

DIRECT EFFECT - MYTH, MESS OR MYSTERY?

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There are almost as many articles of *doctrine* as there are judicial decisions about direct effect. The comments range from enthusiastic approval to contemptuous dismissal of what the Court has done. For some, direct effect is an essential characteristic of the Community legal order and without it the Community legal order would not be the same. For others, direct effect is an infant disease² or, more depressingly, the Court has lost its way or, more ominously, the Court has mystified a simple problem in order to confer a special sanctity on the Community legal order and therefore on the Court.

I must say that I sometimes wonder whether I am on the same planet as some of the commentators. Taking part in the Court's deliberations, I see only a group of judges from different countries seeking to find acceptable legal solutions to practical legal problems.

My diagnosis is that direct effect is not a disease but that it is liable to become a virus infecting the correct analysis of what are in reality separate though related problems. Essentially, I suggest that there is a danger of falling into what philosophers call the nominalist fallacy. This is the belief that because we use a particular word or expression, there must exist, somewhere in the universe, something to which that word or expression refers. So when we use the expression 'direct effect', there must be somewhere outside Community law a concept (or as Plato would have called it an 'idea') of direct effect. That, and only that, *is* direct effect. Anything that does not correspond to that model is not direct effect and, to the extent that the Court uses or seems to use that expression in relation to other phenomena, it must be wrong.

Commentators have suggested a number of different ways of describing what direct effect is about. On one view, it is a package of criteria for selecting the norm to be applied or, in some cases, for rejecting a particular norm as the norm to be applied. On another view, it is a filter of judicial competence, designed to answer the question, "Is this particular norm one that a judge can apply in this particular fact situation, or has it not yet reached the province of the judiciary?" Put another way, direct effect is concerned with the separation of powers. That analysis was applied by Chief Justice Marshall of the United States in 1829 in a case raising the question whether a treaty

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² *Pescatore*, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, (1983) 8 *ELRev.* p. 155 ff.

had become 'self-executing'. After affirming that by its nature a treaty is a contract between nations and not a legislative act, he said:

“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”³

Another way of looking at the problem is that direct effect (or the techniques of direct effect) are closely related, and in some respects identical, to familiar problems of national law. How far can individuals rely on programmatic legislation to derive rights for themselves? For example, when the Parliament has set up a system of urban and environmental control, to what extent can an individual rely on those statutes to prevent a neighbour building a house in a particular way or in a particular place? If Parliament requires local authorities to make arrangements for housing homeless persons, can an individual rely on that legislation to insist that a particular local authority must provide him or her with a house?

Again, direct effect can be related to the distinction between remedies in public and private law and the question of *locus standi*. Is this dispute a matter for judicial review of executive action or for a private law remedy under the civil law? Does *this* individual have capacity, title and interest to sue for *this* remedy in *this* case? As Professor Winter said in the article which began the analysis of direct applicability and direct effect:

“In every Member State there exists quite a bit of law which is not enforceable in the courts because those rules were not meant to give the private individual enforceable rights, or because they are too vague or incomplete to admit of judicial application.”⁴

In order to bring some order into the discussion, it is useful to go back to the beginning with the Opinion of Advocate General Lagrange in *FEDECHAR*, the tenth case decided by the Court.⁵ There he said:

“One could, no doubt, make the point that our Court is not an international court but the court of a Community created by six States on a model which is more closely related to a federal than to an international organisation, and that

³ *Foster & Elam v Neilson*, 27 US (Pet.) 253, 314 (1829), quoted by Winter in *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, (1972) CMLRev., pp. 425-438, at p.429.

⁴ *Op. cit.* at p. 436.

⁵ Judgment of 16 July 1956, Case 8/55, *Fédération Charbonnière de Belgique v High Authority*, [1954-55] ECR 245, at p. 277.

although the treaty which the Court has the task of applying was concluded in the form of an international treaty, and although it unquestionably is one, it is nevertheless from a material point of view the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community. As regards the sources of that law there is obviously nothing to prevent them being sought where appropriate in international law, but normally, and in most cases, they will be found in the internal law of the various Member States.”

