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Direct Effect: Convergence or Divergence?

A Comparative Perspective

prof. dr. Jan H. Jans & Jolande M. Prinssen, LL.M

DIRECT EFFECT

1 Introduction

It is somewhat surprising that after 40 years' development of EC law, of the case law of the European Court of Justice (ECJ) and academic debate, there are still major differences in the way national courts apply one of the key doctrines of European law: the doctrine of direct effect. As a result of direct effect, national courts are bound to apply Community law in order to achieve effective legal protection of individuals and uniform application¹ of Community law. Yet, because the manner in which directly effective provisions are deployed in the national legal systems is fundamentally governed by national (procedural) law, the application and enforcement of directly effective provisions may produce very different outcomes in the various Member States.

One might ask why bother at all with the question of differences and similarities in the application of the doctrine of direct effect by the various national courts. The answer of course must be that these differences may affect the very rationale of the doctrine, providing effective legal protection and ensuring the uniform application of Community law. Differences significantly affecting these objectives cannot be accepted. Furthermore, if there are 'unacceptable' differences in the light of these principles, the question of harmonization, whether through the agency of the ECJ or by the Council's enacting the necessary directives, has to be discussed.

The objective of this contribution is therefore to present you with some ideas concerning what kind of differences in application have to be accepted and what kind of differences are not acceptable. Without any attempt to be comprehensive we shall illustrate our views using examples of judgments coming from various jurisdictions.

2 National case law and the direct effect doctrine 'as such'

The right of private parties to invoke directly effective provisions of Community law needs no further elaboration. Whenever a provision of Community law is 'unconditional and sufficiently precise', individuals may rely on this provision before a national court.² Furthermore, as far as the consequences of conflicting national law are concerned the ECJ ruled in *Simenthal*:

'that every national court must... apply Community law in its entirety and protect the rights which the latter confers on individuals and must accordingly set aside any

¹ Cf. on the requirement of 'uniform application' Van Gerven (2000), p. 501-536, in particular at p. 504-505, who makes it perfectly clear that this requirement does not preclude all national differences.

² Cf. Case 8/81 *Becker* [1982] ECR 53. Cf. about these conditions more extensively Prechal in this volume's chapter II.

provision of national law which may conflict with it, whether prior or subsequent to the Community rule.³

Thus a national court is bound to give precedence to directly effective Community law over conflicting provisions of national law.

2.1 Questioning the doctrine and its consequences; Dutch, French and Spanish case law

It goes without saying that it is not acceptable in a given case for a national court to refuse outright to apply the doctrine of direct effect. Nor for the national court to refuse to accept its consequences fully. We agree with Van Gerven, who stated that in relation to rights which Community law confers on individuals, the answer must necessarily be that their content should be the same throughout the Community.⁴ When national courts do question the direct effect doctrine, the result will generally be that Community-based rights will be applied differently in the various Member States. Of course these kinds of clear-cut examples of European disobedience are rare. But then again examples can be found in various national legal orders where national courts have applied the doctrine in a more restricted manner than required by the ECJ.

A judgment of a Dutch Court of Appeal in the so-called *Waterpakt* case comes close to such outright disobedience.⁵ In that case the Court of Appeal refused to apply a directly effective provision of the Nitrate Directive⁶ by referring to a pending infringement procedure before the ECJ. In order to avoid divergent rulings the Court of Appeal decided to stay the procedure and wait for the judgment of the ECJ. In our view this is incompatible with the independent nature of the doctrine. As early as in *Van Gend en Loos* the ECJ ruled that the existence of infringement procedures does not mean that individuals cannot plead the infringement of Treaty obligations by public authorities before a national court.⁷

³ Case 106/77 *Simmenthal* [1978] ECR 629 (para. 21).

⁴ Van Gerven (2000) at p. 526. See also the conclusion of AG Jacobs in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, where he states that although it is in principle for the national courts to determine whether the conditions for liability are met, the question of the grant of rights to individuals is more properly a matter for the ECJ (para. 52).

⁵ Hof (Court of Appeal) The Hague (2.8.2001), *Waterpakt*, published in *M&R* 2001, no. 95, with case note by J. Jans and M. de Jong.

⁶ Council Directive 91/676/EEC, OJ 1991, L 375/1.

⁷ Case 26/62 *Van Gend en Loos* [1963] ECR 1. See also Case 28/67 *Mölkerei-Zentrale* [1968] ECR 585, where the ECJ ruled that proceedings brought by an individual are intended to protect individual rights in a given case. Infringement proceedings are intended to ensure uniform application of Community law. They 'have different objects, aims and effects, and a parallel may not be drawn between them'.

We would also like to suggest that the French reluctance⁸ to accept the doctrine in judicial review of *individual* decisions of public authorities seems to be at odds with the requirements laid down in the case law of the ECJ. Here we are referring to the French, so-called *Cohn-Bendit*⁹ case law, according to which directives may not be invoked by individuals before French courts in support of an action against an *individual* administrative act:

‘les directives ne sauraient être invoquées par les ressortissants de ces Etats à l’appui d’un recours dirigé contre un acte administratif individuel’.

With the observation of the *Conseil d’Etat* in the same case that ‘à défaut de toute contestation sur la légalité des mesures réglementaires prises par le gouvernement français pour se conformer aux directives arrêtées par le Conseil des communautés européennes’, it has acknowledged that it is permitted to challenge the validity of the underlying implementing legislation. This second element of the *Cohn-Bendit* judgment, ‘an escape route’,¹⁰ can be regarded as an application of the ECJ’s *Kraaijeveld* judgment before it even existed.¹¹ This escape route has been used and developed by the *Conseil d’Etat* for a more Community law friendly approach in subsequent cases.¹² However one major problem is still that in cases where no implementing national legislation exists, the escape route is more or less non-existent.

