European Union

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European Union - Directives ‘directly effective’? To What Extent.

Abstract

The European Community has had a decidedly significant impact upon the legal systems of the Member States. It was established in 1957 by the Treaty of Rome, the main objectives being to develop stability throughout Europe by means of encouraging a closer union between member states. It has evolved a long way since having developed its own institutions and an autonomous legal system, with laws that bind each member state ultimately enabling it to regulate the rights and obligations of its members. It achieves this primarily through Treaties, a primary form of EC legislation that forms the basis of all other European Law. However the effect of EC treaties is unlike that of any other international agreement as the latter bind only states at an intergovernmental level and do not of themselves give rise to rights or interests which the citizens of the states can have enforced before their own national courts even if they are designed for the protection of individuals. Although the text of EC treaties does not indicate that their provisions will be any different, the ECJ has taken its own view as to the nature and effect of treaties known as the doctrine of 'direct effect.'

This jurisprudential concept means that individuals are able to derive rights directly from community law, which can be enforced in their own national courts. It is a private species of enforcement, placing control in the hands of ordinary individuals as distinct from the public enforcement mechanism of community law as contained in Article 226 of the Treaty of Rome which enabled the Commission to bring proceedings against member states for breaches. This system was deficient in many ways as, not only was it unable to cope with the increasing work load and had insufficient remedies, it was political in nature. Direct effect, on the other hand, has allowed individuals to play a role and has potentially brought the community into the lives of every citizen. However despite its significance, it is important to put it into context of the many types of community law, not all of which entail direct effect or which can only be directly effective in certain circumstances, such as directives.

Introduction

The judicial foundations for direct effect were laid down in Van Gend En Loos (1963) a case which arose when the applicant was charged an import duty by Customs and Excise that had been increased to 8% in contravention of Article 12 of the EC treaty, which specified 3%. The question referred to the ECJ was whether Article 12 had direct effect i.e. did it confer rights upon individuals which they could enforce before their national courts. Strong submissions were made on behalf of the three governments that intervened in the case, holding that the ECJ had no right to decide whether EU prevailed over national law since this was a matter of national constitutional law. They also argued that the EC treaty was no different from any other international treaty creating obligations only between states and that the concept of direct effect would thus contradict the intentions of those who had created the treaty.

However the ECJ rejected this line of reasoning holding that direct effect could in fact exist and thus individuals may have rights conferred upon them directly under EC treaties which may be applied against individuals' own state or each other. Their initial reasoning referred to a vision of the kind of legal system that it considered necessary to carry out the political and legislative programme that the treaties had set out to create – "a community not only of states but also of persons…that calls for the participation of everybody." They supported this by attempting to draw upon the text of the treaty, particularly the preamble, holding that it makes reference not only to governments but also individuals and thus is "more than an agreement which creates mutual obligations between the contracting states." In this sense it was distinct from other international treaties and constituted "a new legal order of international law for the benefit of which the stated have limited their sovereign rights, albeit within limited fields, the subjects of which comprise not only member states but also their nationals." Therefore they concluded that, "community law…is intended to confer upon individuals rights which become part of their legal heritage." This constituted a ground-breaking judgment which was not received with enthusiasm by all. The Advocate General, although accepting that certain treaty provisions could product direct effect, believed that Article 12 was not one of these, voicing concerns that to hold it directly effective could lead to a non-uniform application of that Article. He questioned whether "the authors intended to product the

consequences of an uneven development of the law….consequences which do not accord with an essential aim of the community." Certainly none of the textual evidence provided by the ECJ for direct effect was particularly strong and its teleological approach to interpretation, which involved it reading the text in such a way to determine the underlying aims of the community as a whole, is questionable.

However the courts did impose some constraints on the doctrine, which otherwise has potentially far reaching implications. It recognised that there would most likely be practical limitations to the doctrine. For instance, if a provision is vague setting out a general aim which requires further implementation to be made clear then it would be difficult to accord direct effect to that provision and allow its direct application in a national court. Interpretations by different national courts would differ, thus undermining uniformity and it would lead to the usurpation of political authority by the courts. In view of such concerns and to introduce direct effect in a more restrained manner, the court in Van Gend set out criterion, outlining that a treaty provision will only have direct effect where it is clear and precise, establishes a negative unconditional obligation, it does not leave any meaningful discretion to member states and does not require further state action for its implementation.

