Horizontal Direct Effect of Directives: Reform Long Overdue?

By Beatrice Grasso

Introduction

Since its introduction in the European legal system, the principle of direct effect has generated very conflicting opinions. On the one hand, in fact, it is seen as fundamental to protect citizens’ rights in a decentralised system of enforcement such as that of the European Union; on the other, however, it has been identified as an inappropriate exercise of judicial activism on part of the Court of Justice of the European Union (previously known as European Court of Justice; hereinafter referred to as ‘Court of Justice’ or ‘the Court’), leading to the excessive erosion of individual Member States’ sovereignty.

This issue became particularly controversial with respect to directives, which, because of their nature, are more dependent on Member States’ willingness to implement them promptly and correctly, with disagreements emerging especially in relation to their potential to confer rights directly on individuals. In light of the great importance of the principle of direct effect, particularly in relation to directives, and its potential repercussions on the rights and obligations of individual citizens, this article seeks to provide a critical evaluation of said principle and of the alternative means developed by the Court of Justice in order to mitigate disadvantages caused to individuals by the absence of horizontal direct effect for directives.

In order to achieve this objective, a brief overview of the development of direct effect will be provided firstly. Subsequently, consideration will be given to the reasons why the Court of Justice refused horizontal direct effect for directives. In the final part, alternative means of redress available to individuals will be identified and their effectiveness assessed. It is here submitted that, although the alternative methods developed by the Court to mitigate the effects of its decision not to allow individuals to rely on direct effect of directives in proceedings which do not involve public entities can be fairly effective if taken jointly, they tend to generate considerable uncertainty and impose a

greater financial burden on individuals and States alike than horizontal direct effect otherwise would. Despite the shortcomings of such doctrine, and the disagreements it generates, it is here contended that, on balance, its introduction in EU law would be a highly necessary and long overdue one.

**Origin of the principle of direct effect**

The concept of direct effect was first introduced by the Court of Justice in the landmark case of *Van Gend en Loos*. This principle, which is not included in any of the Treaties, was, however, not wholly invented by the Court of Justice, but was rather the transposition and reformulation of a pre-existing principle of public international law. The general rule in public international law provides that international treaties do not confer rights directly on individuals: it is, in fact, the governments’ task to introduce such provisions into national legislation, so as to carry out their obligations under any treaty. An exception to this rule is nevertheless present, and was identified by the Permanent Court of International Justice (PCIJ) in its judgment in the *Danzig* case as far back as 1928, where it held that some treaties – now commonly referred to as ‘self-executing’ – could confer direct and personal rights on individuals, but only if it was the parties’ express intention to adopt a treaty to create individual rights and obligations enforceable by municipal courts.

In *Van Gend*, which concerned the introduction of a new custom duty in contrast with the provisions then contained in the EEC Treaty, the Court of Justice converted the *Danzig* exception into one of the basic principles of EU law, by holding that a sufficiently clear, precise and unconditional Treaty provision could be capable of conferring directly enforceable rights upon individuals. This was possible because the (then) European Economic Community constituted a ‘new legal order of international law’ for the sake of which States had willingly restricted their

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7 ibid.

sovereign rights in certain fields. In reaching this conclusion, the Court of Justice rejected the Danzig suggestion that such an interpretation should be based on the intention of the parties, but rather applied, as it usually does, a teleological approach of interpretation, striving to give effect to the spirit of the Treaties and achieving the objectives set therein, rather than adopting the strictly textual interpretative approach endorsed by the PCIJ. As the intention behind the Treaties was to create an internal market, it was necessary to ensure consistency in their application and enforcement in all Member States if this objective was ever to be achieved. The fact that the creation of an internal market directly concerns individual citizens within the Union meant that they had themselves become subjects of this ‘new legal order’ as much as Member States, therefore rendering it necessary for them to be able to enforce their rights and obligations and access remedies before their national courts in all matters governed by EU law.