In our view, the French reluctance is only acceptable if, in all individual cases where there is objectively speaking a conflict between an individual decision and directly effective provisions of a directive, the French administrative law courts come to the conclusion that the individual decision is either in violation of the implementing national legislation (and will therefore be annulled) or the implementing legislation is in conflict with the directive and should be set aside (and as a result, the individual decision will also be annulled). It is however unacceptable if, where there is a conflict between an individual decision and a directly effective provision of a directive, the French approach results in the individual decision being upheld.¹³

While there seems to be a reluctance in France to accept direct effect as a means to review *individual* decisions, but rather a preference to review the legal-

⁸ To be more precise: the reluctance of the French *Conseil d’Etat*. The French *Cour de Cassation* has never had any problems with the doctrine of direct effect; see Plötner (1998), p. 45.

⁹ *Conseil D’Etat* (22.12.1978), *Cohn-Bendit*, Rec. p. 524. English translation in [1980] 1 CMLR 543.

¹⁰ Words of Plötner (1998), p. 49.

¹¹ Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, see also our remarks in the following paragraph.

¹² See on these developments Plötner (1998), p. 49-50.

¹³ In the terminology of Van Gerven (2000): this would either affect the content of a Community right or one could even say that French public law does not provide an *adequate* remedy.

ity of the national legislation, the reverse appears to be true in Spain. In Spain, a set of cases are reported where lower courts rejected reliance on unimplemented directives on the ground that they can *only* apply directly effective provisions in the *absence* of national implementing measures, and that they lack competence to review the legality of national implementing law.¹⁴ In the authors' opinion this case law is in outright conflict with the Court's judgment in *Kraaijeveld*. In that case the Court ruled that:

'[I]n particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive'.¹⁵

This statement of the ECJ makes it perfectly clear that there is a duty for national courts to review the legality of national implementing legislation. It should however be noted that in later judgments the Spanish Constitutional Court has accepted that national courts have to set aside national legislation which is in contravention of Community law directives.¹⁶

To some extent elements of both the French and Spanish approaches can be found in the way administrative law courts apply the doctrine in the Netherlands. Sometimes judicial review focuses on the legality of individual decisions in the light of directly effective provisions of EC law; in other instances the Dutch courts have a strong preference for reviewing the legality of the underlying legislation.¹⁷ However neither method is excluded in principle and there seem to be no fundamental reasons for choosing one approach rather than the other.

Neither the French reluctance to review *individual* decisions of administrative authorities in contravention of directly effective provisions of EC law, nor

¹⁴ By Nogueres & Barbero (1993), p. 1148 and 1149, in referral to Tribunal Supremo (30.11.1991) Rep. 5371, reproduced in 83 *Noticias C.E.E.* 1991, p. 121-124.

¹⁵ *Kraaijeveld*, para. 56.

¹⁶ Dietz-Hochleitner (1998), p. 197, referring to Tribunal Constitucional 28/1991 (14.2.1991) and 64/1991 (22.1.1991), *BOE* of 15.3.1991 and 24.4.1991, where the Constitutional Court declined its constitutional function with regard to conflicts between national law and Community law. See also Nogueres & Barbero (1993), who at p. 1149 make reference to the fact that in spite of the pronouncement of the Constitutional Court, the Supreme Court (5.6.1991) reiterated its traditional doctrine as to its lack of competence to oversee the compatibility of national law with Community directives.

¹⁷ See on this more extensively Jans & de Jong (2002).

the Spanish reluctance to review the legality of national implementing *legislation*, are justified by the case law of the ECJ. This is unacceptable if it means that rights of individuals are denied as a result. It should be stressed that application of the doctrine of direct effect and the corresponding obligation for national courts to ignore conflicting legislative and administrative acts must be considered essential to the enforcement of Community law. This implies that national courts are bound to apply directly effective provisions of a directive, both in the absence of implementing national legislation, if necessary by annulling a conflicting administrative decision, and where there is national implementing legislation, by reviewing its legality. In addition, a national court may not on its own authority make the application of the direct effect doctrine depend upon the completion and result of an infringement procedure, as a Dutch Court of Appeal did in *Waterpakt*.

2.2 Formulating the conditions; the House of Lords in the *Three Rivers* case

On the face of it, the case law of the ECJ on the conditions for provisions of directives to be directly effective seems simple and straightforward. Provisions must be ‘unconditional and sufficiently precise’ before they can be relied upon in a national court.¹⁸

However, it is clear from the *Three Rivers* judgment of the House of Lords that things are not always that straightforward.¹⁹ The case concerned a legal action started by more than 6000 depositors of the BCCI against the Governor and the Bank of England. The BCCI was a Luxembourg bank which also carried out its business in the UK. The Bank collapsed in the early 1990s. The principal cause was fraud on a vast scale perpetrated at a senior level. One cause of action was alleged breaches of Community law, in particular the First Banking Directive.²⁰

According to the House of Lords, Community law is capable of conferring upon individuals the right to claim damages from a national authority by two distinct routes. The first one was described as the right to claim damages against the State or an emanation of the State (like the Bank of England) for the non-implementation or misimplementation of Community law, which can be based

¹⁸ Cf. *Becker* (as cited).

¹⁹ House of Lords (18.5.2000), *Three Rivers District Council and Others v. Governor and Company of the Bank of England*, [2000] 2 WLR 1220.

²⁰ Council Directive 77/780/EEC, OJ 1977, L 322/30 (by now replaced by Directive 2000/12/EC of the European Parliament and the Council, OJ 2000, L 126/1). We will not discuss the other cause of action ‘tort of misfeasance in public office’. See on this Andenas (2000) in his case note on the *Three Rivers* case.

upon the principle of direct effect ('*Becker*'-type liability).²¹ The second route is based upon the principle of State liability ('*Francovich*'-type liability).²² However, according to the House of Lords, the conditions which must be satisfied in order to establish a right of damages 'are so closely analogous that they can be taken to be [...] the same.' Subsequently the House of Lords formulated the critical questions in this *BCCI* case as follows: whether 'the Directive of 1977 entails the grant of rights to individual depositors and potential depositors and whether the content of those rights is identifiable on the basis of the provisions of the Directive'.

