

ARE DIRECTIVES DIRECTLY APPLICABLE?

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Abstract

The article seeks the answer to the question of whether directives are directly applicable. It argues that on which legal basis the justification of direct effect of directives is provided - either on the doctrine of estoppel or the principle of effet utile (effectiveness) - is principally important in order to resolve the issue of drawing the limits of direct effect of directives, in particular resolution of the issue of recognition of horizontal direct effect of directives. In that regard, the nature of directives as legal instruments, similarities and differences between directives and regulations, the distinct concepts of direct applicability and direct effect and their relationship are analysed to diminish the obscurity in the legal literature.

Keywords: Direct applicability; Direct effect; Effet utile

Yönergeler Doğrudan Uygulanabilir mi?

Özet

Makale, yönergelerin doğrudan uygulanabilirliği meselesini irdelemektedir. Bu itibarla makale, yönergelerin doğrudan etkisinin hangi hukuki doktrin üzerine kurulduğunun belirlenmesinin (yönergelerin doğrudan uygulanabilirliği ile irtibatlı bir mesele olarak estoppel doktrinin mi, yoksa etkililik prensibinin mi hukuki dayanak teşkil etmesi meselesi), aslen yönergelerin doğrudan etkisinin sınırlarının tespiti ve daha somut ifadeyle de yönergelerin yatay doğrudan etkisinin tanınması meselesi için özel önem arz ettiğini savunmaktadır. Bu çerçevede makalede, hukuki literatürde var olan muğlaklığı azaltma adına yönergelerin hukuki araç olarak doğası, yönergeler ile tüzükler arasındaki benzerlik ve farklılıklar, doğrudan uygulanabilirlik ve etki kavramları ile bu kavramların birbirleriyle ilişkisi incelenmiştir.

Anahtar Kelimeler: Doğrudan uygulanabilirlik; Doğrudan etki; Etkililik

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** Makalenin Gönderilme Tarihi: 13 Mayıs 2016, Kabul Edilme Tarihi: 7 Aralık 2016

Introduction

The matter of direct applicability of directives has been controversial in the legal literature. The primary reason behind that controversy is the unique and *sui generis* characteristics of directives as a legal instrument. The reluctance of the CJEU in expressing direct applicability of directives, though it explicitly recognises their direct effect, augments that controversy. Obscurity about the relationship between the concepts of direct applicability and direct effect in the legal literature forms the third reason behind that controversy. The matter of direct applicability of directives however constitutes a litmus paper in depicting the *sui generis* EU legal order and the nature of the entire corpus of EU law with its relationship with the national legal systems. The article seeks to lessen this controversy by examining these matters.

Directives as Legal Instruments

Directives are legal instruments of the EU defined in Article 288 TFEU. According to Article 288 TFEU, whose text has remained exactly the same as laid down by the founding fathers, “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

As a legal instrument, “there is no clear parallel in national and international law”¹ to directives. Directives, in nature, are the source of an intrigue, controversy, mess and division for legal researchers² and even defined as an unidentified normative object.³

Directives are, in principle, individual acts which bind merely their addressee(s) which is/are the Member State(s).⁴ In other words they were originally executive acts, but have become legislative acts through direct

¹ B. de Witte, A. Geelhoed & J. Inghelram, “Legal Instruments, Decision-Making and EU Finances”, P. J.G. Kapteyn et al, **The Law of the European Union and the European Communities**, The Netherlands, Kluwer, 2008, p. 282.

² R. Kovar, “Le Conseil d’État et l’Effet Direct des Directives: La Fin d’une Longue Marche”, **Europe**, 2010 Janvier; He initially expressed in 1987 that “la directive intrigue, dérange, divise. Sa singularité en est la cause”. See R. Kovar, “Observations sur Intensité Normative des Directives”, **Liber Amicorum Pierre Pescatore**, Baden-Baden, Nomos Verlagsgesellschaft, 1987, p. 359. It seems that he no longer regards the simplicity of directives as the cause of such implications and anyhow grants a right to the researchers of the identification of the nature of directives in falling into such an intrigue, mess and division.

³ D. Simon, “Directive”, **Rép. Communautaire Dalloz**, 1998.

⁴ Ibid.

effect.⁵ Directives are not designed to be automatically operative in the national legal systems, but through national implementing measures. In order the normative content of directives to be realised national implementing measures are generally needed. Directives are contemplated as legislative measures⁶ with a two phase-legislative procedure and a two-tier implementation. EU legislation forms the framework into which national action must be fitted.⁷ They are not binding in their entirety, but in terms of the result prescribed therein. The Member States are required to transpose not the text of the directives, but the content and results set out therein. They are accordingly instruments of cooperative law-making within a two-tier governance structure: while the supranational level only imposes a result, it is then to be achieved at the national level.⁸ Directives are supranational (communitarian) in their substance, but national in their form.⁹ In that regard, the Commission described directives as a hybrid and a flexible instrument.¹⁰ Wherever a directive is properly (completely, timely and correctly) implemented in a Member State, its effects thus extend to individuals through the intermediary of the national implementing measures.¹¹

Directives, which are not in themselves *erga omnes*, acquire general application with *erga omnes* effect through the national implementing measures merely. In other words, their general applicability is also in principle indirect and depends only upon their transposition into domestic law that makes the obligations upon individuals enforceable.¹² Even though

⁵ R. Schütze, “The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers”, *Yearbook of European Law*, Vol: 25, 2006, p. 91.

⁶ Case 41/74 *Yvonne van Duyn v. Home Office* [1974] ECR 1337, paras. 13; Case T-135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v. Council of the European Union* [1998] ECR II-02335, para. 67; In the light of the classification of measures set out in the Lisbon Treaty, whilst some directives might have legislative nature when they are adopted either in ordinary or special legislative procedure, the rest might have the non-legislative nature such as implementing or delegated nature.

⁷ Commission Communication to the Council and the European Parliament - The Principle of Subsidiarity, SEC(92) 1990 Final, Bulletin EC 10–1992, 27 October 1992, p. 15.

⁸ F. Becker ve A. Campbell, “The Direct Effect of European Directives: Towards the Final Act?”, *Colum. J. Eur. L.*, Vol: 13, 2007, p. 401.

⁹ L-J. Constantinesco, *L'Applicabilité Directe dans le Droit de la C.E.E.*, Bruxelles, Bruylant, 2006, s. 66.

¹⁰ F. Snyder, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques”, *Modern Law Review*, Vol: 56, 1993, p. 19.

¹¹ Case 102/79 *Commission v. Belgium* [1980] ECR 1473; Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, para. 19; Case 270/81 *Felicitas Rickmers-Linie KG & Co. v. Finanzamt für Verkehrsteuern, Hambourg* [1982] ECR 2771, para. 24.

