

European law in proceedings taken against eu member states



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Introduction

The European Court of Justice (ECJ) devised the direct effect doctrine to give international treaties EU legal effect. The doctrine permits individuals to rely on European law in proceedings taken against EU Member States. This paper discusses selected direct effect cases decided since the seminal ECJ Van Gend en Loos decision to highlight persistent direct effect ambiguities and contradictions. Suggested law reforms are also provided in the Conclusion.

Historical Background

In Van Gend en Loos, the ECJ determined it did not have jurisdiction to decide whether international law can override domestic law. The Treaty was only intended for interstate compliance; direct effect is contrary to such intention. The ECJ decided that EU treaties must promote a ‘community not only of states but also of persons, [requiring] participation of all persons,’ with ‘community law [intended] to confer upon individuals any rights which form part of their legal heritage.’ In Van Gend en Loos, the ECJ explains direct effect principles as (i) subject measure must be clear; (ii) unconditional; (iii) require no additional implementation measures; (iv), State or institutional discretion is not permitted. Directives may have vertical or horizontal effect. Vertical direct effect permits enforcement against a Member State, where horizontal effect is individual citizen enforcement against another.

There have been contradictory applications of both the horizontal and vertical direct effect. In Van Duyn, the ECJ found direct effect where the State obligations were sufficiently clear to be assessed by a court. In contrast,

Ratti provided that a similar directive only operated directly when the implementation date had passed; 'indirect effect' applied to bypass this outcome. Regulations also may have horizontal and direct effects. Their implementation date does not hinder their operation, as Article 288 provides regulations have (i) general application, as (ii) binding and directly applicable in all Member States. This approach is confirmed in *Commission v Italy*, where regulations were not to be subject to additional implementation requirements.

Ambiguous Application of the Doctrine

The issue of the legality of horizontal direct effects has attempted to be bypassed in various cases. In *Von Colson*, the ECJ avoided it by finding that domestic law should be interpreted 'harmoniously with' international law, or as close as reasonably practicable. If application of the law would lead to the substantially the same Directive outcome, the ECJ will look at whether the horizontal direct effect should be allowed, and labelled this the 'indirect effect.' This idea was supported in later cases, for example in *Marleasing*, where the ECJ decided that domestic laws enacted before or after the Directive would nevertheless require implementation, even if national law does not relate to the Directive and is not enacted to specifically implement it.

The doctrine also allows remedies for individuals in situations where a State has not appropriately implemented laws to properly reflect the Directive as the EU intended it to be applied. It is the responsibility of the Member State to certify that its institutions, authorities and court systems are following the rules of the Directive, therefore domestic courts can be sure the laws are

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applied to reflect their intended meaning. Discerning the 'intended meaning' is difficult, as the ECJ often will not recognise a horizontal effect expressly, only impliedly by permitting a ruling to bypass the intention of the Directive by overriding the conflicting domestic legislation. This means a Directive can disapply a domestic law, permitted in *CIA Securities v Signalson*, where particular provisions in Belgium were found invalid as they did not properly follow the Directive.

Conflicting Judicial Approaches

The ECJ has creatively used methods to either ensure the doctrine can be applied. For instance, in the *Foster* case, the court formulated a 'reverse vicarious liability' decision. This was used to find subsidiaries of the Member State responsible for failures of the domestic legislature, which becomes confusing given that at the same time, a private citizen also does not influence the implementation of a Directive but cannot be found liable. Contrastingly, in *Ratti*, the ECJ applied estoppel to hold a State liable and obliged to give effect to the Directive appropriately, because if this does not occur, citizens cannot rely on it at a domestic level. The State which does not correctly give effect to it is committing an equitable wrong against individuals. Complications also become evident in *Marshall* and *Defrenne* (No 2). In *Marshall*, the ECJ held a Directive only bind Member States, and invalidated any horizontal direct effect. However, in *Defrenne*, it held that Article 157, directed at Member States, could also be applied horizontally against individuals.

As mentioned, the *Van Duyn* case caused ambiguity as the ECJ found that

Article 45 could be directly effective yet did not meet the requirement of <https://assignbuster.com/european-law-in-proceedings-taken-against-eu-member-states/>

being unconditional, because the power of the Member States was regulated by judicial control. However, since no treaty has ever been found to not be regulated by judicial control, the Van Duyn case therefore removed the limitation of unconditionality. The second requirement of clarity was applied flexibly in Defrenne (No 2), as the court held that Article 157 was directly effective due to its dual meaning, the first being a general interpretation based on a 'mere aspiration' of gender equality, the second being a specific restriction disallowing unequal remuneration in the workforce.

The ruling in Marshall has caused the most controversy in recent times, as the court held that Directives will only have a direct effect on Member States and not in litigation between private individuals. However, the ECJ then used various methods to avoid its own ruling, allowing Directives to have a de facto effect with the same outcome. Additionally, the ECJ interprets 'Member States' inconsistently to allow them to be subject to vertically effective Directives in some situations and not others. This was shown in Foster v British Gas, where the court held an authority 'in any legal form' with the duty of providing any public service 'under control of the State' held powers beyond regular rules imposed on individuals and hence would be bound by unimplemented Directives.