Although Van Gend only introduced direct effect for Treaty articles creating obligations for States towards individuals in a vertical relationship (‘vertical direct effect’), the doctrine was later substantially expanded to comprise also Treaty articles which placed duties on other individuals, thereby rendering them enforceable also in horizontal relationships (‘horizontal direct effect’). Over the years, the Court of Justice gradually expanded the scope of the principle, establishing that regulations could also have direct effect, both vertically and horizontally. As for directives, they posed a particular problem: given that they are not directly applicable but only require Member States to achieve a particular result, thus leaving them wide discretion as to the methods used, it

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12 ibid.
13 ibid; Alina Kaczorowska, European Union Law (3rd edn, Routledge 2013) 266.
14 Case 43/75 Defrenne v Sabena [1976] ECR 455
was initially thought that they would not be capable of fulfilling the \textit{Van Gend} criteria.\textsuperscript{18} The same issue initially seemed to arise also in relation to decisions and general principles, as they too are not directly applicable, that is, they require further implementing legislation to be passed in order for them to take effect in the various Member States.\textsuperscript{19}

\textbf{Introducing direct effect of directives}

A change in stance came with the case of \textit{Grad},\textsuperscript{20} where the Court of Justice conceded that non-directly applicable provisions, such as directives or decisions, may have direct effect, provided their ‘nature, background and wording’ were capable of doing so.\textsuperscript{21} The Court of Justice relied on the doctrine of effectiveness (generally referred to by its French name, \textit{effet utile}) to guide its interpretation of the law. Under this doctrine, if the purpose of a provision has been clearly identified, any subsequent interpretation of the specific terms of the provision itself must be interpreted so as to guarantee that the provision will retain its overall effectiveness.\textsuperscript{22}

In \textit{Grad}, the Court adopted the view that the introduction of direct effect for non-directly applicable provisions was needed to ensure that the \textit{effet utile} of such measures would not be weakened by the fact that nationals of Member States could not invoke certain provisions in national courts, despite the obligation that these provisions placed on Member States to act in a particular way.\textsuperscript{23} It was therefore necessary to promote integration and to reinforce legal safeguards for individuals in national courts by granting direct effect also to decisions and, potentially, directives.\textsuperscript{24}

Subsequently, the Court of Justice confirmed this possibility in the case of \textit{Van Duyn}.\textsuperscript{25} Miss Van Duyn, a Dutch national, sought to work at the British Headquarters of the Church of Scientology, but was refused leave to enter the country by British immigration authorities on grounds of public

\begin{itemize}
  \item \textsuperscript{18} AJ Easson, 'The "Direct Effect" of EEC Directives' 28 ICLQ 319, 323-324, 328.
  \item \textsuperscript{19} ibid.
  \item \textsuperscript{20} Case 9/70 \textit{Grad v Finanzamt Traunstein} [1970] ECR 825.
  \item \textsuperscript{21} ibid, para 6.
  \item \textsuperscript{22} Nial Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 Fordham Int’l L J 656, 674.
  \item \textsuperscript{23} Case 9/70 \textit{Grad v Finanzamt Traunstein} [1970] ECR 825, para 5.
  \item \textsuperscript{24} Case 9/70 \textit{Grad v Finanzamt Traunstein} [1970] ECR 825, Opinion of AG Roemer, 847; see also Case 33/70 \textit{SpA SACE v Ministero delle Finanze} [1970] ECR 1213, para 15.
  \item \textsuperscript{25} Case 41/74 \textit{Van Duyn v Home Office} [1974] ECR 1337.
\end{itemize}
policy, as the UK Government took the view that the Church’s activities had harmful effects on those involved. It was, however, not unlawful to work for the Church of Scientology per se, and Miss Van Duyn had not personally committed any violation of the existing British policies. One of the grounds on which she challenged the decision of the British authorities to refuse her leave to enter the country was that, on the basis on art 3(1) of Directive 64/22126 (now art 27(2) of Directive 2004/38),27 any measures taken by Member States on the basis of public policy must be based exclusively on the personal conduct of the individual. As the directive had not yet been implemented by the UK, however, it became necessary to consider whether, as Miss Van Duyn argued, it could have direct effect.