¹² S. Prechal, *Directives in EC Law*, Oxford, OUP, 2005, p. 12, 16 and 96.

they are originally supposed to acquire general application indirectly through national legislation transposing them into national law, they have acquired, from the perspective of rights rather than obligations, general application through the principle of direct effect. They were originally invented as an indirect source of law, as a kind of '*loi cadre*' (framework law), though in some occasions the practice has advanced to some extent differently to produce detailed directives. By virtue of their characteristics, directives require collaboration and cooperation between two levels to be completely and fully implemented and to have full legal effects. Directives become fully and completely operative and effective through the national implementing measures merely, since remedies for the private enforcement of directives constitute minimal guarantee compared to situation supposed to be provided by the national implementing measures. The right of individuals to rely on a directive before the national courts as against the defaulting Member State constitutes a minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of directives and cannot justify a Member State's absolving itself from taking in due time appropriate implementing measures sufficient to achieve the result prescribed therein.¹³

As a consequence, directives have been considered in case law generally as indirect means of legislation/regulation and classified as measures of general application or as measures having general scope which apply to objectively determined situations and produce legal effects with respect to a category of persons viewed generally and in the abstract.¹⁴

¹³ *Commission v. Belgium*, op.cit. footnote 11, para. 12; Case 42/80 *Commission v. Italy* [1980] ECR 3635, para. 5; Case 68/81 *Commission v. Belgium* [1982] ECR 00153, para. 5; Case 301/81 *Commission v. Kingdom of Belgium* [1983] ECR 00467, paras. 6, 13; Case C-208/90 *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-04269, para. 20; Case C-433/93 *Commission v. Germany* [1995] ECR I-02303, para. 24; Case C-96/95 *Commission v. Germany* [1997] ECR I-01653, para. 37; Case C-253/95 *Commission of the European Communities v. Federal Republic of Germany* [1996] ECR I-02423, para. 13.

¹⁴ Case 70/83 *Kloppenborg v. Finanzamt Leer* [1984] ECR 1075, para. 11; Case 160/88 *R Fédération européenne de la santé animale v. Council* [1988] ECR 4121, para. 28; Case C-298/89 *Government of Gibraltar v. Council of the European Communities* [1993] ECR I-03605, para. 16; Case C-10/95 *P Asociación Española de Empresas de la Carne (Asocarne) v. Council* [1995] ECR I-4151, para. 29; Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander AG and Others v. European Parliament and Council of the European Union* [2000] ECR II-2487, paras. 28-29; Case T-532/08 *Norilsk Nickel Harjavalta Oy and Umicore SA/NV v. European Commission* [2010] ECR II-3959, para. 96; Case T-539/08 *Etimine SA and Ab Etiproducts Oy v. European Commission* [2010] ECR II-4017, para. 98.

Leaving to the Member States in a directive the choice of form and methods does not nevertheless mean to allow them the choice of not giving effect to the directive at all, or of giving effect to it only in part.¹⁵ The provisions of a directive are no less binding on the Member States addressed than the provisions of any other rule of EU law.¹⁶ The Member States are under the obligation to ensure the full and exact application of all the provisions of any directive within the period of time prescribed therein for its transposition.¹⁷ In that regard, they are obliged to choose, within the bounds of the freedom left to them by Article 288 TFEU, the most appropriate forms and methods to ensure the effectiveness of directives, account being taken of their aims.¹⁸ Directives are to be turned into binding provisions of national law having the same legal force.¹⁹ The obligation of the Member States arising from a directive to achieve the result prescribed by the directive and under Article 4 TEU to take all appropriate measures to ensure fulfilment of that obligation is binding on all the national authorities including decentralised authorities such as municipalities.²⁰

The full implementation of directives is to be secured not only in fact but also in law and so a practice in conformity with the requirements of a directive and consistent with the protective aims of a directive may not constitute a reason for not transposing that directive into national law whose provisions are appropriate for the purpose of creating a situation which is sufficiently precise, clear and transparent in order to enable individuals to ascertain their rights and their obligations.²¹ It is settled case law that the fact

¹⁵ Opinion of Advocate General, Case 38/77 *Enka BV v. Inspecteur der Invoerrechten en Accijnzen Arnhem* [1977] ECR 2217.

¹⁶ Case 52/75 *Commission v. Italy* [1976] ECR 277, para. 10.

¹⁷ Case 92/79 *Commission v. Italy* [1980] ECR 1115, para. 6.

¹⁸ Case 48/75 *Jean Noël Royer* [1976] ECR 497, para. 73; Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and others* [1996] ECR I-1435, para. 14; Case C-40/04 *Criminal Proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 58.

¹⁹ *Commission v. Belgium*, op.cit. footnote 11, para. 10, 12; Case 96/81 *Commission v. the Netherlands* [1982] ECR 1791, para. 12; Case C-197/96 *Commission v. France* [1997] ECR I-01489, para. 14; Case C-354/98 *Commission v. French Republic* [1999] ECR I-04927, para. 11.

²⁰ Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR I-839, para. 32; Case C-91/92 *Paola Faccini Dori v. Recreb Srl* [1994] ECR I-3325, para. 26; Case C-224/97 *Erich Ciola v. Land Vorarlberg* [1999] ECR I-2517, para. 30; Case C-258/97 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v. Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECR I-1405, para. 25; Case C-438/99 *Maria Luisa Jiménez Melgar v. Ayuntamiento de Los Barrios* [2001] I-06915, para. 32.

²¹ Case C-339/87 *Commission v. the Netherlands* [1990] ECR I-851, para. 25; Case C-131/88 *Commission v. Federal Republic of Germany* [1991] ECR I-00825, para. 6; Case C-361/88

that an activity covered by a directive is not carried on in a Member State does not release that Member State from its obligation to transpose that directive.²² Nevertheless, the implementation of a directive does not necessarily require legislative action in each Member State with the proviso that the national law effectively guarantees the application in full of the directive, the legal position under national law is sufficiently precise and clear, and individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts.²³ What is required is that the existing general legal context in a Member State ensures the application of directives in such a way that there is neither practical nor even theoretical risk of misapplying the rules laid down by the directives.²⁴

Directives and Regulations Compared

The typology of legal instruments set out in Article 288 TFEU directly corresponds to the taxonomy of competences. Whereas the competence conferred for the adoption of regulations is exercised in the fields of transfer and signifies substitution of national competences by the EU's, the competence conferred to issue directives corresponds to the fields of competences mainly limited, shared, framed or coordinated in which the Member States remain holder of normative powers to exercise them under the requirements of harmonisation. Directives therefore seem to be used in the fields where the intensity of EU competences is not so high.²⁵ In other words, the authors of the Treaty intend to realise more legal integration through uniform regulations where the EU has complete normative

Commission v. Germany [1991] ECR I-02567, para. 24; Case C-366/89 *Commission v. Italy* [1993] ECR I-4201, para. 17; Case C-343/08 *Commission v. Czech Republic* [2010] ECR I-275, para. 40; Opinion of Mr Advocate General Tizzano, Case C-144/99 *Commission v. the Netherlands* [2001] ECR 3541, para. 36.

²² *Ibid.* (*Commission v. the Netherlands*), paras. 22, 25 and 32; Case C-214/98 *Commission v. Greece* [2000] ECR I-9601, paras. 22-27; Case C-372/00 *Commission v. Ireland* [2001] ECR I-10303, para. 11; Case C-441/00 *Commission v. United Kingdom* [2002] ECR I-4699, para. 15; Case C-71/05 *Commission v. Luxembourg*, [2006] ECR I-75, para. 12; *Ibid.* (*Commission v. Czech Republic*), para. 39; Opinion of Advocate General Bot, Case C-41/09 *Commission v. the Netherlands* [2011] ECR I-831, para. 83.