Its conclusion was that it was not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the Directive (harmonization). In short, according to the House of Lords, the relevant provision did not create rights for individuals and, as a consequence, the depositors of BCCI could neither rely on the doctrine of direct effect nor on the principle of State liability.

With all respect, we have some problems with the House of Lords' approach.²³

First of all, we are not aware of any case law of the ECJ stating that there are indeed two routes (State liability and direct effect) by which damages can be claimed. It was our belief that the route of State liability was 'invented' by the ECJ to fill the gaps left by the doctrine of direct effect in this respect. In the case of non-implementation and misimplementation and other conflicts with national law, reliance on directly effective provisions of EC law normally results in application of the necessary Community law provisions. The purpose of direct effect is to ensure that provisions of Community law prevail over national provisions. On the other hand, the right to reparation is a necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

Nor are we aware of any case law of the ECJ which states that the conditions for 'direct effect' ('unconditional and sufficiently precise') are more or less the same as those for State liability (individual rights, sufficiently serious breach,

²¹ In reference to *Becker* (as cited). The House of Lords noted that in order for there to be liability under this principle the rights said to have been conferred by the Directive must be 'unconditional and sufficiently precise'.

²² In reference to Joined Cases C-6/90 and 9/90 *Francovich* [1991] ECR I-5357. For this the House of Lords quoted the well known *Dillenkofer* judgment: 'the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the state's obligation and the loss and damage suffered by the injured parties'; Joined Cases C-178/94, 179/94 and 188-190/94 *Dillenkofer* [1996] ECR I-4845, para. 22.

²³ And we are not alone in our criticism. Cf. Wissink (2002) and Andenas (2000).

causal link, damages). Of course the Court made it clear in *Brasserie* that direct effect implies that these provisions confer rights on individuals upon which they are entitled to rely directly before the national courts and that breach of such provisions may give rise to reparation.²⁴

Arguably, what the House of Lords should have done was first to assess whether or not the relevant provisions of the First Banking Directive were directly effective (by considering whether they were unconditional and sufficiently precise in either the ‘*Becker*’ or ‘*Kraaijeveld*’ way) and, if this was the case, come to the conclusion that individual rights were at stake which might give rise to *Francovich*-style liability. The Lords’ approach should however be reserved for provisions of directives which do not have direct effect. In that case a detailed analysis of the substantive content becomes relevant. After all, a provision of Community law may lack direct effect and still give rise to rights of individuals.²⁵ On this, we would also like to refer to the dissenting opinion of Lord Justice Auld in the Court of Appeal. He came to the conclusion, in our opinion rightly so, that the First Banking Directive:

*‘imposed clearly defined obligations on Member States and on their regulatory bodies and, in doing so, gave rise to corresponding Community law rights on individuals in the position of the plaintiffs to enforce those obligations, if necessary by an action for damages.’*²⁶

What the House of Lords did however was something completely different: it did not discuss the direct effect of the Banking Directive, but analysed the provisions of the Banking Directive from a very - in our opinion, too - narrow viewpoint concerning ‘individual rights’. The real question was not whether the Directive’s primary objective is to provide guarantees and safeguards to individual or groups of savers and other creditors of the BCCI and other banking institutions, but whether public authorities failed to meet their directly effective obligations under the Directive and whether individuals suffered damage as a result.

In this respect the French case law after *Parodi*²⁷ has been referred to,²⁸ where the French *Cour de Cassation*, among other French courts, did provide for protection of the depositors under the First Banking Directive. By contrast, the

²⁴ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para. 23 (with regard to the Treaty provisions on free movement of goods).

²⁵ See for example Joined Cases C-6/90 and 9/90 *Francovich* [1991] ECR I-5357.

²⁶ Court of Appeal (4.12.1998) *Three Rivers District Council and Others v. Governor and Company of the Bank of England*, [2000] 3 CMLR 1, 152.

²⁷ Case C-222/95 *Parodi* [1997] ECR I-3899.

²⁸ By Andenas (2000), p. 401.

tendency in Germany is to undertake banking supervision in the public interest only, and not to protect individual interests of bank creditors.²⁹ In view of these different approaches, the House of Lords should at least have referred the matter to the ECJ as to whether the provisions in question have direct effect, and/or whether a violation gives rise to State liability. Considering the same differences, it is hard to see how the Lords could have regarded the issue as an *'acte clair'*.³⁰ After all according to the *Cilfit* doctrine, it is not sufficient that the matter is clear to the Lords, but they must be convinced that the correct application of Community law is equally obvious to the courts of other Member States and the ECJ.³¹

Against this background, we would like to emphasize that national courts do not normally have any discretion about whether or not to accept the direct effect of a provision of Community law; it either does have direct effect or it does not.³² Furthermore we would like to suggest that national courts should *especially* exercise extreme caution when they *deny* the direct effect of provisions of Community law. National courts need to be fully aware of this. If there is an 'arguable'³³ case for accepting the direct effect of a given provision of Community law, national courts should not deny the direct effect without referring the case to the ECJ.³⁴

2.3 Horizontal direct effect or not; Spanish and Italian approaches

In well established case-law, the ECJ has rejected horizontal direct effect of directives, that is to say, the possibility of directly invoking a directive against an individual and imposing an obligation upon an individual.³⁵ According to the Court, a directive may not in itself impose obligations on an individual and a provision of a directive may not be relied upon as such against an individual. In this respect, national courts generally reject reliance on directly effective provisions of directives in litigation between private parties.³⁶

²⁹ Andenas (2000), p. 400-403, where he criticizes the fact that the House of Lords did not make any reference to developments in French and German case law.

³⁰ In the same vein Wissink (2002).