Once again, the Court focused on the need to ensure the effectiveness of the whole system of Community law, and held that the *effet utile* of obligations being imposed on Member States would be invalidated if individuals could not rely on them,28 and it would be inappropriate to allow a State to place reliance on its failure to implement a directive to curtail individual rights.29 Moreover, such conduct would be incompatible with the binding effect of directives,30 and with the Member States’ duty under the Treaties to fulfil their obligations resulting from acts of institutions of the Union, and to facilitate the achievement of the Union’s tasks.31

**a. Vertical direct effect**

Directives will therefore be capable of having vertical direct effect if, taking account of their wording and nature,32 the *Van Gend* criteria are met, that is, they are clear, precise, unconditional

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and leave little or no discretion to Member States. A particular problem was nevertheless posed by the fact that directives give rise to such discretion by definition, seen that they leave national authorities in each Member State free to choose the form and methods by which the provision will be implemented. It was therefore difficult to see how they could ever be directly effective without at the same time depriving States of their right to choose the specific means of implementation.

This obstacle was nonetheless soon overcome. Referring to previous case-law, the Court of Justice held that Member States’ freedom to choose the preferred method to give effect to a directive would remain unaffected until the time limit set for implementation had expired. Once this has lapsed, however, individuals will be able to rely on a directive which meets all other criteria in proceedings against the State. Furthermore, due consideration had to be given to the principle of supremacy of Union law, which has also been developed by the Court of Justice in its jurisprudence throughout the years. Despite the fact that no express provision has been included in any of the Treaties in relation to this principle, its existence was acknowledged in 2007 by the Treaty of Lisbon, which introduced Declaration 17 to confirm the status of supremacy as a ‘cornerstone principle of

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Community law.\(^{39}\) Therefore, in accordance with this principle, directives found to have direct effect will take precedence over any conflicting provisions of national law.\(^{40}\)

### b. Horizontal direct effect

This extension of the scope of direct effect was not well received by Member States, prompting several criticisms of the Court of Justice, and even accusations of judicial activism.\(^{41}\) Concerned with the possible consequences of further ill-received judgments and desiring to minimise the risk of defiance from Member States,\(^{42}\) the Court of Justice rather unsurprisingly decided to restrict the scope of the principles it had established, notably by refusing to further extend them so as to allow for directives to have horizontal direct effect.\(^{43}\) The most evident result of this decision was that, while citizens could rely upon this principle to enforce their rights against the State, they were precluded from doing so in any proceedings involving other individuals – term which, for the purposes of this area of law, includes both natural and legal persons.

The Court attempted to officially justify this change in stance by adopting a strictly textual interpretation of the Treaties, in stark contrast with its previous reliance on the teleological approach, used consistently for many years.\(^{44}\) The main argument that the Court of Justice put forward was that, as directives were addressed to Member States, they could not in themselves place obligations directly on individuals.\(^{45}\) Any such obligation would, moreover, be unjust, since

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42 ibid, 161.


individuals would not be informed of new provisions, given that – at the time – directives did not have to be published in the Official Journal.\textsuperscript{46}

This was nevertheless difficult to accept as a truly insurmountable obstacle, inasmuch as directives were usually published anyway\textsuperscript{47} and, even in the case where they were not, it would have sufficed to identify publication as a pre-requisite to direct effect to eliminate this particular injustice towards individuals.\textsuperscript{48} Notwithstanding this, a similar argument is now untenable, since publication on the Official Journal has been made compulsory also for directives in 1992, under the Maastricht Treaty.\textsuperscript{49} Furthermore, it was claimed that to allow directives to have horizontal direct effect would dim the difference between them and regulations, as established in the Treaties,\textsuperscript{50} and would give rise to legal uncertainty, contrary to the principles and spirit of Union law.\textsuperscript{51} These arguments, albeit highly criticised,\textsuperscript{52} might nonetheless have been accepted by commentators, had the Court of Justice itself not eroded them through subsequent judgments.\textsuperscript{53}

Notwithstanding this, it soon became clear that this established restriction of the scope of direct effect had given rise to manifest injustice and discrimination, as it meant that, for instance, individuals working in the public sector were de facto afforded more rights vis-à-vis their employers than those working in the private sector. This issue was clearly displayed in two cases involving the same directive, which the Court of Justice heard on the same day: the cases of Von Colson\textsuperscript{54} and Harz.\textsuperscript{55} Both cases involved German women who argued they had been discriminated

\textsuperscript{46} Case 152/84 Marshall v Southampton and South-west Hampshire Area Health Authority [1986] ECR 723, Opinion of AG Slynn, 734.