²³ Case 29/84 *Commission v. Germany* [1985] 01661, para. 23; Case C-365/93 *Commission v. Greece* [1995] ECR I-499, para. 9; Case C-144/99 *Commission v. the Netherlands* [2001] ECR I-3541, para. 17; Case C-259/01 *Commission v. French Republic* [2002] I-11093, para. 17; Case C-70/03 *Commission v. Spain* [2004] ECR I-7999, para. 15.

²⁴ Opinion of Mr Advocate General Van Geven, Case C-131/88 *Commission v. Germany* [1990] ECR I-847, para. 7.

²⁵ Simon, op.cit. footnote 3; L. Coutron, "Le Lente Conversion du Conseil d'Etat à l'Effet Direct des Directives", *L'Actualité Juridique Droit Administratif (AJDA)*, 2010, p. 1412.

authority, whereas, directives are designed to harmonise rather than to provide uniformity where a certain normative competence for the Member States is preserved.²⁶ It was thought that directives would be used particularly in the fields where existing national law is very complex and voluminous which needs to be adapted to EU Law.²⁷

Under international law, there are two sorts of obligations whose differentiation depends upon their nature: ‘obligation of conduct/means’; ‘obligation of result’. In the former case, obligation requires the subjects a particular form of conduct and to use of specifically determined means, whereas in the latter case, obligation does not require the subjects a particular course of conduct, but requires them to achieve a specified result by means of their own choice of various actions, means or conducts. What distinguishes the former from the latter is not that the obligation of conduct/means does not have a particular objective or result, but that its objective or result must be achieved through a specifically determined means, action or conduct, which is not true of international obligation of result.²⁸

Being binding of a regulation in its entirety as enshrined in Article 288 TFEU means that the Member States do not have any choice of the forms or methods to implement a regulation, since not only the result dictated by them is binding, but also the forms and methods prescribed therein are obligatory.²⁹ Directives as being an instrument of indirect law-making represent only the first stage in a legislative operation and, in principle, do not create EU norms applicable as such but impose an obligation of result to be achieved by the Member States.³⁰ The binding nature of directives is therefore limited to the results prescribed therein. Whereas regulations are vehicles for obligations of conduct which are addressed to specific organs of the Member States, directives are principally vehicles for obligations of

²⁶ F. Emmert & M. P. de Azevedo, “L’Effet Horizontal des Directives – La Jurisprudence de la CJCE: Un Bateau Ivre?”, *Revue Trimestrielle de Droit Européenne*, Vol: 29, 1993, p. 503.

²⁷ Prechal, *op.cit.* footnote 12, p. 3.

²⁸ Report of the Commission to the General Assembly on the Work of its Twenty-ninth Session, *Yearbook of the International Law Commission 1977, Volume II, Part Two*, p. 11-30.

²⁹ S. Fisher, “The Direct Effect of Secondary Legislation in European Community Law”, *Queensland University of Technology LJ*, Vol: 8, 1992, p.1.

³⁰ A. Dashwood, “From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?” C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies Volume 9, 2006–2007*, Oxford, Hart, 2007, p. 82.

result, which leave a choice to the Member States as to the means of implementation.³¹

Regulation is a legally complete and perfect act, designed to apply throughout the EU whose incorporation into national law is neither necessary nor permissible.³² The Member States, unless otherwise expressly provided, are precluded from taking measures, for the purposes of applying regulations, which are intended to alter their scope or supplement their provisions.³³ The Member States therefore may not, in the absence of a European provision to the contrary, have recourse to national measures capable of modifying the application of regulation.³⁴ The Member States are under the obligation not to obstruct or impede direct applicability inherent in regulations or direct effect of regulations, the strict compliance with which is an indispensable condition of their simultaneous and uniform application throughout the EU. No procedure is permissible in EU law whereby the EU nature of a legal rule is concealed from those subject to it. In other words, for the simultaneous and uniform application of regulations throughout the EU, the Member States must not adopt or allow national authorities with a legislative power to adopt a measure by which the European nature of a legal rule and the consequences which arise from it are concealed from the individuals concerned.³⁵ The CJEU does not want, as the underlying reason, the European nature of the provision to be obscured and wants to enable them to be applied as a provision of EU law, not of national law, unlike directives.³⁶

By virtue of Treaty based-direct applicability of regulations in the national legal systems, the Member States have repeatedly been prohibited from copying the contents of regulations in national legislative provisions.³⁷

³¹ D. Wyatt, “The Direct Effect of Community Social Law – Not Forgetting Directives”, *European Law Review*, Vol: 8, 1983, p. 241; T. Tridimas, “Horizontal Effect of Directives: A Missed Opportunity?”, *European Law Review*, Vol: 19, 1994, p. 621; T. Tridimas, “Black, White and Shades of Grey: Horizontality of Directives Revisited”, *Yearbook of European Law*, Vol: 21, 2001, p. 327.

³² Case 34/73 *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze* [1973] ECR 981, para. 11; Dashwood, op.cit. footnote 30, p. 82.

³³ Case 40/69 *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollmann* [1970] ECR 69, para. 4; Case 74/69 *Hauptzollamt Bremen-Freihafen v. Waren-Import-Gesellschaft Krohn & Co* [1970] ECR 451, para. 4.

³⁴ Case 18/72 *NV Granaria Graaninkoopmaatschappij v. Produktschap voor Veevoeder* [1972] ECR 1163, para. 16.

³⁵ *Variola*, op.cit. footnote 32, paras. 10-11; *Zerbone Snc v. Amministrazione delle finanze dello Stato* [1978] ECR 99, paras. 24-26.

³⁶ T. Hartley, *The Foundations of European Community Law*, Oxford, OUP, 2003, p. 204.

³⁷ R. H. Lauwaars, “Implementation of Regulations by National Measures”, *Legal Issues of Economic Integration*, Vol: 10, 1983, p. 41.

The uniform application of provisions of regulations allows no recourse to national rules except to the extent necessary to carry them out.³⁸ The adoption of measures designed to implement regulations is justified only to the extent necessary and appropriate for their proper implementation.³⁹ There is therefore no incompatibility between direct applicability of a regulation and the adoption of national implementing measures on the basis of that regulation. That is because, the fact that a regulation is directly applicable does not prevent its provisions from empowering a Member State to take implementing measures.⁴⁰ The Member States may need to modify their law to comply with a regulation or they may need to pass consequential legal measures in order to give full effect to what is demanded by the regulation in accordance with its provisions.⁴¹ The Member States were considered being able to take, on a transitional basis and without prejudice to any future action on the part of the institutions, any implementing measures compatible with the principles of the regulation within the context of facilitating the application of regulations.⁴² All methods of implementation are considered contrary to Articles 288 and 297 TFEU which would have the result of creating an obstacle to the direct effect of regulations and of jeopardising their simultaneous and uniform application throughout the EU.⁴³ National implementing measures cannot thus adversely affect, amend or expand the scope of regulations, undermine their effectiveness.⁴⁴

Whereas regulations are normative acts with *erga omnes* effect, as aforementioned directives acquire general application with *erga omnes* effect through the national implementing measures merely or to some extent through their direct effect. Whereas directives may be the source of rights for individuals, they can accordingly be only an indirect source of obligations for individuals.⁴⁵

³⁸ Case 39/70 *Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-St. Annen* [1971] ECR 49, para. 4.