³¹ Case 283/81 *Cilfit* [1982] ECR 3415 (para. 16).

³² See however paragraph 4 below, where we discuss to what extent it is possible that provisions of Community law have direct effect according to national (constitutional) law where they do not meet the standard EC law conditions for direct effect.

³³ For instance, where national courts in other jurisdictions have accepted that a given provision of Community law is directly effective.

³⁴ By way of an extended analogy of the ECJ's ruling in Case 314/85 *Foto-Frost* [1987] ECR 4199.

³⁵ Cf. Case C-91/92 *Faccini Dori* [1994] ECR I-3325 and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281.

³⁶ See quotations made in several of the national reports in: *Les Directives Communautaires: effets, efficacité, justiciabilité*, Stockholm XVIII FIDE-congress 1998 (I).

For example the House of Lords has rejected horizontal direct effect because a directive has no effect upon the private rights of parties.³⁷

There are but few exceptions in national case law, where the direct application of directives in private litigation was accepted. For instance in Spain, the *Tribunal Supremo* has held on a few occasions that the Directive relating to unfair terms in consumer contracts³⁸ may produce horizontal direct effect.³⁹ And Italian courts have also sometimes acknowledged the direct effect of directives in relationships between individuals.⁴⁰ In this respect a judgment of the Italian *Corte di Cassazione* is mentioned, where it upheld a decision which recognized horizontal direct effect by stating that although the ECJ denies the horizontal direct effect of Directives, ‘this does not rule out that the national court may and shall judge as if the conflicting national law did not exist’.⁴¹

Although it could be said that the effective application of Community law and the protection of at least one party is increased by the ‘national’ acknowledgement of horizontal direct effect, it is debatable whether this divergent application of Community law is acceptable. Because imposing an obligation upon an individual by way of direct effect may be unacceptable from a European law point of view, it is not inconceivable that national courts would be obliged, on the basis of Article 10 EC, to exclude the application of the directly effective provision of a directive between individuals, even where such an application is in accordance with national constitutional law. We will come back to this issue later in paragraph 4 of this contribution. Yet in private litigation national courts, following the case law of the ECJ, generally consider the appropriate enforcement mechanism to be the duty to interpret national legislation in light of the Directive and reserve the application of directly effective provisions for emanations of the State.⁴²

³⁷ E.g. House of Lords *Duke v. Gec Reliance* (11.2.1988) [1988] 1 CMLR 719 and House of Lords *Regina v. Secretary of State for Employment ex parte Seymour Smith* [1997] 2 CMLR 904.

³⁸ Council Directive 93/13/EEC, OJ 1993, L 95/29.

³⁹ Díez-Hochleitner (1998), p. 199, in reference to Tribunal Supremo (8.11.1996), RJA 1996/7954, Tribunal Supremo (30.11.1996), RJA 1996/8457 and Tribunal Supremo (5.7.1997), RJA 1997/6152.

⁴⁰ See the examples mentioned by Adinolfi (1998), p. 1331.

⁴¹ By Adinolfi (1998), p. 1331 and 1332, in reference to Corte di Cassazione (3.2.1995), No. 1271, *Dir. Lav.* 1995, II, 8. In this respect, Adinolfi also mentions Italian Court of Cassation (27.2.1995) No. 2275, *Riv. dir. internaz* 1995, 448, where the Court corrected its approach.

⁴² See for example on ‘indirect effect’ in UK Courts and the scope of the interpretative obligation in horizontal disputes Craig (1997), in particular at p. 528-535. See also Betlem in this volume’s chapter IV.

2.4 Horizontal side-effects of vertical direct effect; examples of national (mainly English, German and Dutch) case law

In spite of the consistent rejection of horizontal direct effect, the ECJ has on several occasions accepted the possibility of reliance on directives between individuals. Where, in a case like *CIA Security*, the Court holds that the relevant obligation may be relied on between individuals and national courts are bound to set aside the national measure because of its incompatibility with the Directive, the directly applied provision will certainly affect the legal position of the individuals concerned.⁴³ Moreover, the Court has confirmed the direct effect of provisions of a directive in proceedings against the State in situations where the application of these provisions could easily have legal consequences for third parties.⁴⁴ Without entering the discussion on this complicated issue, it seems that the Court is willing to accept the direct effect of directives, where the application of the directive, although clearly affecting the legal relationship of individuals, does not *in itself* amount to imposing an obligation on an individual.⁴⁵ That is to say, Community law provisions which impose obligations on the Member States can be directly invoked both in proceedings against the State and in proceedings between individuals to prevent the application of national legislation which is inconsistent with the directive in question. The Court seems to have accepted the possible horizontal side-effects of the application of this type of (disguised vertical)⁴⁶ direct effect.

⁴³ Cf. Case C-194/94 *CIA Security* [1996] ECR I-2201, Case C-85/94 *Piageme II* [1995] ECR I-2955, and more recently, Case C-443/98 *Unilever Italia* [2000] ECR I-7535. See also the observation of Lord Hoffman in *Regina v. Secretary of State for Employment ex parte Seymour-Smith*, [1997] 2 CMLR 904, p. 909, where he rejected the submission that *CIA Security* could be regarded as a departure from the rejection of horizontal direct effect because this case should be regarded as plainly distinguishable: 'there is not hint in the judgment of the Court that it intended to depart from its jurisprudence [...] the case was one in which, unusually, the issue in litigation between private parties was whether, as a matter of public law, the manufacturer was doing something unlawful. If the regulation alleged to have been infringed could not be enforced against him by the State, it could not be right for the defendant to say that his alarm system did not comply with the law'.

⁴⁴ Cf. Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, *Kraaijeveld* (as cited) and Case C-435/97 *World Wildlife Fund (WWF)* [1999] ECR I-5613. However, in Case C-221/88 *Busseni* [1990] ECR I-495 the Court rejected the possibility of invoking a provision of a directive against the State because this would amount to imposing an obligation on the private parties involved. On the issue how this approach can be reconciled with *Fratelli Costanzo*, see Jans e.a. (1999), p. 76 and 77.