\textsuperscript{47} Case 9/70 Grad v Finanzamt Traunstein [1970] ECR 825, Opinion of AG Roemer, 848.


\textsuperscript{49} Now codified in TFEU [2010] OJ C83/01, art 297(2).

\textsuperscript{50} ibid.

\textsuperscript{51} Case C-201/02 R (on the application of Wells) v Secretary of State for Transport [2004] ECR I-723, para 56.


\textsuperscript{54} Case 14/83 Von Colson v Land Nordrhein Westphalen [1984] ECR 1891.

\textsuperscript{55} Case 79/83 Harz v Tradax [1984] ECR 1921.
against on grounds of gender when applying for a job, the only difference being that Von Colson had applied for a job in the public sector, whereas Harz had applied for a job in the private sector. However, as a result of the Court of Justice’s judgment in Marshall,\textsuperscript{56} where it had refused horizontal direct effect for directives, only Von Colson would be able to exercise her rights deriving from Union law.\textsuperscript{57} This blatant unfairness prompted the Court of Justice to attempt to diminish the adverse effects its decision was having on the enforcement of citizens’ rights.

**Alternative doctrines mitigating the lack of horizontal direct effect**

So as to overcome the practical repercussions of its decision, the Court took the opportunities offered by a number of cases to start developing a series of alternative means to guarantee protection of individual rights in national courts.\textsuperscript{58}

**a. The broad interpretation given to the meaning of ‘State’**

In order to mitigate the effects of its refusal to extend horizontal direct effect to directives, the Court of Justice firstly proceeded to broaden the scope of vertical direct effect by expanding the definition of State so as to include its emanations. The Court, in fact, soon recognised that directives fulfilling all other criteria could be relied upon by individuals in actions against bodies which were under the control of the State or which had exceptional powers, such as tax authorities,\textsuperscript{59} local and regional authorities,\textsuperscript{60} authorities responsible for the maintenance of security and public order,\textsuperscript{61} and public health services.\textsuperscript{62}

\textsuperscript{56} Case 152/84 Marshall v Southampton and South-west Hampshire Area Health Authority [1986] ECR 723

\textsuperscript{57} Case 14/83 Von Colson v Land Nordrhein Westphalen [1984] ECR 1891.


\textsuperscript{60} Case 103/88 Fratelli Costanzo SpA v Comune di Milano [1989] ECR 1839, paras 30-31

\textsuperscript{61} Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, para 57

\textsuperscript{62} Case 152/84 Marshall v Southampton and South-west Hampshire Area Health Authority [1986] ECR 723, para 50
The Court subsequently provided clearer guidance for national courts as to the interpretation of the meaning of State in the landmark case of *Foster v British Gas*,\(^\text{63}\) where it followed the Advocate General’s suggestion that ‘State’ ought to be construed widely.\(^\text{64}\) In its judgment, the Court held that directives could always be relied upon against ‘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’.\(^\text{65}\)

It follows from this definition that, for the purposes of EU law, the term “public body” goes beyond its normal understanding in the narrow sense, to include also various emanations of the State itself. In order to satisfy the test, a body must meet the three criteria identified in the quote above, that is, it must be placed under the control of the State to provide a public service and to that end must have been endowed with special powers.\(^\text{66}\) Subsequent developments have determined that the *Foster* test is not to be applied as a statutory definition, but a more purposive approach should be adopted by courts in construing “State”,\(^\text{67}\) which eventually led to the finding that privatised undertakings could also be considered State authorities.\(^\text{68}\) The full extent of the significance of this conclusion can be better appreciated if it is considered that it stands in sharp contrast with earlier cases, which only a few years before had conclusively established that nationalised companies were incapable of meeting the *Foster* criteria.\(^\text{69}\)

Although generally this development was positively received,\(^\text{70}\) doubts have consistently been raised as to its fairness. It is, in fact, difficult to reconcile the Court’s desire not to penalise individuals for a failure of their national government with its subsequent attribution of responsibility on authorities or private bodies which bear no responsibility in a central

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\(^{63}\) Case C-188/89 *Foster v British Gas* [1990] ECR I-03313.

\(^{64}\) Case C-188/89 *Foster v British Gas* [1990] ECR I-03313, Opinion of AG Van Gerven, para 8.