³⁹ G. F. Mancini, **Democracy and Constitutionalism in the European Union – Collected Essays**, Oxford, Hart, 2000, p. 247.

⁴⁰ Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v. Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECR 2749, paras. 34-35.

⁴¹ P. Craig & G. de Búrca, **EU Law – Text, Cases, and Materials**, Oxford, OUP, 2011, p. 105.

⁴² Case 30/70 *Otto Scheer v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1197, paras. 10-11.

⁴³ Case 39/72 *Commission v. Italy* [1973] ECR 101, para. 17; Case 50/76 *Amsterdam Bulb v. Produktschap voor Siergewassen* [1977] ECR 146, para. 7.

⁴⁴ Opinion of Mr Advocate General Verloren van Themaat, Case C-54/81 *Fromme v. Balm* [1982] ECR 1466.

⁴⁵ Prechal, *op.cit.* footnote 12, p. 12, 96.

Unlike regulations, save the regulations which require national implementing measures, directives are never self-sufficient to be *fully effective* in the national legal systems without implementing national measures.⁴⁶ By leaving the Member States free as to the choice of form and methods of their implementation, directives do not require uniformity, but allow a certain degree of differences across the Member States. They are accordingly more compatible with the principle of subsidiarity. That is because directives with a decentralising function within the decision-making process have lesser impact on national law and are more respectful of the national legal systems by leaving more scope for national law, whereas regulations are in principle more intrusive and interventionist as they replace and drive out national law.⁴⁷

The Concept of Direct Applicability as a Distinct Concept from the Concept of Direct Effect?

Article 288 TFEU states that “[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” Such an express inclusion of the concept of direct applicability into the Treaty only as to regulations has raised some questions. Is the concept of direct applicability a unique feature of regulations or also related to the provisions of Treaties and other instruments including directives? If it is regarded as not related to directives, which feature of directives makes it lacked of such a qualification? What is the relevance of the Treaty-based concept of direct applicability with the judge-made concept of direct effect? Are these concepts the same or distinct? If they are the same, what was the point in inventing such an identical judge-made concept? If they are distinct, is direct applicability a prerequisite to direct effect? As direct effect of directives has been expressly confirmed by the CJEU we return to the first question again: are directives also directly applicable?

As interpreted by Hartley, the authors of the Treaty probably intended with the term direct applicability the concept of direct effect in the sense of

⁴⁶ *Ibid.*, p. 92.

⁴⁷ W. van Gerven, “Articles 30, 48, 52 and 59 after *Keck & Mithouard*, and Protection of Rights Arising from Directives after *Faccini Dori*”, *Colum. J. Eur. L.*, Vol: 2, 1996, p. 217; D. Simon, *La Directive Européenne*, Paris, Dalloz, 1997, p. 18; C. Timmermans, “Community Directives Revisited”, *Yearbook of European Law* Vol: 17, 1997, p. 1; Prechal, *op.cit.* footnote 12, p. 4-5; S. Prechal, “Adieu à la Directive?”, *EuConst*, Vol:1, 2005, p. 481; J. P. Jacqué, *Droit Institutionnel de l’Union Européenne*, Paris, Dalloz, 2006, p. 543; de Witte, Geelhoed & Inghelram, *op.cit.* footnote 1, p. 282; C. Timmermans, “Un Nouveau Chapitre sur L’Invocabilité des Directives”, *Mélanges en L’Honneur de Jean-Pierre Puissechet – L’État Souverain dans Le Monde D’Aujourd’hui*, Paris, Pedone, 2008, p. 293.

the latter's use in the case law. However with the introduction of the concept of direct effect into the case law the necessity arises for distinct definitions about these concepts. The dilemma in that attempt is however as follows: if the concept of direct applicability is interpreted to mean the same thing with the concept of direct effect, it would seem that regulations merely can be directly effective. If one interprets these two terms as distinct concepts, one has to find a suitable meaning for the term direct applicability, which refers to some quality possessed solely by regulations. This option in turn causes other problems,⁴⁸ such as lack of direct applicability of the corpus of EU law other than regulations. Irrespective of preference for such a classification, it should be clarified first whether Article 288 TFEU is exhaustive and, accordingly, decisive with regard to the effect of the entire corpus of EU law in the national legal orders both in the sense of direct applicability and direct effect. The interchangeable usage of the concepts of direct applicability and direct effect by the CJEU sometimes also increases the problem confronted. At the outset it should be clarified that any classification between these terms will inevitably go beyond the confines of the *expressis verbis* qualification cast by the text of Article 288 TFEU.

Winter was the first legal scholar who made a differentiation between the terms of direct applicability and direct effect. According to him, the former deals with the matter of how EU law is incorporated into national legal orders in order to become the law of the land, whereas the latter deals with the matter of conditions under which incorporated EU norms are susceptible of being invoked before the national courts by individuals. For instance, direct applicability of regulations inherent by virtue of Article 288 TFEU causes them to penetrate directly into the national legal systems and so they automatically become an integral part of the law of the Member States, whereas not all their provisions are directly effective.⁴⁹ Along the same vein, it is argued that "direct applicability is tightly bound up with a monistic concept of the relationship" between EU law and national law, thus any process of incorporation or reception must be excluded as to the whole of EU law.⁵⁰ Direct applicability is deemed as connecting the legal orders and dealing with the question of whether EU law has to be transformed into

⁴⁸ Hartley, *op.cit.* footnote 36, p. 203.

⁴⁹ J. A. Winter, "Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law", **Common Market Law Review**, Vol: 9, 1972, p. 425; It is nevertheless a fact that even Winter occasionally is not beyond falling into confusion of these two concepts in his article.

⁵⁰ R. Kovar, "The Relationship between Community Law and National Law", Commission of the European Communities, **Thirty Years of Community Law - The European Perspective Series**, Belgium, Commission, 1983, p. 131, 137.

national law. Within the context of direct applicability, a measure thus becomes automatically part of the national legal order when it comes into force and the fact of which makes national legislative reproduction otiose. Direct effect, on the other hand, deals with the question of whether the provision relied on is sufficiently operational in the context of an actual dispute for direct application by a national court. As a qualification of a rule to be invoked before a national court, direct effect ascertains whether the rule is suitable for judicial enforcement in a concrete case. It thus lends the provisions themselves by their very nature to judicial application.⁵¹

Direct applicability is correlated with the texts or instruments and deemed a character or feature of the instruments/sources of law, while direct effect is correlated with the norms and deemed a character or feature of the norms contained in those instruments/sources. Direct applicability means whether the instrument by virtue of its form is automatically integrated, as a source of law, into the national legal systems and does not require any further step of incorporation, transposition or reception to render it applicable by a national judge. Direct effect is about the separation of powers and specifically about the extent of the judicial power to enforce the obligations laid down. Namely, it deals with the issue of whether the enforcement of a provision remains solely within the province of the legislature and executive or it comes within the province of the judiciary. Direct effect suggests that the norm, in terms of its some inherent quality relating to its substance rather than its form, is capable of penetrating the firewall between EU law and national law not only to be susceptible of being judicially applied without which it could not have effects, but also to create rights, impose obligations and alter legal relationships. Direct effect provides the criteria for selecting or rejecting the norms to be applied and for clarifying the scope of judicial competence.⁵²

⁵¹ P. E. Morris, "The Direct Effect of Directives – Some Recent Developments in the European Court: Part I", *Journal of Business Law*, 1989, p. 233; H. G. Schermers, "No Direct Effect for Directives", *European Public Law*, Vol: 3, 1997, p. 527; P.J.G. Kapteyn, "The Application and Enforcement of Community Law in the National Legal Systems", P. J.G. Kapteyn et al, *Kapteyn & VerLoren van Themaat The Law of the European Union and the European Communities*, The Netherlands, Kluwer, 2008, p. 512, 517.