⁴⁵ Cf. Case C-443/98 *Unilever Italia* [2000] ECR I-7535. See also Gilliams (2000), Dougan (2000) and Betlem in this volume's chapter IV (paragraph 2.4) as to the interpretation of this case law.

⁴⁶ Term used by Dougan (2000).

Application of this kind of enforcement can be found in relation to the public procurement directives. For example in Sweden, a judgment of the Supreme Administrative Court has been reported where the Court, referring to Directive 92/13,⁴⁷ allowed a private litigant to contest the rights of another individual, who had already been granted a public procurement contract under Swedish law.⁴⁸

Other interesting observations can be made in this respect by examining national case law on the environmental impact assessment directive (EIA Directive) and its application in so-called trilateral legal relations.⁴⁹ National case law involving the EIA obligation shows that there are differences in judging the acceptability of horizontal side-effects of the (vertical) direct effect of directives.

The *Huddleston* case provides a clear example where horizontal side-effects were accepted.⁵⁰ In this English case judicial review was sought by Huddleston. The Court of Appeal had to ascertain what to do about a statutory planning regime which, in breach of a directive, enabled a company, in this case Sherburn, to revive a mining permission without providing an EIA. In answer to the question whether the application of the direct effect of the Directive would be entering the forbidden territory of horizontal direct effect, Lord Justice Sedley concluded that although Sherburn would be subjected to more onerous conditions for the grant of the permission, to give the directive direct effect would not 'impose an obligation in the objectionable sense - that is to say, to interpose a new obligation in the relations between individuals or retrospectively to criminalise the activity of one of them. It is to prevent the State, when asked by a citizen to give effect to the unambiguous requirements of a directive, from taking refuge in its own neglect to transpose them into national law'.

The Dutch Council of State adopted the same approach where it allowed an interested party to invoke the EIA Directive, which resulted in annulment of an authorization granted to a company (Aramide) because no EIA had been carried out.⁵¹ However a Belgian case has been reported where the Council of State rejected direct effect in a similar situation to *Huddleston* in view of the horizontal effect. There, the Belgian Council of State refused to apply the same

⁴⁷ Council Directive 92/13/EEC (public procurement), OJ 1992, L 76/14.

⁴⁸ By Eliasson, Abrahamsson & Mattsson (1998), p. 397 (Swedish Supreme Administrative Court, 26.6.1996, Case RÅ 1996, Ref. 50). This case seems to be a straightforward application of the *Fratelli Costanzo* doctrine. Cf. also Irish High Court (17.6.1997) *SIAC Construction v. Mayo Country Council*, referred to by Travers (1998), p. 188.

⁴⁹ Council Directive 85/337/EEC, OJ 1985, L 175/40, amended by Council Directive 97/11/EC, OJ 1997, L 73/5.

⁵⁰ Court of Appeal (8.3.2000) *Regina v. Durham Country Council and others ex parte Rodney Huddleston*, [2000] 2 CMLR 313.

⁵¹ Dutch Council of State (19.12.1991), *Aramide*, AB 1992/122.

directive in a case where the claimants contested a building permit granted without an environmental assessment because:

*‘la jurisprudence citée par les requérants vise le cas où un citoyen pourrait se prévaloir d’une obligation mise à charge de l’Etat par une directive, que l’exception à la règle générale qui a ainsi été admise par la Cour de justice ne saurait être étendue au cas où, comme en l’espèce une obligation est mise à charge d’un citoyen’.*⁵²

A decision of the German *Bundesverwaltungsgericht* seems to take a similar view as the Belgian Court. In this case the *Bundesverwaltungsgericht* recognized that the EIA Directive could be invoked in order to contest a planning decision for a government-built highway.⁵³ The *Bundesverwaltungsgericht* observed:

‘Ob der einzelne aus diesen Bestimmungen subjektive Rechte für sich herleiten kann, spielt in diesen Zusammenhang keine Rolle. Die Möglichkeit des gemeinschaftsbürgers, sich auf hinreichend genaue und unbedingte Richtlinienvorschriften zu berufen, ist nicht eine Voraussetzung, Aufschluß darüber zu geben, ob der Richtlinieninhalt im säumigen Mitgliedstaat objektivrechtlich gilt. Ebenfalls keine Rolle spielt hier, daß eine unmittelbare Anwendung einer nicht umgesetzten Richtlinie zu Lasten Privater nicht in Betracht kommt; denn hier handelt es sich um ein Vorgaben, dessen Träger der Staat ist.’

This case concerned an application for planning permission by a public authority. The final sentence of the paragraph quoted, seems to imply that if it were a private person who had applied for planning permission, the *Bundesverwaltungsgericht* would not have accepted the horizontal consequences. In this respect it should also be noted that there is a lively debate concerning the pros and cons of these kinds of horizontal effects in German doctrine.⁵⁴

In the authors’ opinion this Belgian and German case law fails to acknowledge the Court’s case law. After all, in *Kraaijeveld* and *WWF* the Court seems to have accepted these kinds of horizontal effects.⁵⁵ In our view, having accepted these horizontal side-effects the ECJ has created a duty for the national courts to apply the vertically directly effective provision in question. However, as it may be difficult for national courts to distinguish acceptable horizontal side-effects from the unacceptable horizontal direct effect of directives, national courts should refer questionable cases to the ECJ. Because the acceptability of these side-effects

⁵² Conseil D’Etat (21.9.1993), *Reintjes*, Recueil des arrêts No. 44.142.

⁵³ Bundesverwaltungsgericht 100, 238 (25.1.1996), *DVB1*. 1996, p. 677, *NJW* 1997, p. 144

⁵⁴ Cf. Ruffert (1996), p. 76-77 in particular.