This did not, however, hinder the development of the doctrine as the ECJ showed little reluctance to relax the conditions laid down in Van Gend, allowing it to extend to other treaty articles as well as other community legislation, in addition to treaties, which has also been rendered capable of having direct effect by the ECJ. Other forms of community legislation are known as secondary sources and are set out in Article 249 which states that "in order to carry out their tasks the Council and the Commission shall, in accordance with the provisions of this treaty make regulations, issue directives and recommendations and deliver opinions."

Regulations, the most common form of secondary legislation, are, according to Article 249 “binding in their entirety and directly applicable in all member states.” Therefore since they become a part of the domestic law of the member state automatically and do not require further incorporation into national legislation, they confer rights upon individuals which can be relied on in their national courts. Certainly they appear to satisfy the Van Gend conditions for direct effect and unlike the situation concerning the direct effect of treaty provisions, there is strong textual evidence which provides for their direct enforceability. In Commission ‘v’ Italy (1973) the court emphatically confirmed the direct effect of regulations and criticised the attempts by member states to alter the requirements of a community regulation.

However the position in relation to directives is more complex and highly controversial. Under Article 249 directives “bind any member state as to the result to be achieved while leaving domestic agencies competence as to form and means.” They come in the form of instructions to member states to bring national law in line with the provisions of the directive with a specific date provided by which implementation must be assured. Therefore unlike regulations and most treaty provisions, directives do not come into force immediately but require incorporation into national law in order to come into effect. They ensure harmonization of laws in different member states and are considered more flexible as they provide states with discretion and some scope for national differences. Although eventual implementation need not be uniform in every member state, the actual aim must be properly secured and where it is not, this may constitute a breach. Considering this, it appears that the very nature of directives is incompatible with the notion of direct effect as laid down in Van Gend; it leaves some discretion to members states, it will require further state action for its implementation and it is likely that it will set out its term in general terms since it is merely a framework. However, once again, this failed to deter courts from considering whether directives may still give rise to direct effect and they expounded on this fundamental question through a line of important cases.

In Van Duyn ‘v’ Home Office (1974) a Dutch national came to the UK to take up an offer of employment with the Church of Scientology but he was refused leave to enter the UK on account of this. She relied on among other provisions, Directive 64/221 which regulated the freedom of movement of workers within the community. The question that was referred to the ECJ was whether the provisions of the directive could have direct effect. The courts held that directives were indeed capable of being directly enforceable by an individual against a member state if they have not been implemented properly or at all. They contended that “it would be incompatible with the binding effect attributed to a directive by Article 249 to exclude the possibility that the obligation which it imposes may be invoked by those concerned.” Therefore, this binding nature would be more effectively secured if they may “be invoked by individuals in the national courts.” They went on to say that each provision must be examined in its context to determine whether it purpose is to grant rights to individuals and whether it is sufficiently clear and precise to be capable of being applied directly by a national court. In this case, the problem in relation to the directive was that it gave member states discretion to take measures restricting the movement of non-nationals on the grounds of public policy. However the court held that the exercise of this discretion was restricted by a provision of the directive, which imposed a clear precise obligation, and thus it was capable of being directly effective.

Although the decisions was favourable from the perspective of individuals as they were able to invoke rights from a directive even if it had not been implemented, and from the perspective of the courts through their desire to make directives a more effective form of community law, generally it was not a popular one. In particular, some of the member states felt that the court had gone too far in advancing the conception since directives were intended to leave member states with some discretion as to the form and means and allowing by individuals to invoke rights directly from the directives this was undermined.

The court, in response to such criticism, advanced their reasoning in Pubblico Ministerio 'v' Tullio Ratti (1980) in which the applicant was subjected to criminal proceedings under domestic legislation for breaching Italian legislation that had been implemented to effect the provisions of a directive but which was more stringent on the matter of the packaging of solvents. Therefore Ratti relied on his defence on the direct effect of the community directive, which led to a preliminary reference being made to the ECJ. To justify the direct enforceability of directives, the court put forward what has become known as the 'estoppel' argument. The reasoning follows that the state commits a wrong by not implementing a directive by the appropriate time or not implementing it properly and thus the they are estopped from refusing to recognise its binding effect in cases where it is pleaded against them by individuals relying on rights under that directive. The case also confirmed the position that individuals could only rely upon rights directly under the directive "at the end of the prescribed period and in the event of a the member states default," at which point the member state forfeits any discretion they were given and the directive becomes directly effective.