⁵² D. Edward, "Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations", *Scritti in onore di Giuseppe Federico Mancini*, Diritto dell'Unione europea, Vol. 2, Milano, Giuffrè Editore, 1998, p. 423-443; D. Edward, "Direct Effect: Myth, Mess or Mystery?", in M. J. Prinsen & A. Schrauwen (eds.), *Direct Effect - Rethinking a Classic of EC Legal Doctrine*, Groningen, Europa Law Pub., 2002, p. 3-17; J. Bengoetxea, "Direct Applicability or Effect", M. Hoskins & W. Robinson (eds.), A

Furthermore, several legal scholars interpret direct applicability as domestic validity of law of a legal order in another, so dealing with the question of whether that rule has the force of law within a domestic sphere without the requirement of transformation. The concepts of validity (direct applicability) and direct effect cannot be equated, since in some cases criteria additional to validity apply before a rule of a legal order can be given effect in another.⁵³

Even though the CJEU has used the terms of direct applicability and direct effect interchangeably, there are some occasions in that it has emphasised their differences. The CJEU for instance defines direct applicability of a regulation as that “its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law”.⁵⁴ Hence, the concept of direct applicability, within the consideration of a monistic notion of the relationship of a rule of legal order with another legal order, deals with the question of whether a rule of external origin, whenever it comes into force in its original legal order, automatically constitutes as such an integral part of a domestic legal order and so has domestic validity without requiring any further act of incorporation, transformation or reception. Thus direct applicability connotes automatic penetration or automatic validity of a rule of external origin in/to a domestic legal system.

On the other hand, the concept of direct effect generally connotes being operative of that rule in the domestic legal system and thus deals with the issue of whether that rule, under some conditions, has the quality of being itself sufficiently operative for the judicial/administrative application and so being susceptible to be invoked or relied upon before the domestic judicial/administrative authorities. Prechal defined it as “the obligation of a court or another authority to apply the relevant provision of [EU] law, either as a norm which governs the case or as a standard for legal review”, namely as the quality of provisions to be applied accordingly.⁵⁵

True European - Essays for Judge David Edward, Oxford, Hart, 2003, p. 354, 360, 362; J. Bengoetxea, “Is Direct Effect a General Principle of European Law?”, U. Bernitz, J. Nergelius & C. Cardnér, **General Principles of EC Law in a Process of Development**, Great Britain, Kluwer, 2008, p. 9-10.

⁵³ Y. Iwasawa, “The Doctrine of Self-executing Treaties in the United States: A Critical Analysis”, **Virginia Journal of International Law**, Vol: 26, 1986, p. 627; A. Nollkaemper, “The Direct Effect of Public International Law”, M. J. Prinsse & A. Schrauwen (eds.), **Direct Effect - Rethinking a Classic of EC Legal Doctrine**, Groningen, Europa Law Pub., 2002, p. 159.

⁵⁴ *Variola*, op.cit. footnote 32, para.10; *Amsterdam Bulb*, op.cit. footnote 43, para. 4; *Zerbone*, op.cit. footnote 35, para. 23.

⁵⁵ Prechal, op.cit. footnote 12, p. 241.

Is the Entire Corpus of EU Law Directly Applicable?

Ascription of direct applicability to regulations in Article 288 TFEU is not exhaustive in the case law and so this ascription is not decisive, in the sense of *a contrario* interpretation, for EU law other than regulations. The concept of direct applicability with its broad content embracing the entire corpus of EU law therefore went in case law beyond *expressis verbis* designation given in Article 288 TFEU. That is because, the CJEU pointed out in *Costa/ENEL* that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”⁵⁶ The entire corpus of EU law is therefore considered by the CJEU as an integral part of the national legal systems regardless of its external origin and of being directly effective.⁵⁷ In that regard, as clarified by Warner AG EU law must not be regarded as foreign law in the national legal systems, but as an integral part of their own law (national legal systems), albeit not as an integral part of their national law. Namely it should be considered, for instance, in the sense of being part of the law applicable in England or part of the law of England, not as part of English law.⁵⁸ As expressed by Timmermans, the whole body of EU law does not constitute a *corpus alieni iuris* situating outside the national legal systems and necessitating an act of transformation or incorporation to acquire status in the national legal systems.⁵⁹

The Relationship between Direct Applicability and Direct Effect

The issue of whether all provisions of regulations, which are *expressis verbis* directly applicable, are *a fortiori* directly effective is to be analysed first. There are two understandings about the direct effect of regulations. According to the first understanding, direct effect is regarded by the CJEU as inherent in regulations.⁶⁰ The CJEU confirmed on some occasions that a

⁵⁶ Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585.

⁵⁷ Prechal, op.cit. footnote 12, p. 133; S. Prechal, “Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union”, C. Barnard (ed), **The Fundamentals of EU Law Revisited - Assessing the Impact of the Constitutional Debate**, Oxford, OUP, 2007, p. 45.

⁵⁸ J. P. Warner, “The Relationship between European Community Law and the National Laws of the Member States”, **LQR**, Vol: 93, 1977, p. 349.

⁵⁹ C. W. A. Timmermans, “Directives: Their Effect within the National Legal Systems”, **Common Market Law Review**, Vol:16, 1979, p. 533; Timmermans, op.cit. footnote 47, p. 291-294.

⁶⁰ *Amsterdam Bulb*, op.cit. footnote 43, para. 5.

regulation shall have general application and shall be directly applicable. By reason of its nature and its function in the system of the sources of EU law, therefore, a regulation has direct effect.⁶¹ The CJEU similarly maintained in *Leonesio* that “[r]egulations become part of the legal system applicable within the national territory, which must permit the direct effect provided for in Article [288 TFEU] to operate in such a way that reliance thereon by individuals may not be frustrated by domestic provisions or practices.”⁶² It appears in these judgments that direct applicability of regulations is automatically decisive for and so leads *a fortiori* to direct effect of their provisions. Provisions of a regulation automatically produce direct effect and national courts need not examine whether those provisions actually meet the criteria required for direct effect. Some regulations may obligate the Member States to take implementing measures, but these measures do not exclude a direct effect of such a regulation⁶³ and its direct effect remains unimpaired even if the required national measures were not taken.⁶⁴

Under the second understanding, the issue of direct effect of regulations is separated from their direct applicability and direct effect of regulations is considered depending on the questions of “whether an area of discretion was left to the national authorities in the matter of implementation and in what manner the national provisions were to supplement the measures adopted.”⁶⁵ Under that understanding, the CJEU moderately stated that “regulations are directly applicable and, consequently, may by their very nature have direct effects”.⁶⁶ In *Bertholet*, it held that the provisions of the regulation concerned “are clear and capable of direct application without difficulty”⁶⁷ the fact of which implies that if not, they would not be capable of directly applicable in the sense of direct effect. Warner AG clarifies that even though every provision of every regulation is directly applicable by virtue of Article 288 TFEU, not every provision of every regulation has direct effect, in the sense of conferring on individuals rights enforceable before the national

⁶¹ Case 43/71 *Politi s.a.s. v. Ministry for Finance of the Italian Republic* [1971] ECR 1039, para. 9; Case 31/78 *Francesco Bussone v. Ministro dell'agricoltura e foreste* [1978] ECR 2429, paras. 28-29.