Recent Commentary

Developing from the original restrictions imposed in Van Gend en Loos, various approaches have been adopted by the courts. Academic commentary posits that European law must become less influential and permit domestic courts to have more discretion in the event of conflicting national law, especially if the provisions in question are from local

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constitutions. To begin, there are established criteria to be met before any EU legislative provision can take a direct effect, which is carried forward from the original decision in Van Gend en Loos. The second point developed from the Marshall case is that the Directives can only legally have a vertical direct effect; the horizontal effect is allowed impliedly on some occasions.

Problematically, legislation in Member States do not contain any guiding regulations on these limitations, possibly due to the ongoing inconsistent approach taken by the ECJ. However it should be noted that the first type of restriction has been flexibly applied recently and the Van Gend en Loos principles are less strict, while still broadly applied.

Considering the doctrine beyond the level of Member States has also led to inconsistencies with application to individual citizens. For example, obligations are often imposed to restrict individuals through use of the de facto horizontal direct effect, such as free-market regulations, although these were never intended by parliament apply to private individuals. The case of *Alemo-Herron* outlined this problem, where the ECJ addressed a Directive on transferring of undertakings contained in Article 16 of the Charter which permits free formulation of contracts while conducting business. The interpretation under international law overruled that of the domestic application of contractual freedom. Academics say this unfair application should be avoided, and greater domestic judicial discretion permitted by mandating a margin to favour local courts who are applying the EU law if the international application will adversely affect fundamental rights.

Conclusion

The ECJ doctrine of direct effect has applied inconsistently and ambiguously at various times by the Court. These inconsistencies have led to the doctrine being legitimately critiqued as a political tool to strengthen the power of European Union laws over sovereignty in the domestic sphere. It has led to ongoing problems within the judicial system deriving from the criteria of *Van Gend en Loos*, which saw the ECJ bypass specific discussions by State Representatives stating they did not intend for the Treaty to be distinguished from other international treaties, and did not accept that it should provide rights to citizens to enforce at a domestic level either.

There is now apparent ongoing ECJ application of de facto rules that conflict with national legislation, where inconsistent circumventions sanctioned by the ECJ do not uphold the objective of international courts to prevent application of a horizontal effect. By removing the original restrictions on the doctrine, the local court system may be given more discretion to apply provisions fairly between individuals and Member States, and a flexible approach will allow the doctrine to be used for the benefit of both individuals and organisations seeking effective enforcement.

Cases

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Costa v. E. N. E. L. [1964] ECR 1141.

Defrenne v Sabena (No 2) [1976] ECR 455

Foster and Others v British Gas plc [1990] ECR I-3313.

Francovich and Bonifaci v Italy [1991] ECR I-5357.

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NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

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Van Duyn v Home Office [1974] ECR 1337.

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Footnotes

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2. Van Gend en Loos, above n 2.
3. Ibid, at [20].
4. Ibid, at [21].
5. NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen (' Van Gend en Loos') [1963] ECR 1.
6. Gerrit Betlem & André Nollkaemper, ' Giving Effect to Public

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7. *Van Duyn v Home Office* [1974] ECR 1337.
8. *Publico Ministero v Tullio Ratti* [1979] ECR 1629, at para. 23.
9. Treaty on the Functioning of the European Union (TFEU), Article 288.
10. *Commission v Italy* [1973] ECR 101, at para. 17.
11. *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.
12. R. Mastroianni, 'On the distinction between vertical and horizontal direct effect of derivatives: what role for the principle of equality?', *EPL*, 1999, Vol. 5, p. 417.
13. *Marleasing SA v La Comercial de Alimentacion SA* [1990] ECR 1-4135
14. *Von Colson*, above n 8, at [3].
15. G. Betlem. 'The principle of indirect effect of community law', 1995, *ERPL*, Vol. 3, No. 1.
16. *CIA Security International SA v Signalson SA and Securitel Sprl* [1996] ECR 1-2202.
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18. *Ibid.*
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23. Ibid.
24. Defrenne, above n 22.
25. Marshall, above n 21.
26. Sophie Robin-Olivier, ' The evolution of direct effect in the EU: Stocktaking, problems, projections,' International Journal of Constitutional Law, 2014, Vol. 12, Issue 1, available online at: <http://icon.oxfordjournals.org/content/12/1/165.full>
27. Foster, above 18.
28. Paul Craig and Grainne de Burca, EU Law: Text, Cases, and Materials (5th edition: Oxford University Press: 2011), p. 188.
29. Van Gend en Loos, above n 2.
30. Marshall, above n 21.
31. Robin-Oliver, above n 26.
32. Ibid.
33. Case C-426/11 Alemo-Herron and others, July 18, 2013, unreported.
34. Directive 2001/23 of March 12, 2001: approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, 2001 O. J. (L 016).
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37. Ibid, p. 6.