⁵⁵ *Kraaijeveld* and *WWF* (as cited). See also *Unilever Italia* (as cited).

goes to the heart of the doctrine of direct effect, it is for the Court to rule on the issue and it should not be left to the national courts. To avoid divergence the general approach for national courts should therefore (again) be: if there is a *prima facie* case for direct effect, direct effect should only be rejected after a reference to the ECJ.

2.5 Conclusions

Are differences with respect to the doctrine of direct effect acceptable? We would like to stress again the rationale of the doctrine, on the one hand to provide effective legal protection and, on the other, to ensure 'uniform' application of Community law. The case law of the ECJ shows that national law which affects the doctrine of direct effect 'as such' is incompatible with Community law and cannot be accepted.

In view of that, it is our opinion that there should be no national discretion in what we would like to call the 'standard setting' of the direct effect doctrine as a doctrine of EC law. By this we mean that all issues concerning questions like: what are the conditions to be applied for assessing direct effect, what are the consequences in terms of supremacy of directly effective provisions, and what is the relationship between direct effect and concepts like indirect effect and State liability and the enforcement procedure under Article 226 EC etc., should be decided by the ECJ. In other words, the ECJ should have the monopoly in terms of *shaping the contours* of the doctrine as such; it is the ECJ that rules exclusively on the question whether and, if so, under what circumstances, a Community law provision does or does not have direct effect.

In this respect, it should be noted that the Dutch refusal to apply the direct effect doctrine in anticipation of the decision of the ECJ in the enforcement procedure, where no support for this approach can be found in the case law of the ECJ, can not be accepted. And by persevering in its rejection of the possibility of relying on directives against individual administrative acts in the absence of implementing measures, the *Conseil d'Etat* also goes against the EC standard for the application of directly effective provisions of Community law. Furthermore, the judgment of the House of Lords in the *Three Rivers* case, where it decided - perhaps implicitly - that the condition of 'individual rights' must be applied in liability and direct effect cases alike, and no reference was made to the ECJ, seems to fail to acknowledge national differences (by courts and in literature).

In view of the maxim *in dubio, pro direct effect* national courts should be very cautious about denying the direct effect of a given provision of Community law and, in cases of real doubt, should refer the case to the ECJ. Diverging national judgments, resulting from different national approaches in respect of the key elements of the doctrine, are not acceptable and should be avoided as far as possible.

3 National case law and the ‘modalities’ of applying the doctrine of direct effect; the Berkeley case

The rulings of the Court in cases like *Rewe/Comet* make clear that some national differences are to be considered inherent in Community law.⁵⁶ In the absence of specific Community rules it is for the Member States to determine the competent courts and applicable procedural rules for legal proceedings relevant to the enforcement of Community law. The two well known basic conditions of the so-called *Rewe*-test are that these rules may not be less favourable than those relating to similar ‘domestic’ remedies (principle of non-discrimination) and that these rules may not make the exercise of Community rights virtually impossible or excessively difficult (principle of effectiveness).⁵⁷ It must be acknowledged that the case law of the ECJ in *Rewe/Comet* implies the legitimacy of national differences concerning the modalities of applying the direct effect doctrine.

The judgment of the ECJ in *Upjohn* suggests that national differences in the *intensity* of, and the *methods* used in, judicial review must also be accepted, and are only subject to a *Rewe*-test.⁵⁸ So it might (or might not, for that matter) be correct to state that the ‘Wednesbury unreasonableness’ test applied in English judicial review leaves more latitude to public authorities than the legitimacy tests normally applied by German *Verwaltungsgerichte* and that, even though the various approaches of Dutch administrative law courts differ from those employed by both the English and the German courts, these differences are acceptable.

We would like to illustrate these national differences with a judgment of the House of Lords in the *Berkeley* case.⁵⁹ This case involved the granting of a planning decision by the Secretary of State for the Environment for a development of the Fulham Football Club. Lady Berkeley, who lives near the site, and who, according to the written judgment ‘has taken a course on Ecology and was concerned about the effect of the development on the diversity of species in the Thames’ took legal action. She argued, among other things, that the grant of planning permission should be quashed on the ground that it was *ultra vires* because no Environmental Impact Assessment (EIA) had been undertaken as required by the relevant directive.

⁵⁶ Case 33/76 *Rewe* [1976] ECR 1989; Case 45/76 *Comet* [1976] ECR 2043 and Case 265/78 *Ferwerda* [1980] ECR 716.

⁵⁷ Cf. Prechal (2001).

⁵⁸ Case C-120/97 *Upjohn* [1999] ECR I-223.

⁵⁹ House of Lords (6.7.2000) *Berkeley v. Secretary of State for the Environment and Others*, *Journal of Environmental Law* 2001, p. 89-105, case law analysis by Upton.

In the Court of Appeal the judge had stated that even if an EIA was required, he would as a matter of *discretion* refuse to quash the permission. The reason was that in his opinion the absence of the EIA ‘had no effect on the outcome of the inquiry and could not possibly have done so’. UK planning law allowed the judge to exercise his discretion in this way. However, the House of Lords disagreed with the approach taken by the Court of Appeal. Although UK planning law, in providing that the Court ‘may’ quash an *ultra vires* planning decision, clearly confers a discretion upon the Court, the House of Lords doubted:

‘whether, consistently with its obligations under European law, the Court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the Court under Article 10 (ex Art. 5) of the EC Treaty to ensure fulfilment of the United Kingdom’s obligations under the Treaty’.

In other jurisdictions, in Germany and the Netherlands for instance, we find that judges have the same kind of discretion.⁶⁰ In Germany the courts generally will exercise their discretion; Dutch courts will not. So once again: national, even intra-national, divergences. Acceptable or not?