⁶² Case 93/71 *Orsolina Leonesio v. Ministero dell'agricoltura e foreste* [1972] ECR 287, para. 22.

⁶³ *Eridania*, op.cit. footnote 40, paras. 34-35.

⁶⁴ G. Bebr, **Development of Judicial Control of the European Communities**, The Hague, Martinus Nijhoff, 1981, p. 560, 583, 586.

⁶⁵ Opinion of Mr Advocate General Roemer, Case 93/71 *Leonesio v. Italian Ministry for Agriculture and Forestry* [1972] ECR 297.

⁶⁶ *van Duyn*, op.cit. footnote 6, para. 12.

⁶⁷ Case 31/64 *"De Sociale Voorzorg" Mutual Insurance Fund v. W.H. Bertholet* [1965] ECR 81.

courts.⁶⁸ The CJEU confirmed in *Monte Arcosu* that by virtue of their very nature and of their function in the system of sources of EU law, the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may nevertheless necessitate, for their implementation, the adoption of national measures of application. In the light of discretion enjoyed by the Member States in respect of the implementation of the provisions concerned, it cannot be held that individuals may derive rights from those provisions in the absence of national measures of application. These provisions may not be relied on before a national court by individuals where the national legislature has not adopted the provisions necessary for their implementation in the national legal system.⁶⁹ The CJEU in *X* transposed its reasoning in respect of directives to the provisions of regulations, which necessitate the adoption of measures of application by the Member States and so are non-directly effective. That is because, even though the EU measure concerned in the main proceedings is a regulation, which by its very nature does not require any national implementing measures, Article 11 of Regulation 3295/94 empowers the Member States to adopt penalties for infringements of its Article 2.⁷⁰ As a consequence, direct applicability of regulations in the second group of judgments seems to be a leading factor to direct effect, albeit not being sufficient. “[T]he mere status of an instrument *qua* regulation cannot determine whether any of its provisions in fact enjoy direct effect”⁷¹ It is in the end, the material content of regulations, not their form, which determines their legal effect.⁷² As declared by Morris, regulations are always directly applicable but do not necessarily engender direct effect, even though some cases nevertheless display that all regulations automatically enjoy direct effect which is an intrinsic characteristic of a regulation.⁷³

In the light of these judgments, if the CJEU itself already admitted that some provisions of regulations may not have direct effect, the deterministic association of direct effect of regulations with their direct applicability loses

⁶⁸ Opinion of Advocate General Warner, Case 131/79 *Regina v. Secretary of State for Home Affairs* [1980] ECR 1604.

⁶⁹ Case C-403/98 *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna, Organismo Comprensoriale n° 24 della Sardegna and Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)* [2001] ECR I-103, paras. 25-29.

⁷⁰ Case C-60/02 *Criminal proceedings against X* [2004] ECR 651, para. 62.

⁷¹ A. Dashwood et al, **Wyatt and Dashwood's European Union Law**, Oxford, Hart, 2011, p. 257.

⁷² A. J. Easson, “The “Direct Effect” of EEC Directives”, **ICLQ**, Vol: 28, 1979, p. 319.

⁷³ Morris, op.cit. footnote 51.

its significance. Accordingly the issue of direct effect of regulations is detached from their nature of direct applicability and there is no presumption that direct applicability of regulations *a fortiori* leads to direct effect. Direct applicability and direct effect are distinct, but to some extent overlapping concepts.

Are Directives Directly Applicable in the Sense of Constituting as such an Integral Part of the National Legal Systems?

There are three main lines of understanding on the relationship between the qualities of direct applicability and direct effect as to directives. The first line generally describes directives directly effective merely and so refusing their quality of being directly applicable. According to them, it is certainly inappropriate to speak of direct applicability of a directive, the term of which is used in Article 288 TFEU only for regulations, but only of the direct effect of directives. They are not being directly applicable in the sense of being automatically incorporated into the national legal systems from their entry into force. They have by definition to be implemented in the Member States by legislation or at least by administrative action and still require further action on the part of the competent national authorities. They are accordingly incapable of ever enjoying the status of direct applicability; i.e. being an integral part of the national legal systems without the assistance of national law. Directives, as being an example of indirect incorporation, do not, as such, penetrate the national legal systems, but require an act of incorporation in order to become part of internal law and directly applicable. So under no circumstances can one say that directives may also have the content and effects of a regulation, at most they may produce similar effects. Having used the expression of similar effects for the categories of acts other than regulations mentioned in Article 288 TFEU to have, the CJEU intended to emphasise that there could be no question of attributing to directives a character of direct applicability in the fullest sense and accordingly of eroding their distinction drawn by Article 288 TFEU from regulations.⁷⁴

⁷⁴ Opinion of Advocate General Reischl, Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1647; Morris, op.cit. footnote 51; P.E. Morris & P.W. David, "Directives, Direct Effect and the European Court: The Triumph of Pragmatism – Pt I", **Business Law Review**, 1987 April, p. 85; Warner, op.cit. footnote 58; Opinion of Advocate General Warner, Case 815/79 *Cremonini and Vrankovich* [1980] ECR 3614; Opinion of Advocate General Mischo, Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3976, para. 4; Bebr, op.cit. footnote 64, p. 560; Schermers, op.cit. footnote 51; Edward, op.cit. footnote 52, p. 3-17; Edward, op.cit. footnote 52, p. 433; A. Arnall, **The European Union and its Court of Justice**, Oxford, OUP, 2003, p. 107-113; Bengoetxea, op.cit. footnote 52, p. 354, 360 and 362; J.

According to the second line, generally direct effect of directives precedes and leads to their direct applicability. To be precise, they think the simultaneous application of direct effect and direct applicability, even though the former triggers the latter and prevents directives from being frozen. Whenever the objective of a directive is disregarded by the addressee, the CJEU, in order to correct this disregard, prescribes to the national court to consider that sufficiently precise and unconditional provisions of the directive are integrated into the legal system of the Member State addressed. In other words, to become for directives an integral part of the national legal systems follows their quality of being directly effective, not the other way round. Directives therefore become an integral part of the national legal systems insofar as they are directly effective. “In order for the provisions of a directive to have effect in the absence of domestic implementing legislation, certain conditions must also be met demonstrating that *those provisions can be automatically integrated into national legislation and therefore applied without any intervening measure*. An incomplete legal rule, as a directive is by definition, is initially frozen in the absence of an instrument transposing it, unless the nature of its provisions is such that they can simply be applied directly.”⁷⁵

According to the third line, with which I concur, directives are considered within the entire corpus of EU law being as such an integral part of the national legal systems and so directly applicable. To be precise direct applicability, though not a sufficient quality, is regarded as an element of, a prerequisite⁷⁶ or the logical precursor⁷⁷ to direct effect. The statement in *Variola* that “Member States are under a duty not to obstruct the direct applicability inherent in regulations and *other rules of [EU] law*”⁷⁸ is to be

Bengoetxea & N. Jääskinen, “Rights and Diverse Effects in EU Law: A Hohfeldian Approach to the Doctrine of Direct Effect of Directives”, R. Banakar (ed.), **Rights in Context: Law and Justice in Late Modern Society**, Surrey, Ashgate, 2010, p. 278; J. Dickson, “Directives in EU Legal Systems: Whose Norms Are They Anyway?”, **European Law Journal**, Vol: 17, 2011, p. 190; R. Schütze, **European Constitutional Law**, Cambridge, CUP, 2012, p. 323.