Taking that as the starting point, the problem for the Court in the 1950s and early 1960s was to define more precisely how the internal law of the Community was to be inserted between conventional international law and the domestic law of the Member States? There were, and still are, several different approaches to this. Of the original Member States, Belgium and Luxembourg were monist. They found it easy to accept that international norms, and therefore the norms of the Community treaties, are as much part of the law to be applied by a national judge as any provision of national law. Germany and Italy were dualist. For them, it was far from evident that Community law had entered the realm of national law to be applied by a national judge. France and the Netherlands took an intermediate position. France accepted the binding nature of treaty obligations but insisted on reciprocity. The Netherlands amended its Constitution during the 1950s, first to increase the extent of internal application of treaty law and then, three years later, to limit it.

Logically, the first question to be decided was the question of primacy: In the event of conflict, does the law of the Treaty prevail over inconsistent national law? Under the EEC Treaty, that question arose one year after the question of direct effect. Under the ECSC Treaty, it arose in *Humblet* in 1960. There the Court said:

“[If] the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law that Member State is obliged by virtue of Article 86 of the Treaty [Article 5, now Article 10 EC], to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and the Protocol which have the force of law in the Member States following their ratification and which take precedence over national law.”⁶

It is worth noting that, in that short quotation from 1960, we find enunciated two of the three basic principles of Community law, the principle of primacy and the obligation to make reparation for breach of treaty obligations.

In the EEC context *Costa*⁷ dealt with the question of primacy but was preceded by *Van Gend en Loos*⁸. Nevertheless, it is important to note the reasoning in *Costa*.

⁶ Judgment of 16 December 1960, Case 6/60 *Humblet v Belgium* [1960] ECR 559 at p. 569.

⁷ Judgment of 15 July 1964, *Costa v ENEL* Case 6/64, [1964] ECR 585.

⁸ Judgment of 5 February 1963, Case 26/62 *Van Gend en Loos* [1963] ECR 1.

Essentially it is this. Acceptance by all the Member States of the Community legal order on a basis of reciprocity is logically inconsistent with a unilateral power on the part of individual Member States to pass incompatible national legislation. Article 5 (the obligation to abstain from measures liable to jeopardise attainment of the objectives of the Treaty) would be unenforceable if Member States could derogate unilaterally. The unconditional contractual obligations undertaken under the Treaty would be merely contingent obligations if Member States were free to pass incompatible legislation.

The Court emphasised that the Treaties were contractual, that they created obligations for the Member States and that the action taken by them must not be such as to derogate from or nullify the obligations they have undertaken under the treaties. It is in that context (albeit expressed subsequently) that we should consider what the Court said in *Van Gend en Loos*.

The question put by the Dutch tribunal in *Van Gend en Loos* was whether Article 12 has “*direct application* [in the original Dutch *interne werking*] within the territory of a Member State, in other words whether nationals of such a State can, on the basis of the article in question, lay claim to rights which the courts must protect”.

In its argument the Netherlands Government insisted on the distinction between internal effect [*interne werking*], which I think we would now call direct applicability, and direct effect [*directe werking*], the first being a condition of the second. The first question is, does the norm apply in internal national law at all? The next question is, can it be invoked by an individual?

The argument is clear, but the terminology is not. The confusion of terminology is worse when one examines the different language texts of the judgment. One expression is used in German (*unmittelbare Wirkungen* (plural)), but two different expressions are used in French (*effets directs* and *effets immédiats* (plural)) and in Dutch (*onmiddelijk effect* (singular) and *directe werking*). The Italian text uses quite different terminology (*atto a produrre direttamente degli effetti sui rapporti* and [*avendo*] *valore precettivo*)

What this shows is that, when the Court decided *Van Gend en Loos*, it was not applying pre-existing concept which had already been fully worked out in international law or in national law (except to some extent in Dutch law). The practical problem raised by the Dutch court, to which the Court had to give an answer, was whether Article 12 had, by virtue of the Treaty alone, entered the national law of the Member States and, if so, could it be invoked by Van Gend en Loos against the Dutch Government? Or, put another way, did enforcement of Article 12 remain solely within the province of the legislature and executive, or had it come within the province of the judiciary? The Court’s answer, which is too well known to need repetition here, depends on an analysis of the obligations undertaken by the Member States towards each other and towards their citizens.