It is clear that the problems in this case are of a different order compared to those in the *Three Rivers* case. They are not about direct effect ‘as such’, but rather concern the question what role national *procedural* rules play in the case of conflicts between national law and EC measures with directly effective provisions: i.e. the modalities of applying the doctrine of direct effect.⁶¹

The House of Lords’ approach in the *Berkeley* case, where ‘discretion’ was discussed in the context of Article 10 EC, is in the authors opinion a correct one. We would like to advocate the same approach in respect of matters such as national rules on court fees, consequences of procedural errors, statutory limitations, compulsory representation, *locus standi*, etc. Even though national case law shows that these rules have a considerable effect on the outcome of national procedures, national discretion should be respected as long as these rules do not affect the effectiveness of legal protection.

Of course the Community legislator can intervene by enacting relevant directives. However, we would not be in favour of too general an approach by the Council. A directive on, for instance, *locus standi* for non-governmental organizations might make perfect sense in the areas of consumer and environmental law; but in other areas (e.g. tax and social security law) it might not. Only the ‘rough edges’ of national procedural law should be removed by Community harmonization and a case-by-case approach is to be preferred.

⁶⁰ See on this more extensively Jans & De Jong (2002).

⁶¹ Or, in the terminology of Van Gerven (2000): this is not a matter of ‘rights’ or ‘remedies’ but of ‘procedures’.

Thus, with regard to the modalities of applying the doctrine of direct effect, as a general rule we would suggest to respect national discretion. If in a given situation the results are unsatisfactorily, it is up to the Council to harmonize that area. In exceptional circumstances the Court can intervene on the basis of the second *Rewe* condition of effectiveness, as it has done in cases like *Emmott*⁶² and (though not explicitly) *Océano*.⁶³ In recent literature some scholars have tried to explain the tension between the need for uniformity on the one hand and national discretion on the other by using the concept of ‘proportionality’.⁶⁴ Maybe the concept of ‘subsidiarity’ is more precise in this context: what is good for domestic law should be, in principle, good enough for Community law.⁶⁵

4 Direct effect from the perspective of minimum harmonization

Direct effect as a doctrine of EC law does not allow national standard setting. But how does this relate to the various doctrines of direct effect and/or self-executing provisions of European and international law as a doctrine of *national constitutional* law? We have seen that national courts have on occasion applied directly effective provisions even before the Court had recognized such an effect. It is legitimate to wonder whether national courts are entitled to confer direct effect on a provision of Community law or an EU-framework decision, irrespective of the fact that the relevant provision does not have direct effect from a Community law point of view.

In our opinion these questions are primarily, if not exclusively, governed by national (constitutional) law. In this respect, the case law of the ECJ on the conditions for direct effect can be regarded as a form of minimum harmonization.

Support for this idea can be found in the *Brasserie* case, where the Court considered direct effect to be only a ‘minimum guarantee’ (and State liability its ‘necessary corollary’).⁶⁶ Furthermore, as regards the conditions governing State liability, it stated that a Member State may incur liability under less strict conditions on the basis of national law.⁶⁷ Even stronger support can be found in the *Dior* case, where the Court ruled that Community law does not prohibit

⁶² Case C-208/90 *Emmott* [1991] ECR I-4269.

⁶³ Joined Cases C-240-244/98 *Océano* [2000] ECR I-4941.

⁶⁴ Van Gerven (2000), p. 533; Prechal (2001), p. 39-58 and Biondi (1999).

⁶⁵ See also the conclusion of A.G. Jacobs in Joined Cases C-430/93 and 431/93 *Van Schijndel* [1995] ECR I-4705.

⁶⁶ *Brasserie du Pêcheur*, para. 20.

⁶⁷ *Brasserie du Pêcheur*, para. 66.

the legal order of a Member State according to individuals the right to rely directly on Article 50(6) of TRIPs or oblige the courts to apply that rule of their own motion even if this provision is not, by virtue of Community law, directly effective.⁶⁸

In this respect, we would also like to refer to the Court's judgment in the *Sievers* and *Schrage* cases.⁶⁹ In these cases a German court was seeking to ascertain whether the limitation in time of the possibility of relying on the direct effect of Article 141 EC⁷⁰ precludes national provisions of less restrictive character. The ECJ ruled that the limitation of the possibility of relying on the direct effect of Article 141 EC was not intended in any way to deprive the workers concerned of the opportunity of relying on national provisions laying down a principle of equal treatment. The Court went on to add that national provisions having the effect of ensuring application of the principle of equal pay for male and female workers contribute to the implementation of Article 141 EC, in compliance with the obligation which is incumbent on the Member States. As a result it concluded:

'In such circumstances, the principle of legal certainty inherent in the Community legal order, which may move the Court, exceptionally, to limit the possibility of relying on a provision which it has interpreted, does not fall to be applied and does not preclude the application of national provisions which ensure a result which conforms with Community law'.

All the cases cited above seem to suggest, although without explicitly dealing with the issue, that more 'liberal' national approaches with respect to direct effect are allowed. More 'liberal' must be interpreted in the sense of the capability of producing 'more legal protection' and a 'more effective application of Community law'. So Community law does not preclude, as a matter of principle, judgments at the national level accepting the direct effect of directives by virtue of national law.

The necessary consequence of this is also that national courts first have to assess whether there is a Community law based right for the individual to rely on Community law or to claim damages. If the European conditions for a successful claim are not met, national courts should subsequently consider whether the claim can be based on national law. For instance: in cases of State liability there is no reason for Dutch courts not to discuss State liability on the basis of Dutch

⁶⁸ Joined Cases C-300/98 and C-392/98 *Dior* [2000] ECR I-11307.

⁶⁹ Joined Cases C-270/97 and C-271/97 *Sievers* and *Schrage* [2000] ECR I-929.

⁷⁰ As a result of the *Defrenne II* and *Barber* case law where the Court ruled that overriding considerations of legal certainty required it to limit, to a certain extent, the retroactive effect of the relevant Treaty provision; Case 43/75 *Defrenne II* [1976] ECR 455 and Case C-262/88 *Barber* [1990] ECR I-1889.

public law if the more stringent *Francovich/Dillenkofer* test has failed. In other words, national courts must be aware of the fact that national law can play a role above the minimum level of ECJ case law standards.