⁷⁵ Opinion of Advocate General Léger, Case C-287/98 *Grand Duchy of Luxemburg v. Berthe Linster, Aloyse Linster and Yvonne Linster* [2000] ECR I-6920, paras. 24-25, 30, 37, emphasis added; See also G. A. Bermann et al, **Cases and Materials on European Community Law**, St. Paul, Minnesota, West Publishing Co., 1993, p. 182; T. Dal Farra, “L’Invocabilité des Directives Communautaires devant le Juge National de la Légalité – Etude Comparée des Conceptions de la Cour de Justice des Communautés Européennes et du Conseil d’État”, **Revue Trimestrielle de Droit Européenne**, Vol: 28, 1992, p. 631.

⁷⁶ Winter, *op.cit.* footnote 49.

⁷⁷ Fisher, *op.cit.* footnote 29.

⁷⁸ *Variola*, *op.cit.* footnote 32, para. 10; Emphasis added.

interpreted as a clear implication that other provisions of EU law also have direct applicability. If the concept of direct applicability is regarded as having the force of law in a domestic legal system, nobody would deny that directives were intended to have the force of law in the national legal systems under the Treaty of Rome. Directives are included into the whole body of EU law, which does not constitute a *corpus alieni iuris* situating outside the national legal systems. If regulations do not require any incorporation within the consideration of Article 288 TFEU, directives do not need it either. Directives are integrated in the national legal systems by only their entry into force and benefit as the entire corpus of EU law direct applicability, since competence with regard to adoption of measures for the implementation of directives (or decisions addressed to the Member States) is not in the nature of competence of reception, but of competence of implementation. Transposition of directives in national law, as a requirement inherent in these instruments, is aimed not for incorporating them into the national legal orders, but for adapting of national law to the result imposed by them. The act of transposition in that regard is not required if the pre-existing national rules are already compatible with the directive. Thus the notion of direct effect remains the same irrespective of the nature of instrument, namely whether the provision concerned is enshrined in the Treaty, a regulation, a directive or a decision.⁷⁹

It could be helpful here to quote two opposite approaches regarding direct applicability of directives in order to grasp the issue better. Prechal argues that the fundamental choice of the CJEU in *Van Gend en Loos* and *Costa/ENEL* regarding the relationship between EU law and national law also determines the place of directives in the national legal orders. If directives are not considered integrated into the national legal systems from their date of entry into force, there would be no explanation for the fact that individuals can rely on their provisions before the national courts, which must take them into consideration as elements of EU law to apply. She continues that *inter alia* the principle of consistent interpretation can more readily be understood if it is *a priori* accepted that directives are an integral part of the national legal systems.⁸⁰ In other words, she places the character

⁷⁹ Easson, op.cit. footnote 72; G. F. Mancini, "The Making of a Constitution", **Common Market Law Rev.**, Vol: 26, 1989, p. 595; Blanquet, op.cit. footnote **Hata! Yer işareti tanımlanmamış.**; L. Krämer, "The Implementation of Community Environmental Directives within Member States: Some Implications of the Direct Effect Doctrine", **J. Env'tl. L.**, Vol: 3, 1991, p. 39; Timmermans, op.cit. footnote 47, p. 291-294.

⁸⁰ Prechal, op.cit. footnote 12, p. 92-93; I completely agree with her expression that "directives *are* integrated in the national legal systems as from the date of their entry into

of EU law, including directives, being an integral part of the national legal systems⁸¹ as a legal basis for the principle of consistent interpretation. She asserts that it would be paradoxical to restrict the requirement of consistent interpretation only to implementing measures once the theory that EU law is an integral part of the national legal systems has been accepted, EU law must be for that reason taken into account by the national courts.⁸²

On the contrary, having drawn a distinction articulated by Raz between norms, which are binding according to a given legal system and hence given legal effect by the courts of that system, and norms, which are actually part of the legal system of a given jurisdiction, Dickson argues that some norms which courts of a given legal system are bound to apply are not norms which are part of that legal system, but as norms of some other legal system binding according to the norms of the former. These norms, for instance under the conflict-of-law doctrines, are given effect on a given legal system and change people's rights and duties without being and becoming themselves part of the law of the land. She accordingly regards directives as not being directly applicable, since they are, by their very nature, intended to require national implementing measures, where such measures are missing certain conditions must be met and justificatory obstacles must be surmounted in order for them to penetrate into national legal systems in such a way as to give them direct effect. She continues that where directives operate as they are intended in the national legal orders what is intended to become part of national legal order and what actually becomes part of national legal orders is not directives themselves, but rather the national implementing measures adopted to achieve the result prescribed therein. She asks that if the EU and national legal orders really are so integrated, why we should need to render EU law cognisable to the domestic judges at all through direct effect.⁸³

Both arguments seem to me tainted by over-generalisation of a certain effect of a norm of external origin in a domestic legal system. Every particular effect of a norm of external origin deserves distinct attention and is decisive for its extent merely. Instead, there should be a true, appropriate and quintessential question to be asked: whether there is a certain effect of a

force. If this were otherwise, there would be no explanation for the fact that individuals can rely on provisions of Community directives before national courts and that the latter must take them into consideration as elements of Community law".

⁸¹ F. Schockweiler, "Les Effets des Directives dans les Ordres Juridiques Nationaux", *Revue du Marché Unique Européen*, 2/1995, p. 9.

⁸² Prechal, *op.cit.* footnote 12, p. 186.

⁸³ Dickson, *op.cit.* footnote 74.

norm of external origin in a domestic legal system without *a priori* whose quality of direct applicability - in other words, without having the quality of constituting as such an integral part of the domestic legal system or becoming the law of land - such an effect could not be possible in the legal practice. To be precise, is there any kind of legal effect of a norm of external origin whose prerequisite is its direct applicability?

For that purpose, it is possible to examine the relationship between international law and national law in some experiences. We know that some kinds of legal effects of norms of external origin or international law might be possible without their being part of the law of the land. Indirect effect of a norm of an agreement would be possible in the domestic legal system of a dualist state, for instance in the UK, without that norm constituting an integral part of that system through transforming act. As stated by Lord Atkin, the stipulations of an agreement duly ratified do not within the UK, by virtue of the agreement alone, have the force of law.⁸⁴ Even though an unincorporated agreement is not nevertheless a source of law in a dualist State, it may have some domestic legal effects or consequences. The courts might take it into account in interpreting ambiguous domestic legislation dealing with the same subject. The approach of the British courts to the ECHR, although ratified by the UK but has not acquired the status of domestic law until recently, constitutes a good example of her.⁸⁵ Being an integral part of domestic law does not necessarily seem to be a requirement or a prerequisite in the legal practice, which may allow us an analogy for directives, for/to conforming interpretation of the domestic rules with the rules of external origin.