\(^{65}\) Case C-188/89 *Foster v British Gas* [1990] ECR I-03313, para 20. However, note the difference in formulation in para 18.


\(^{67}\) *National Union of Teachers v Governing Body of St Mary’s Church of England Junior School* [1997] 3 CMLR 630 (CA) [44]-[45] (Schiemann LJ).

\(^{68}\) *Griffin v South West Water Services* [1995] IRLR 15 (Ch) 16 (Blackburne J).

\(^{69}\) *Doughty v Rolls Royce plc* [1992] 1 CMLR 1045 (CA) [27] (Mustill LJ).

government’s failure to implement a directive.\(^{71}\) Moreover, this approach still did not eliminate the inherent inequality resulting from the difference in treatment afforded to individuals dealing within the public sector as opposed to those dealing in the private.\(^{72}\)

**b. The principle of indirect effect**

To remedy the injustice it had, perhaps unwillingly, generated, the Court of Justice subsequently developed what has become known as the principle of ‘indirect effect’, by which national courts are required to interpret domestic legislation, considered in its entirety,\(^{73}\) in conformity with Union law,\(^{74}\) a principle which has been argued to represent a logical conclusion deriving from the established supremacy of EU law.\(^{75}\) Driven by the need to ensure the *effet utile* of EU law, and based on the presumption that all Member States wish to comply with their obligations under the Treaties,\(^{76}\) this interpretative obligation exists regardless of whether the provision in question is capable of having direct effect,\(^{77}\) thereby including directives enforced against individuals, and irrespective of whether the national law pre- or post-dates it.\(^{78}\)

Adopting once again a textual approach to the interpretation of the Treaties,\(^{79}\) the Court of Justice bypassed its own objections to horizontal direct effect of directives. The Court reasoned that one of the factors precluding the existence of horizontal direct effect was that a directive could not ‘of

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\(^{73}\) Cases C-397-401/01 *Pfeiffer v Rotes Kreuz* [2004] ECR I-8835, para 115.


\(^{77}\) ibid.

\(^{78}\) Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135, para 8.

itself’ impose an obligation on individuals. This rendered the operation of indirect effect between individuals acceptable due to the fact that the obligation in question is not technically imposed by the directive itself, but rather by national law which is merely interpreted in light of the directive. This reasoning has been taken a step further by the judgment in Mangold, where the Court of Justice found that, if a directive could be interpreted as solely codifying a general principle of Union law, national courts should ensure the effectiveness of the principle by allowing individuals to rely on the principle itself, even though the directive may not be suitable to have direct effect and the date for implementation has not passed.

Despite the fact that the introduction of the principle of indirect effect constituted a giant leap forward by the Court of Justice in circumventing the lack of horizontal direct effect of directives, there are limits to the effectiveness of this principle. The Court itself, by stating that courts have to interpret national law ‘as far as possible’ in conformity with EU law, recognised the existence of natural boundaries. Moreover, in order to abide by the general principles of legal certainty and non-retroactivity, pre-existing national law cannot be interpreted in light of a directive which has not yet been transposed if that would have the effect of imposing an obligation or aggravating the criminal liability of an individual. Furthermore, the effectiveness of this doctrine of consistent

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86 Case C-105/03 Criminal Proceedings Against Maria Pupino [2005] ECR I-05285, para 44.

interpretation rests largely on the ability and the willingness of national courts to reach a favourable outcome for individuals.88

It has also been argued that the application of indirect effect generates greater uncertainty than horizontal direct effect would.89 Some commentators, in fact, maintain that, if the latter were approved, by virtue of the primacy of EU law, individuals would have no doubt as to the fact that a clear, precise and unconditional directive would take precedence over any conflicting national provisions, once the deadline for implementation had passed.90 As things currently stand, however, individuals wishing to understand their rights and obligations need to examine the whole body of domestic law and attempt to foresee whether and how a court might interpret it in light of a directive, even when this would not be fit for direct effect.91

c. The principle of State liability

Given these weaknesses, the Court of Justice attempted to find another way to safeguard individual rights. The occasion came with the case of Francovich,92 which concerned a directive incapable of direct effect93 in a situation where there was no national law which could be interpreted in conformity with it.94 In its judgment, the Court found that, because certain provisions of Union law were capable of generating rights and obligations for individuals, and national courts were required to ensure the full efficacy of such provisions, their value would be undermined if individuals were