The problem of vocabulary disclosed by the different language texts of *Van Gend en Loos* persisted until Winter (significantly, a Dutch professor) wrote his article in 1972. It is worth noting, given some of the recent criticism of the Court’s judgments, that

having made the important distinction between direct applicability and direct effect, Winter wrote:

“It is not to be excluded ... that provisions of regulations which are not suited to take direct effect may nevertheless have certain limited effects in the relationship between the Member States and persons under their jurisdiction. It is conceivable that a national judge declares inapplicable a State measure taken in violation of a regulation without going so far as to secure for the private individual the exact legal position which he would have had if the State had taken the correct positive measures for performance of this obligation.”⁹

Thus, having established the distinction between direct applicability and direct effect, Winter warned that this would not be the only problem. The question would also arise whether a directly applicable provision of the Treaty or of a regulation may have certain ‘direct’ effects but nevertheless not go so far as to create positive rights for specific individuals.

In the light of *Van Gend en Loos*, the analysis is now relatively simple as regards provisions of the Treaties themselves and of regulations which are by their nature directly applicable. Following *Costa* (and Advocate General Lagrange in *FEDECHAR*) the Treaties and regulations are part of the corpus of law to be applied by the national judge. The question in any given case is, not whether the Treaty or a regulation has breached the firewall between international and national law, but rather whether the particular provision at issue has the necessary characteristics of clarity, precision and ‘directness’ to enable a judge to apply it at the instance of an individual.

In the early 1970s, two new problems arose which were treated as being problems of the same type, as indeed, in a sense, they were. The first concerned the direct effect of international agreements including the Association Agreements, and the second the direct effect of directives.

As regards international agreements, the question arose first in the *International Fruit* case¹⁰: Was the GATT directly effective? The Court answered 'No'. The analysis was, once again, to ask first what obligations were undertaken under the GATT, and then to ask whether those obligations were judicially enforceable or not. The answer was that they were not because enforcement of the obligations left room for executive negotiation. That takes us back to Chief Justice Marshall and the separation of powers. The same analysis was adopted more recently in *Portugal v Council*¹¹ as regards the direct effect of the WTO Agreement.

⁹ *Op.cit.*, p.436-7.

¹⁰ Judgment of 12 December 1972, *International Fruit*, Cases 21-24/72 [1972] ECR 1219.

¹¹ Judgment of 23 November 1999, *Portugal v Council*, Case 149/96, [1999] ECR I-8395.

As regards the Association Agreements, the decision in *Haegeman*¹² seemed to solve the problem of direct applicability. The Court held that the Association Agreements entered national law because the agreements were concluded by directly applicable regulations. This somewhat forced analysis was replaced by a sounder analysis in *Kupferberg*¹³, repeated in *Demirel*¹⁴.

The question of direct effect was raised more acutely in *Polydor*.¹⁵ The terms of the provision in question were identical in the EEC Treaty and the Association Agreement with Portugal. When the English Court of Appeal referred the case, it seemed obvious to Lord Justice Templeman that there must be direct effect. The terms of Article 30 of the Treaty and Article 14(2) of the Agreement with Portugal were the same. Article 30 had direct effect, so Article 14(2) must also have direct effect¹⁶.

