaty does not apply only to the action of public authorities, but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services, including agreements and rules which do not emanate from public authorities.

Indirect effect

According direct effect to provisions of Community law (including Treaty provisions, which are the topic of this paper) is not the only way of enabling their enforcement by national courts and tribunals - the European Court was concerned to give as much as possible useful effect (usually the term “effet utile” is used untranslated) to Community law; it tried therefore to circumvent the difficulties as to direct effect described above (in case that the EC norm in discussion did not satisfy the basic conditions – sufficiently clear, precise and unconditional) by pursuing another line of reasoning.

As already presented, the Court of Justice may enforce a provision of Community law, whether it has direct effect or not, by means of the procedure stipulated in article 226 to 228 EC; in addition, national courts may enforce measures of EU law, even in case that they should not have direct effect (as they do not fulfill the cumulative conditions presented above), through two additional means: namely, through the duty of consistent interpretation - “indirect effect” - and through the doctrine of state liability.

The establishment of the duty of consistent interpretation appeared in Von Colson case, which took in discussion a directive invoked during the proceedings before a German labour court, as its terms were insufficiently clear and unconditional to satisfy the test for direct effect; however, the Court of Justice ruled that this did not necessarily mean that the directive could be of no assistance to the claimants.

The Court’s reasoning in support of this conclusion is, in some respects, reminiscent of its reasoning in Van Gend en Loos. In particular, the fact that the EC Treaty contains no explicit authority for the proposition that national courts are required to interpret and apply provisions of national law in conformity with Community law did not stop the Court of Justice making such a proposition (the Court explicitly relied on two sources of law in support of its establishment of the doctrine of indirect effect: article 6 of Directive 76/207/EC in discussion and article 10 EC - the latter contains the “fidelity principle”).

The Court's ruling in Van Colson established the duty of consistent interpretation as being limited to the specific context of the interpretation by a national court of national law whose explicit purpose was the transposition of Community law (and the particular of directives) into national law.

This limited interpretation was dropped by the Court in its ruling in the Marleasing case, which 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” (18).

Expanded the law of indirect effect in two ways: first, by giving it a more wide ranging content, requiring all national legislation to interpreted in the light of EC law, irrespective of whether it was implementing legislation or not, and irrespective of whether it was enacted prior or subsequent to the provision of EC law in question; and secondly, strengthening the national courts' interpretive duty.

Still, the risks implied in using the doctrine of indirect effect have been recognized by the Court of Justice in two ways: first, the Court has held that indirect effect does not require contra legem interpretations of national law (the strength of the interpretive obligation is not so strong as to require a provision of national law to be given a meaning that contradicts its ordinary meaning); secondly, the Court has been particularly cautious of using the doctrine in the field of criminal law, where legal certainty is particularly important for safeguarding the liberties of the individual.

Liberalization of the doctrine of indirect effect has been made in Pfeiffer case, where ECJ stipulated that "the requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction to ensure the full effectiveness of Community law when it determines the dispute before it …".

The judgment in Pfeiffer illustrates thus the extent to which the Court has developed the doctrine; effective judicial protection may have originated with the terms of Article 6 of Directive 76/207/EC, but it is no longer so confined - on the contrary, it is now "inherent within the system of the Treaty", and applies to all EC law, including Treaty provisions.

Moreover, concerning the question of which instruments of European law national courts are required to consider when applying indirect effect (it might have been thought, in the wake of Von Colson, that national courts would be required to consider only such instruments of European law as may be directly enforceable in national courts - i.e., Treaty provisions, Regulations, Decisions and Directives), in 1989, however, the Court established in the Grimaldi case that the duty of consistent interpretation was to be taken into account not just for "hard law", but also of legally non-binding recommendations.

A final point about the duty of consistent interpretation needs to be made, respectively to the Pupino case, where the Court recognized action of indirect effect in the third pillar of the European Union.

The case arose a dispute relating to the interpretation, by an Italian criminal court, of Council Framework Decision 2001/220/JHA, adopted under article 34(2)(b) TEU, which provides that "Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of farm and methods. They shall not entail direct effect".