The direct effect of directives was not, however, afforded 'free reign' and the courts achieved some measure of constraint through the concepts of vertical and horizontal effect. Van Duyn and Ratti affirmed that directives only have vertical effect so that an individual who is adversely affected by the states failure to implement a directive properly or at all only has rights against the state and not against a non-state entity or other individuals as the directive imposes the obligation of implementation upon the state. Therefore a 'horizontal' limitation was placed upon the scope of the direct effect of directives. This principle was addressed in Marshall 'v' Southampton and South West Hampshire Health Authority (1986) in which the applicant who was employed by the Health authority, was required to retire at 62 when men doing the same work did not have to retire until 65. Although under national law, by virtue of the Sex Discrimination Act, this was not discriminatory, she succeeded in the claim for unfair dismissal by relying on the Equal Treatment directive, which had not been implemented in the UK. The directive was sufficiently clear to have direct effect but the courts took the opportunity to confirm that, "that a directive may not of itself impose obligations on an individual and that a provision may not be relied upon as such against such a person." Therefore since the health authority was an 'organ of the state,' the directive had vertical direct effect.

The court also addressed the issue of horizontal effect and the reason they offered for not according full direct effect to directives appeared to be textual. They argued that directives were not capable of having horizontal direct effect as in accordance with Article 249, "the binding nature of a directive …exists only in relation to 'each member state to which it is addressed' and thus since it does not address individuals it cannot be binding upon them. The argument is in reality not strong as it appears that the phrase from Article 249 seeks to distinguish between different member states and not between individuals and member states as the court assumed. Furthermore such close textual analysis has not been effective in other contexts, for instance, Treaty Articles, such as Article 119, are also explicitly addressed to the member states yet the courts have failed to elaborate on this aspect with regards to their direct effect and allowed their direct application to individuals as well as the state.

The reasoning offered by the Advocate General in this case, with regards to horizontal direct effect, was perhaps more credible. He believed that that to accord horizontal direct effect to directives would, primarily "totally blur the distinction between regulations and directives" and secondly, perpetuate uncertainty, as there is no formal obligation for their publication within the Official Journal. His latter argument was a 'rule of law' concern, that since directives did not have to be published, individuals might not have been aware of certain obligations under directives. However since the Maastricht Treaty there is now an obligation to publish so that, to some extent, this problem has now been alleviated.

Since Marshall, the position has been confirmed by subsequent case law and in Duke 'v' GEC Reliance (1988) Mrs Duke was unable to rely upon the Equal Treatment Directive, as Mrs. Marshall had, as her employer was a private individual. Similarly in Paola Faccini Dori 'v' Recreb srl (1994) the Italian Govt had failed to implement a directive in respect of consumer rights to cancel certain contracts negotiated away from business premises. Dori having concluded a contract at a railway station was unable to rely on the directive to claim a right of cancellation as, although it was sufficiently clear, the court refused to extend the concept of direct effect "to the sphere of relations between individuals."

Clearly, as, member states argued, such decision illustrates “an unfair distinction between the rights of state employees and those of private employees,” but the court firmly held that “such a distinction may easily be avoided if the member state concerned has correctly implemented the directive into national law.” However this problem regarding the ‘horizontal’ limitation on the scope of directives which means that they are not directly effective in all circumstances, has somewhat been alleviated with the courts developing a number of other measures through which directives can have legal effect in member states, enhancing their domestic application. Primarily, the courts have expanded the definition of ‘state’ against which directives can be enforced. In Marshall it was accepted that individuals could rely on rights set out in the directive against health authority as it could be regarded as an “organ of the state.” However the question of what constituted the ‘state’ was left largely unanswered with little guidance on what entities could be properly classified as ‘organs’ of the state with the Advocate General suggesting that this was a matter for each member state to determine.

The issue was somewhat clarified in Foster ‘v’ British Gas (1990) in which the ‘state’ was defined as any “organisation or body subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable between individuals.” The court specified this as including “tax authorities, local or regional authorities, constitutionally independent authorities responsible for the maintenance of public order/safety and public authorities providing health service.” In accordance with this the court considered a company in the position of British Gas to be an organ of the state. Clearly this has significantly broadened the definition of state since Marshall and critics have argued that this undesirable in the sense that ‘state’ should be a body which has the power to effect the implementation of a directive and rights should only be invoked against them as they are the ones under the obligation. Local authorities and nationalised industries such as British Gas do not have such power and cannot even affect the states decision on how and when to implement directives. In respect of this, the position laid down in Marshall regarding horizontal effect is undermined as individuals are able to enforce rights against bodies who would in any other context be non-state entities.