The answer of the Court, to the surprise of some, was that that was not so. In their arguments before the Court, the intervening governments and the Commission stressed that the obligations assumed under the Treaty were different in character from those assumed under the Association Agreements. The mechanisms for settling disputes between the contracting parties were also different, in that the Association Agreements left scope for negotiation.¹⁷ Put another way, dispute settlement remained in the province of the 'political department'

In its judgment, the Court adopted the same analysis as it had adopted in *Van Gend en Loos*, starting with the nature of the Association Agreement in which Article 14(2) appeared and the obligations undertaken by the contracting parties. Just because Article 30 had direct effect and Article 14(2) was in the same terms, it did not follow that Article 14(2) must have direct effect.¹⁸

Finally, as regards international agreements, we should mention the recent TRIPs cases, though the point at issue is of relatively marginal interest.¹⁹ TRIPs (the Agreement on Trade-Related Aspects of Intellectual Property Rights) is Annex 1C of the (WTO) Multilateral Trade Agreements. It contains provisions relating to the

¹² Judgment of 30 April 1974, *Haegeman v Belgium*, Case 181/73, [1974] ECR 449.

¹³ Judgment of 26 October 1982, *Kupferberg*, Case 104/81, [1982] ECR 3641.

¹⁴ Judgment of 30 September 1987, *Demirel*, Case 12/86, [1987] ECR 3719.

¹⁵ Judgment of 9 February 1982, *Polydor*, Case 270/80, [1982] ECR 329.

¹⁶ See the judgment of the Court of Appeal, per Templeman, L.J., in [1980] 2 CMLR 347 at p.421 (paras 38-40).

¹⁷ See the arguments reported at [1982] ECR pp. 340-341.

¹⁸ See, most recently, the judgment of 29 January 2002, *Pokrzepowicz-Meyer*, Case C-162/00, not yet published in ECR, points 32 and 33.

¹⁹ Judgments of 16 June 1998, *Hermès*, Case 53/96, [1998] ECR I-3606; 14 December 2000, *Parfums Christian Dior*, Joined Cases C-300/98 and 392/98, [2000] ECR I-11307; and 13 September 2001, *Schieving-Nijstad*, Case C-89/99, [2001] ECR I-5851.

conditions under which courts will grant interim measures in intellectual property disputes. The question raised by the Dutch court was whether these provisions have direct effect in the sense of conferring rights on individuals which the courts must protect.

Having said that the WTO Agreement does not have direct effect, the Court said that the same was true of TRIPs. But the question raised by the national court did not exhaust the problem and, indeed, was beside the real point. The real issue is, what are the courts of the Member States to do in circumstances where the procedural provisions of TRIPs apply?

The Court's answer depended again on an analysis of obligations. The Member States, individually and as Member States of the Community, have undertaken certain obligations as to what their courts will do when granting interim measures. These obligations are incumbent on the national courts as organs of the Member States as well as upon the Court of Justice as an organ of the Community. The obligation to comply does not depend on whether the obligation can be enforced at the instance of individuals. To put the point another way, the rule at issue is a rule of procedure binding on the courts irrespective of the wishes of the litigants. (When we have to decide whether a rule of procedure should be applied, we do not normally ask whether litigants have a subjective right to require it to be applied, though it may be relevant to ask whether a particular litigant has a legitimate interest to do so.)

As regards the direct effect of directives, the correct approach was identified by the English judge who referred *Van Duyn*, the first case that raised this question.²⁰ He was faced with the question whether the Directive 64/221 had direct effect. Article 3(1) of that Directive provides that:

“Measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.”

Was that a norm that a national judge could apply for the benefit of Mrs Van Duyn? Article 189 (now Article 249 EC) provides that, unlike regulations which are directly applicable, directives are binding as to the result to be achieved, leaving to Member States the choice of form and method. The referring judge said:

“Article 3, paragraphs 1 and 2, in that directive clearly I think go to the ‘result to be achieved’ within the meaning of Article 189 of the Treaty and not to the ‘form and methods’, which are left to the national authorities.”²¹

The judge distinguished between the obligation to achieve a result and the possibility of choosing how you will arrive at it. The terms of Article 3(1) of the directive ("Measures taken on grounds of public policy and public security shall be based exclusively on the personal conduct of the individual concerned") left no room for

²⁰ Judgment of 4 December 1974, *Van Duyn v Home Office*, Case 41/74, [1974] ECR 1337.