88 See, for example, Duke v GEC Reliance Ltd [1988] AC 618 (HL) 641 (Lord Templemann); followed in Finnegan v Clowney Youth Training Programme Ltd [1990] 2 AC 407 (HL) 416-417 (Lord Bridge of Harwich) and Porter v Cannon Hygiene [1993] IRLR 329 (NI CA) para 13 (Kelly LJ). However, note Litster v Forth Dry Dock and Engineering Co Ltd [1990] 1 AC 546 (HL) 559 (Lord Oliver of Aylmerton) and Webb v EMO Air Cargo (UK) Ltd [1995] 1 WLR 1454 (HL) 1459-1460 (Lord Keith of Kinkel).


90 ibid.


93 ibid, para 26.

94 ibid, para 34.
unable to recover damages for losses caused by Member States’ failure to comply with Union law.\textsuperscript{95} It was thus inherent in the spirit of the Treaties that Member States should be obliged to make good any loss or damage for which they were responsible.\textsuperscript{96} This obligation was, however, subject to certain conditions:\textsuperscript{97} firstly, the directive should entail the grant of rights to individuals; secondly, those rights should be identifiable on the basis of the provisions; and thirdly, there must be a causal link between the breach of the State’s obligations and the loss and damage suffered by the individual.\textsuperscript{98}

The Court further developed this principle in following cases, eventually slightly modifying its original formulation of the qualifying criteria. While maintaining both the need for the relevant provision to intend to confer rights upon individuals and the requirement to establish a causal link between the State’s breach and the individual’s loss, the Court further narrowed the test by establishing that the breach also needed to be sufficiently serious,\textsuperscript{99} and found that the decisive test to determine this was to consider whether the State or Community institution concerned ‘manifestly and gravely disregarded the limits on its discretion’.\textsuperscript{100}

In the case of \textit{Factortame},\textsuperscript{101} the Court of Justice, further gave some indications as to what factors national courts should take into account when identifying a sufficiently serious breach, which include the clarity and precision of the provision breached, whether the damage was caused intentionally or involuntarily, and whether any error in law was excusable.\textsuperscript{102} Following cases further clarified this by identifying whether a sufficiently serious breach had occurred in specific situations. Thus, it is now apparent that a serious breach will always be found in cases of non-implementation of directives,\textsuperscript{103} for breaches of a Treaty article,\textsuperscript{104} or when the violation persists

\begin{flushleft}
\textsuperscript{95} ibid, paras 31-33.

\textsuperscript{96} ibid, paras 35-36.

\textsuperscript{97} ibid, para 40.

\textsuperscript{98} ibid. For a more detailed discussion of the judgement in \textit{Francovich} and its significance, see Josephine Steiner, ‘From Direct Effects To \textit{Francovich}: Shifting Means of Enforcement in Community Law’ (1993) 18 EL Rev 3.


\textsuperscript{100} ibid, para 55.

\textsuperscript{101} \textit{R v Secretary of State for Transport ex parte Factortame} [1996] ECR I-01029.

\textsuperscript{102} ibid, paras 55-57.

\textsuperscript{103} Case C-178/94 \textit{Dillenkofer and Others v Germany} [1996] ECR I-04845, para 29
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despite a judgment establishing the existence of an infringement of EU law.\textsuperscript{105} If the case in questions concerns a directive, it will also be necessary to consider whether the error made was excusable or not.\textsuperscript{106}

Despite the existence of such guidelines, determining whether a sufficiently serious breach had occurred has often proven to be problematic for national courts.\textsuperscript{107} This situation has been further complicated by the fact that the principle has been extended to cover breaches committed by all branches of government\textsuperscript{108} as well as private parties,\textsuperscript{109} generating great uncertainty as to who will bear responsibility for individual losses.\textsuperscript{110}

Although the principles of State liability and effective judicial protection have been applauded as the most effective alternative to direct effect,\textsuperscript{111} they still present considerable weaknesses. The main problem seems to lie in the fact that the issue of causation and the quantification of damages are left to national courts to determine according to domestic provisions.\textsuperscript{112} This means that, very often, national procedural rules and the strictness of the test to determine the seriousness of the breach will result in individuals not receiving an effective remedy, if at all, as occurred, for

\textsuperscript{104} Case C-5/94 \textit{R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas} [1996] ECR I-2553, para 28

\textsuperscript{105} \textit{R v Secretary of State for Transport ex parte Factortame} [1996] ECR I-01029, para 57.