The significance of Pupino appears in two ways. First, there is no equivalent in the Treaty on European Union of Article 10 EC, the one provision of the EC Treaty on which the Court of Justice had expressly relied upon in support of its creation of the duty of consistent interpretation in Von Colson (as indicated in Pfeiffer, the duty is now seen by the Court as one which, as direct effect has always been, requires no textual justification - it is rather a duty that inheres "within the system" of the Treaties). Secondly, the judgment is significant for its decoupling of indirect effect from direct effect (article 34 TEU makes it plain that Framework Decisions under the third pillar cannot entail direct effect, yet Pupino shows that, despite this, they can have indirect effect).

Conclusions

The key reason given by the Court for the direct effect of Treaty provisions - a doctrine not spelled out by Treaties themselves, but created by the European Court's jurisprudence - was that

the fundamental aims of the Treaty and the nature of the system it was designated to create would be seriously damaged if EC law clear provisions could not be domestically enforced by those they affected (the same line of reasoning was later reiterated when acknowledging indirect effect for Community provisions).

Juridical literature suggested a distinction 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 original conditions for direct effect have been loosened in the years since Van Gend en Loos; the current position is that Treaty provisions have conditional and complete direct effect, which means that, provided that they fulfill the basic criteria (sufficiently clear, precise and unconditional), have both vertical and horizontal direct effect, and therefore may be invoked in legal proceedings not only against Member States and state entities, but also against private parties.

On the other hand, 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 - indirect effect provides different ways in which Community law can impact on national legal systems. Also, the principle that national law should be interpreted in the light of EC law is a broad one – it applies not only to directives (although they were the starting point), but also EC Treaty provisions (and general principles of EC law, international agreements entered by the EC, other forms of non-binding EC law).

The implication of the creation of direct effect was enormous; thus, the ECJ conceived a new way of strong enforcement method, which 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 strengthened the effectiveness of Community norms – which appeared as a sanction for those Member States which had not taken the appropriate measures to implement EC law.

Also, by involving individuals and all levels of the national court system directly in the process of their application at domestic level, direct effect appears as a guarantee, a supplementary legal protection for individuals, who may invoke before their national courts the rights conferred to them by EC law.

Finally, from a theoretical point of view, the development of the doctrine of supremacy of Community law over national law was a logical sequel to the doctrine of direct effect.

Apart from the theoretical implications presented above, there were cases when ECJ’s stipulations had important socio-economic consequences; e.g., the finding of horizontal direct effect in Defrenne had considerable practical implications - on the one hand, protection for women in the workplace was significantly enhanced; on the other, the financial implications were considerable, as the immediate burden of compliance fell upon all parties against whom the right could be asserted (the Irish government argued, for example, that the costs of compliance would exceed Irish receipts from the European Regional Development Fund for the period 1975-77 and the British government argued that it would add 3.5 per cent to labour costs).

On the other hand, the development of the principle of harmonious interpretation (indirect effect) is also of important practical significance; despite the greater academic attention that is generally given to direct effect, it is indirect effect that is currently the main form of ensuring effect of EC law (as shown before, the doctrine of indirect effect has originally applied to directives - whether correctly, incorrectly or not transposed at all – but later cases extended it’s application to all EC law, including Treaty provisions which lack direct effect).

As for the future, it is clear that the doctrine of direct effect of Treaties has been well established by the European Court in its jurisprudence and largely discussed in juridical literature; the indirect effect of Treaties, especially the area to be covered by this notion, remains though a topic to be analyzed, in the light of the beginning made by the Pupino case, which extended indirect effect to the third pillar of the European Union.

Starting from the Court's considerations in Pupino, according to which "it would be difficult for the Union to carry out its task effectively if the principle of loyal coo-operation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law, were not also binding in the area of police and judicial co-operation in criminal matters, which is moreover entirely based on co-operation between Member States and the institutions", whether the Court of Justice will keep following this line of reasoning remains to be seen.

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