²¹ See [1974] 1 WLR 1107 at p. 1115E; and [1974] 1 CMLR 347 at p. 357 (para. 15).

Member States to choose between different forms and methods. They prescribed unequivocally the result to be achieved.

That seems to me to be the correct starting point for any analysis of direct effect in the context of directives. The cases following *Van Duyn*, or at least the discussion of them, has concentrated excessively on creating a parallelism between directives and regulations as legal instruments. This has led to a certain amount of intellectual acrobatics on the subject of vertical and horizontal direct effect, estoppel, and so on, as well as the proposal by more than one Advocate General that the distinction between vertical and horizontal direct effect is out of date and should be abandoned.

In order to understand the distinction between the vertical and horizontal direct effect of directives and the consequences that should be drawn from that distinction, the correct approach is, I suggest, again to start from the obligation of result. Many of the early cases were concerned with the directives on equal treatment of men and women in employment. As in the case of Directive 64/221 (at issue in *Van Duyn*), some provisions of these directives left no doubt as to the result to be achieved. In the case of private employers, national legislation was still necessary to impose the obligation of equal treatment on them. But where the Member States (or ‘emanations of the state’) were themselves the employer, the result to be achieved was already clear. The need to decide on form and methods in the case of private employers could not affect the obligation of the Member States to comply with the requirements of the directives in respect of their own employees.

By contrast, in *Faccini Dori*²², which concerned the ‘doorstep-selling’ directive, the dispute was between two private contracting parties. The directive did not (and indeed could not) impose any obligation of result directly on them. Since Italy had failed to implement the directive, Recreb (or rather Interdiffusion, from whom Recreb’s rights were derived) were not bound by any norm applicable to them to give Mrs Faccini Dori the time for reflection prescribed by it.

The distinction between vertical and horizontal direct effect may appear produce paradoxical results. It may or may not be desirable for other reasons that the distinction between regulations and directives should be eliminated. But, so long as it remains, the logic of the distinction between vertical and horizontal direct effect does not seem to me to be open to criticism.

The recent case of *Unilever*²³ has been severely criticised as blurring, or even breaching, the distinction between vertical and horizontal direct effect. But what was really the issue in *Unilever*? Unilever had undertaken to deliver a certain quantity of olive oil to Central Food. The oil was rejected by Central Food on the ground that between the time when the contract had been made and the time when the olive oil was delivered the Italian Government had introduced a new labelling requirement with which the oil did not comply. The Italian law had not, however, been notified under the

²² Judgment of 14 July 1994, *Faccini Dori*, Case C-91/92, [1994] ECR I-3325.

²³ Judgment of 26 September 2000, *Unilever*, Case 443/98, [2000] ECR I-7535.

terms of Directive 83/189. In *CIA Security*²⁴, the Court had held that national measures to which the Directive applied but which had not been notified in accordance with the Directive could not be applied. In *Unilever*, the Court simply said that, in those circumstances, the Italian law was inapplicable.

The difference between *Faccini Dori* and *Unilever* is that in *Faccini Dori* the doorstep-selling directive introduced an exception to the long-standing, and in other respects still valid and subsisting, rule of private law that contracts are contracts and must be observed. The issue was whether Recreb could rely on that existing rule of law, or was bound to allow Mrs Faccini Dori the time for reflection prescribed by the directive but not yet transposed into Italian law. In *Unilever* the issue was not whether Central Food could rely on a pre-existing, valid and subsisting rule of national law, but whether they could rely on a new law which was invalid and unenforceable *ab initio* because it had not been notified.

A different set of problems arose in the *Grosskrotzenburg Power Station* case²⁵, *Kraaijeveld*²⁶ and *Interenvironnement Wallonie*²⁷.