\textsuperscript{108} Comprising courts, see Case C-224/01 \textit{Gerhard Köbler v Austria} [2003] ECR I-10239, para 32; Case 173/03 \textit{Traghetti del Mediterraneo SpA v Italy} [2006] ECR I-5177, para 46.


instance, in *Francovich* itself. Although the Court of Justice has attempted to mitigate this effect, going against its own judgments, by determining in some cases whether, on the facts, causation could be found, this approach does not seem viable in the long term. Moreover, this type of action is not advantageous for individuals, as it involves supplementary litigation costs and lengthy procedures.

d. The principle of incidental effect

In its quest for effective individual protection, the Court of Justice also developed what has become known as “incidental” effect of directives. Faithful to its reasoning in *Marshall*, the Court found that, although directives cannot impose obligations on private individuals, they can nonetheless create rights. An individual will then be able to rely on an unimplemented directive as a defence in legal actions against other individuals. However, this approach has been strongly criticised as lacking consistency and fairness: to allow one party to gain the benefit of a directive, in fact, automatically imposes an obligation on the other party, thus generating uncertainty as to which duties will be imposed on them. In light of this, its actual application in proceedings, and consequently its significance in providing an effective alternative to horizontal direct effect, has been very limited.

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Conclusion

On balance, the alternative means developed by the Court of Justice to alleviate the lack of horizontal direct effect of directives appear, if taken jointly, to have been fairly successful in ensuring remedies for individuals affected by Member States’ breaches of their Union obligations. Nevertheless, their significant drawbacks cannot be neglected, and have indeed prompted calls to allow horizontal effect for directives.

An interesting argument has been advanced to abandon entirely the distinction between horizontal and vertical effect, as the former truly never exists: it has, in fact, been contended that even when an action is between two private parties, it will always be a ‘trilateral’ action brought in front of a court. Since the court’s duty is to interpret the law, which is set out in the directive, and courts are public bodies exercising a constitutional function, the relationship existing between the parties will always be a vertical one between the State (embodied by the court) and private individuals. Therefore, given the inexistence of purely horizontal relationships, all directives should automatically be allowed direct effect.

This rather revolutionary view, however, has as of yet not been embraced. For the time being, the Court of Justice has maintained its position, especially in view of continued opposition by Member States to an expansion of the principle, notwithstanding the fact that it would reduce their liability in damages when these could be attributed to individuals instead. It is strongly hoped, however, that the Court will in the future be willing to accept horizontal direct effect for directives in the


122 ibid.

123 ibid, 198.


interest of coherence and uniformity of Union law, and to enhance judicial protection for individuals.126

References

Domestic Cases (United Kingdom)

Doughty v Rolls Royce plc [1992] 1 CMLR 1045
Duke v GEC Reliance Ltd [1988] AC 618
Finnegan v Clowney Youth Training Programme Ltd [1990] 2 AC 407
Griffin v South West Water Services [1995] IRLR 15
Litster v Forth Dry Dock and Engineering Co Ltd [1990] 1 AC 546
National Union of Teachers v Governing Body of St Mary’s Church of England Junior School [1997] 3 CMLR 630
Porter v Cannon Hygiene [1993] IRLR 329
R v Henn [1980] 2 All ER 166, [1980] 2 WLR 597
Webb v EMO Air Cargo (UK) Ltd [1995] 1 WLR 1454

European Union Cases

Case 57/65 Alfonso Lüticke GmbH v Hauptzollamt Sarrebourg [1966] ECR 205
Case 9/70 Grad v Finanzamt Traunstein [1970] ECR 825
Case 33/70 SpA SACE v Ministero delle Finanze [1970] ECR 1213
Case 43/71 Politi v Ministero delle Finanze [1971] ECR 1039
Case C-93/71 Leonesio v Ministero dell’Agricoltura e Foreste [1972] ECR 287
Case 2/74 Reyners v Belgium [1974] ECR 631
Case 41/74 Van Duyn v Home Office [1974] ECR 1337
Case 36/75 Rutili v Ministre de l’Intérieur [1975] ECR 1219
Case 148/78 Pubblico Ministero v Ratti [1979] ECR 1629

Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53
Case 14/83 Von Colson v Land Nordrhein Westphalen [1984] ECR 1891
Case 79/83 Harz v Traxd [1984] ECR 1921
Case 152/84 Marshall v Southampton and South-west Hampshire Area Health Authority [1986] ECR 723
Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651
Case 103/88 Fratelli Costanzo SpA v Comune di Milano [1989] ECR 1839
Case C-221/88 ECSC v Acciaierie e Ferrerie Busseni SpA [1990] ECR I-495
Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-04135
Case C-188/89 Foster v British Gas [1990] ECR I-03313
Case C-6/90 Francovich and Bonifaci v Italy [1991] ECR I-05357
Case C-271/91 Marshall v Southampton and South-west Hampshire Area Health Authority [1993] ECR I-4367
Case C-91/92 Faccini Dori v Recreb Srl [1994] ECR I-3325
Case C-334/92 Wagner Miret v Fondo de Garantia Salarial [1993] ECR I-6911
Case C-316/93 Vaneetveld v Le Foyer SA [1994] ECR I-00763
Case C-392/93 R v HM Treasury ex parte British Telecom [1996] ECR I-1631
Case C-5/94 R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas [1996] ECR I-2553
Case C-178/94 Dillenkofer and Others v Germany [1996] ECR I-04845
Case C-168/95 Criminal Proceedings Against Luciano Arcaro [1996] ECR I-4705
Case C-319/96 Brinkmann Tabakfabriken GmbH v Skatteministeriet [1998] ECR I-05255
Case C-253/00 Munoz v Frumar [2002] ECR I-7289
Case C-224/01 Gerhard Köbler v Austria [2003] ECR I-10239
Cases C-397-401/01 Pfeiffer v Rotes Kreuz [2004] ECR I-8835
Case C-201/02 R (on the application of Wells) v Secretary of State for Transport [2004] ECR I-723
joined Cases C-387/02, C-391/02 and C-403/02 Criminal Proceedings Against Silvio Berlusconi, Sergio Adelchi, Marcello Dell’Utri and Others [2005] ECR I-3565
Case C-105/03 Criminal Proceedings Against Maria Pupino [2005] ECR I-05285
Case 173/03 Traghetti del Mediterraneo SpA v Italy [2006] ECR I-5177
Case C-144/04 Mangold v Helm [2005] ECR I-9981
Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co [2010] ECR 00
Case C-279/09 DEB Deutsche Energiehandels- Und Beratungsgesellschaft MbH v Germany [2011] 2 CMLR 21
Case C-282/10 Dominguez v Centre Informatique du Centre Ouest Atlantique et Préfet de la Région Centre [2012] ECR 0

Journal Articles

Craig PP, ‘Once More Unto the Bench: the Community, the State and Damages Liability’ (1997b) 113 LQR 67
Lasok KPE, ‘Can Persons Other Than Member States Be Bound by the “Direct Effect” of Directives?’ (1990) 1 ICCLR 195
Steiner J, ‘Coming to Terms With EEC Directives’ (1990) 106 LQR 144
Tridimas T, ‘The Court of Justice and Judicial Activism’ (1996) 21 EL Rev 199
Wade HRW, ‘Sovereignty: Revolution or Evolution?’ (1996) 112 LQR 568

Legislation

Council Directive (EEC) 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ P56/850
Declaration concerning primacy (No 17) annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (signed 13 December 2007) [2012] OJ C326/346

Texts

Arnull A, The European Union and its Court of Justice (2nd edn, OUP 2006)
Brown LN and Kennedy T, The Court of Justice of the European Communities (5th edn, Sweet & Maxwell 2000)
Craig PP and de Búrca G (eds), EU Law: Text, Cases and Materials (4th edn, OUP 2008)
de Búrca G and Weiler JHH (eds), The European Court of Justice (OUP 2001)
Foster N, EU Law Directions (3rd edn, OUP 2012)