A possible area of application of the notion of minimum harmonization outside the First Pillar of Community law might well be in the context of the Third Pillar's Framework Decisions (Art. 34 EU Treaty). The fact that Article 34 states that they shall not entail direct effect does not imply that Member States could not allow 'their' individuals to rely on Framework Decisions before national courts, if this is allowed under their national (constitutional) law. The 'they shall not entail direct effect' of Article 34 EU cannot be taken to have harmonized national constitutional law.

The only real problem concerns cases where national courts would accept 'horizontal direct effect' (individual *v.* individual) or 'inverse vertical direct effect' (State *v.* individual) of directives or would apply the doctrine of indirect effect in a manner which would affect legal certainty of private individuals. With respect to 'inverse vertical direct effect' it is necessary to appreciate that the ECJ's case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law. Accepting 'inverse vertical direct effect' by virtue of national law would circumvent this and, in the authors' view, is unacceptable.⁷¹

As far as 'horizontal direct effect' and 'indirect effect' are concerned, the issue becomes more complex. It is true that a directive may not by itself create obligations for individuals and a provision of a directive may therefore not be relied upon as such against an individual. By accepting 'horizontal effect' on the basis of national law, the directive does not however create the obligations 'by itself'. The source of the obligations is not the directive, but national law.

On the other hand, legal certainty remains a problem. The judgment in *Kolpinghuis* illustrates how the options of national courts can be influenced by general principles of Community law.⁷² In this, criminal, case the ECJ found, in answer to the question how far the national court *may* or must take account of a Directive as an aid to the interpretation of national law, that in light of general principles of law a directive cannot on itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. In this respect, it considered the question whether or not the period prescribed for implementation has expired to be of no relevance to '*the limits which Community law might impose* on the obligation or power of the national court to interpret the rules of its national law in light

⁷¹ See on inverse vertical (in)direct effect more extensively Betlem in this volume's chapter IV, paragraph 2.5.

⁷² Case 80/86 *Kolpinghuis* [1987] ECR 3969.

of the Directive'.⁷³ In brief, general principles of law may limit the powers of national courts to give effect to Community law. Yet, future case law of the ECJ will have to show more clearly to what extent these principles, in particular the principle of legal certainty, affect more 'liberal' national approaches with respect to (in)direct effect (in criminal as well as civil and administrative context).

5 Conclusions

Our survey of the case law has shown considerable differences in the way national courts apply the doctrine of direct effect. What are the main reasons for this? First we would submit that the ECJ has thus far been unable to settle some major unanswered doctrinal questions (e.g. individual rights as a precondition for direct effect; what are the exact boundaries between unacceptable horizontal and permitted vertical direct effect). In the absence of guidance from the ECJ and in the light of the reluctance of many national courts to apply the *Cilfit* criteria for preliminary rulings, it is not surprising to find national divergences here.

The second reason however is that differences in the way national courts apply the doctrine are inherent in the Community legal system as such. There never has been, nor will there ever be a uniform system of legal protection within the Member States of the EU. The question should not therefore be: are national differences acceptable, but rather: what kind of differences are acceptable and what are not?

Unacceptable differences are those which concern the shaping of the doctrine as such (conditions, scope, content). The doctrine of direct effect sets a standard with respect to the interpretation of Community law, and thus falls within the competence of the ECJ. However, except for those cases where this would affect legal certainty as a general principle of Community law, more 'direct effect' is allowed on the basis of national (constitutional) law and could therefore remain a source of national differences.

What should be done about national differences? With respect to differences concerning the modalities: nothing at all. We have to learn to live with it. In exceptional cases national courts and the ECJ may intervene on the basis of Article 10 EC. The second *Rewe* condition of 'effectiveness' limits national peculiarities in this respect. At the end of the day it is the ECJ that rules on the ultimate interpretation of the second *Rewe* condition; unacceptable differences will be 'harmonized' if the Court finds these differences incompatible with the requirement of 'effectiveness'.

⁷³ Para. 15 (italics by the authors). See also joined Cases C-74/95 and C-129/95 *Procura della Repubblica v. X* [1996] ECR I-6609 (para. 31).

Furthermore, the Council might want to regulate national procedural rules in a directive. However, we would not favour too general an approach and we would suggest that there is no *general* competence to harmonize this issue.⁷⁴ The extent to which national procedural rules affect the effectiveness of the direct effect doctrine will depend very much on the substantive rules at issue. Restrictive national rules on *locus standi* (in particular with regard to third party access) will, for example, have a greater negative impact in areas of consumer and environmental law than in tax or social security law.

To avoid unacceptable differences we submit that national courts should make more use of the preliminary rulings procedure. The statement of the House of Lords in the *Three Rivers* case that it did not find it appropriate to make a reference for a preliminary ruling, because it regarded the issue as clear cut, is not convincing at all. Of course we understand the reluctance many national courts feel about using the preliminary rulings procedure and we appreciate why the *Cilfit* criteria are not always applied in the strict sense of that judgment. But judgments at national level which go to the heart of the direct effect doctrine without guidance by the ECJ should, as far as possible, be avoided. In this respect we would like to stress that national courts do have to take developments in other jurisdictions more seriously (as required by *Cilfit!*). Nowadays judgments can only rarely be found where there is an explicit reference to foreign case law. In our view, if a national court wanted to interpret Community law differently from the interpretation already given in another Member State, it could not be maintained that this provision of Community law could be regarded as an *acte clair*.

Finally, the ECJ should also make up its mind about some key doctrinal issues and give clearer guidance. If it wants to be accepted as a constitutional court it should act like one.

⁷⁴ Perhaps with the exception of Art. 308 EC; see Jans & de Jong (1999).