The *Grosskrotzenburg* case was an infringement action by the Commission against Germany. The German Government was alleged to have failed to subject the extension of a power station to an environmental impact assessment as required by the Environmental Impact Assessment Directive.²⁸ The argument of the German Government was this:

The basis of the case-law of the Court ... is that a Member State cannot plead its own failure to implement a directive or its own defective implementation thereof, as against citizens who may be able to base rights on it, and thus concerns exclusively situations in which individuals' rights against the State are at issue. On the other hand, if it is not that category of persons who are relying on the provisions, the authorities cannot be required to apply such provisions, them no matter how definite and precise they may be.

This is the nominalist fallacy again. “Direct effect” is about individual rights so, if we are not talking about individual rights, there is no norm to be applied and no obligation to be enforced.

The Court’s reply was that the relevant question was whether the directive imposed an obligation on Germany to assess the environmental impact of the project. “That question is quite separate from the question whether individuals can rely as against the

²⁴ Judgment of 30 April 1996, *CIA Security*, Case C-194/94, [1996] ECR I-2201.

²⁵ Judgment of 11 August 1995, *Commission v Germany*, Case C-431/92, [1996] ECR I-2189.

²⁶ Judgment of 24 October 1996, *Kraaijeveld*, Case C-72/95, [1996] ECR I-5403.

²⁷ Judgment of 18 December 1997, *Interenvironnement Wallonie*, Case C-129/96, [1997] ECR I-7411.

²⁸ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, page 40.

State on provisions of an unimplemented directive”.²⁹ In other words, the question is whether the provision at issue has entered the province of the judiciary and can be judicially enforced, irrespective of who is asking for it to be enforced.

In *Kraaijeveld*, the issue was slightly different, but the confusion about direct effect was the same. The issue was whether the claimants could rely on the directive to ensure that, before a dyke was constructed which would prevent their access to the water, its environmental impact should be assessed. The consequence of the assessment might or might not be that the dyke would be constructed blocking their access to the water. What mattered was that the procedural obligation be complied with. Then, and only then, would the substantive question arise whether the dyke could be built or not.

The Court’s answer goes back to the point made by Winter in relation to regulations that there may be circumstances in which a state measure may be declared inapplicable without going so far as to secure for the private individual the exact legal position which he would have had if the State had taken the correct positive measures for performance of its obligation.

The same analysis can be applied to *Interenvironnement Wallonie*. The question was: What is the status of a directive and what obligations does it impose during the period between enactment and the time prescribed for transposition? The answer is that from the moment of enactment there is an obligation to achieve a result. The state may be allowed a period of time within which to choose the form and methods for achieving that result and putting them into effect. But, in the interim, the state may not act inconsistently with its obligation of result. Put another way, the period allowed for transposition (which, incidentally, is not a characteristic of all directives) does not put the obligation of result into cold storage till that period has expired.

In summary, the Court's position has been stated in *Linster*³⁰:

“[It] would be incompatible with the binding effect of directives to exclude as a matter of principle any possibility for those concerned to rely on the obligation which directives impose, particularly when the Community authorities have by directive imposed the obligation to pursue a particular course of conduct on the Member States. The effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislator, in exercising its choice as to the form and methods, had kept within the limits of its discretion.

The analysis should always start with the obligation, an obligation on whom, to do what and by when. If you start from there, you will arrive at a coherent result. But the questions then to be solved are not the same in each case. In some cases the question

²⁹ Point 26.

³⁰ Judgment of 19 September 2000, *Grand Duchy of Luxembourg/Linster*, Case C-287/98, [2000] ECR I-6917.

is, does the individual have the right to sue for performance of the obligation? In other cases the question is, does the Community have the right to enforce the obligation? And there may be a series of different problems to which the same apparent reasoning is applied.

As I have said, I do not think that, put in that way, the questions at issue are materially different in a great many cases from questions that arise in national law. 'Direct effect' (using that expression in a broad way) provides us with criteria for selecting or rejecting the norms to be applied and for clarifying the scope of judicial competence. In that respect, it seems to me that it is neither a myth nor a mystery, and I hope that it is not entirely a mess.