Similarly the effectiveness of non-implemented or mis implemented directives that do not have direct effect through the horizontal limitation, has been enhanced through the doctrine of 'indirect effect', which emerged from Von Colson (1986). In this case the ECJ held that "national courts are required to interpret their national law in light of the wording and the purpose of the directive" so that the directive is given some effect despite the absence of proper domestic implementation. This principle may be used in two circumstances; firstly where the defendant is a state entity but a directive is not vertically directly effective as its provision are insufficiently imprecise, conditional and/or require further state action for their implementation. Secondly the provisions of a directive could be indirectly enforced against a non-state entity i.e. it could apply horizontally as between individuals. The court was confronted with a 'horizontal' situation in Marleasing (1990) in which this position was confirmed. Therefore, if national law was in existence that could be read in conformity with a non-implemented directive, then an individual could enforce a legal remedy against another individual through the interpretative route without seeking to enforce the directive directly and encountering the barrier to horizontal effect. This clearly provides an alternative way in which directives can have legal effect in member states.

However Marleasing also addressed the issue of the possible limits to this interpretation principle. The Advocate General's opinion suggested that although this is essentially a matter to be resolved in relation to national principles of interpretation, when interpreting national law in light of a directive, the general principles of community law must still be respected, particularly the principles of legal certainty and non-retroactivity. Therefore an interpretation that would impose a 'civil penalty' upon one of the parties, for instance, would contravene these principles so that harmonious interpretation would not be possible. However beyond this the ECJ has subsequently left it to the discretion of the national court as to whether or not an interpretation in conformity with a directive is possible.

There are certainly drawbacks to such an approach even though it enhances the effectiveness of domestic application of directives, the principle problem for courts being how far they are able to stretch national legislation, short of redrafting it, so that it can be interpreted in conformity with the provisions of a directive. It can essentially be seen as usurpation of the legislature's power as well as undermining the precision and certainty of the law. Furthermore it detracts from the credibility of the courts contention that directives cannot be afforded horizontal direct effect when this can now be affected indirectly through this interpretative route. However the courts have certainly moved away from the initial strong mandatory obligation and have dissuaded national courts from seeking harmonious interpretation where the end result may be seen as a form of horizontal direct effect. This was addressed in Luciano Arcaro (1996) in which a limitation was imposed based upon the possible impact of the interpretation. It was held that the EC does not require national law to be read in light of a directive where to do so would be "to impose on an individual an obligation contained in a directive which has not been transposed." However in practice, where there is a dispute between two parties where one is seeking an interpretation of in light of the directive and the other is resisting it, interpretation in conformity with a directive will usually entail a legal disadvantage for one of the parties.

The final manner, in which it is possible for an individual to enforce a directive when the barrier to horizontal direct effect is encountered, was established in Francovich (1991) in which it was declared that member states may be liable to make good damage for its failure to implement a directive. Therefore, rather than enforcing rights against the state through direct effect, an individual can instead choose to bring proceedings for damages against the state if they have been adversely affected by the failure to implement. This has since been extended beyond failure to implement directives to cover any breach of community law by a member state. The method is highly desirable as it not only provides an incentive for member states to implement directives before the expiry of the time limit for implementation and discourages laxness; it also offers individuals financial relief.

Conclusion

The doctrine of ‘direct effect’ has clearly had a significant impact on the legal systems of all member states, providing a means for individuals to enforce rights derived from community legislation in their own national courts and in this sense can be considered a liberating concept, if not an ‘ideal.’ However, the position, particularly with regards to directives, remains complex and even highly volatile, undermining to some extent the certainty and effectiveness of community legislation that the concept set out to achieve. It is this question of ‘when and to what extent’ directives are directly effective that the jurisprudence of the ECJ has persistently confused and failed to answer with any degree of certainty. Directives appear to be vertically directly effective with horizontal limitations but this is a position that has been undermined with the expansive definition of state and the concept of indirect effect which provide another means for directives to be given legal effect within member states without having to encounter the restrictive conditions of direct effect. However the exact scope of this also remains unclear so that ultimately there is a situation where individuals no longer are aware precisely what the law is, undermining the rule of law. However despite this, it is important to place the doctrine in context, as although it is certainly a significant feature of the EC, the ECJ does lack jurisdiction over some areas of community law and therefore cannot determine the legal effect and nature of certain provisions. Furthermore the political and legal environment in which the community operates is highly dynamic and it is likely that other means of legal enforcement may become as important.