Quite the opposite, the very concept of direct effect is pertinent merely to monist systems, which automatically provides rules of external origin for becoming an integral part of the domestic legal order. As described by Kuijper, “in dualist States a phenomenon like direct effect is inherently impossible; it is literally ‘unthinkable’.”⁸⁶ A state which resorts to the method of transformation rejects the possibility that international law, as being not transformed into domestic law, can regulate its internal

⁸⁴ *Attorney-General for Canada v. Attorney-General for Ontario* [1937] AC 326, 347; *The Tin Council Case, MacLain Watson and Co. v. Dept. of Trade and Industry*. House of Lords, [1989] 2 All ER 523, at 544-545 (*per* Lord Oliver).

⁸⁵ T. Buerghenthal, “Self-executing and Non-self-executing Treaties in National and International Law”, *Recueil des Cours* Vol. 235, 1992, p. 303, p. 318-319, 360.

⁸⁶ P.-J. Kuijper, “Epilogue: Symbiosis?”, M. J. Prinssen & A. Schrauwen (eds.), **Direct Effect - Rethinking a Classic of EC Legal Doctrine**, Groningen, Europa Law Pub., 2002, p. 255.

relationships and lay down rules for the courts.⁸⁷ That is because, dualist approach considers international and domestic legal orders as separate legal orders and international law and domestic law as separate spheres of law. It regards agreements as not forming part of the domestic legal order, but as a part of a separate legal order. International agreements do not automatically become an integral part of domestic law, so an act transforming them into domestic law is required to make them operative in the domestic legal system. In dualist states a ratified agreement is not therefore able to alter the laws of the state unless and until it is incorporated into national law by legislation. “This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the Government or a private individual.”⁸⁸

For that reason, in dualist States direct effect of a provision of international law or of external origin is not possible.⁸⁹ Agreements are thus applied through the legislation, which gives them effect. If words from an agreement are incorporated into a statute with or without reference to the agreement they take effect as part of the statute and it is the statute not the agreement that is applied. If the statute declares that the agreement has the force of law, the agreement itself is being applied. However, it is applied only because the statute says so.⁹⁰ It is not the agreement itself, but the statute which transforms or receives it into domestic law is given effect in the dualist legal systems, since the stipulations of an agreement duly ratified do not within the Great Britain, by virtue of the agreement alone, have the force of law.⁹¹ In that respect, for instance, under the fundamental law of Great Britain, all agreements are non-self-executing and they require implementing measures before they can create domestically enforceable legal rights and obligations.⁹²

⁸⁷ Winter, *op.cit.* footnote 49.

⁸⁸ “The UK's legal relationship with the EU”, <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmleueg/633/63304.htm>> (1 March 2016).

⁸⁹ T. Hartley, **European Union Law in a Global Context**, Cambridge, CUP, 2004, p. 167.

⁹⁰ Hartley, *op.cit.* footnote 36, p. 188, 190.

⁹¹ *Attorney-General for Canada*, *op.cit.* footnote 84, 347.

⁹² Buergenthal, *op.cit.* footnote 85, p. 359; C. M. Vazquez, “The Four Doctrines of Self-Executing Treaties”, **AJIL**, Vol: 89, 1995, p. 695; For that purpose, check both the European Communities Act 1972 and the European Union Act 2011 of the UK. For instance, Section 18 of European Union Act 2011 recently confirms that “[d]irectly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom

Even if direct effect is asserted pertinent also to dualist states, it could only be so, from the domestic point of view as in the case of UK, pursuant to the incorporation of a rule of external legal order by a general and prior act transforming it into national law and by virtue of that act merely. In such a case the legal situation could not however be called as direct effect in a true sense.

From the European point of view, the CJEU deems that EU law, upon its entry into force, automatically constitutes an integral part of the national legal systems independently of a national incorporating act. The CJEU expressed in *Van Gend en Loos* that “independently of the legislation of Member States, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”⁹³ Moreover, direct effect of directives untransposed or even transposed improperly still fits very well the pure monistic conception rather than a dualist one. Despite the fact that in UK law there is no need to a further enactment of incorporation for the entire EU legislation, including those to be enacted in the future, the implementation of directives through a UK statute is quite different from saying that each such EU provision must be recognised in a separate UK statute before it has legal effect in the UK.⁹⁴ In other words, transposition of directives is different from incorporating or transforming external rules into domestic law and notwithstanding the EU ACT 2011, the UK still has to adopt measures in order to implement directives irrespective of their direct effect. National measures adopted for the implementation of directives are not in principle considerably dissimilar from national measures adopted for the implementation of regulations. As the obligation of the Member States to adopt measures to implement regulations does not deprive of or defy their direct applicability, why should such an obligation or need for directives would deprive of or defy their direct applicability? Besides, if direct effect in a true sense is pertinent only to the monistic legal systems, the recognition of direct effect of directives *a fortiori* justifies their direct applicability, without which direct effect would be impossible.

only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

⁹³ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1962] ECR I.

⁹⁴ House of Commons European Scrutiny Committee, “The EU Bill and Parliamentary Sovereignty - Tenth Report of Session 2010–11 - Volume II Written and Oral Evidence”, 6 December 2010, <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633ii/633.pdf>> (2 January 2016).

Briefly improper implementation of directives triggers their direct effect. Otherwise, directives will not find a chance to be applied as such directly to the cases, though they stand as a directly applicable instrument of supervision on the national legal practice. Direct effect of directives thus has a palliative function,⁹⁵ in order to cure pathological situation until the correct, proper and full implementation has been achieved in law and fact. Direct effect of directives, also as a sanction to the failure of the Member States to implement them, precludes them from being dead letters⁹⁶ in the national legal systems. A unique nature of directives thus might somehow resemble dualist approach in the sense that, like in a dualist legal system in which it is the statute, not the agreement or the international act that is applied, it is the implementing measures merely, not the directives that is applied insofar as they are fully, correctly and timely implemented. If not, directly effective provisions of directives themselves are directly applied instead to the cases concerned in the national legal systems. In the case of their proper implementation, there will be no possibility of reliance upon a directive in itself by an individual whose situation will be governed solely through the medium of the national law compatible with EU law. Accordingly, either national implementing measures or directly effective directives instead might be applied to the cases depending upon the state of their implementation in the national legal systems. It is significant that this feature of directives thus departs substantially from the dualist approach. To be precise, either/or question does not arise in a dualist system and such an effect of rules of a different legal order is not possible without an act of incorporation.

Insofar as their full, timely and correct implementation is provided in the national legal systems directives therefore remain latent, but at the same time vigilant, element of EU law constituting as such an integral part of the national legal systems. It cannot be understood that pursuant to their transposition, directives finish their function and so disappear or stand outside the national legal systems. Directives and national implementing measures therefore stand each other in the national legal systems. However whenever any deficiency arises in the implementation of directives, the principle of direct effect is to be resorted in order to render latent directives operative in themselves.

⁹⁵ Kovar, op.cit. footnote 50, p. 134; C. Haguenau, **L'Application Effective du Droit Communautaire en Droit Interne – Analyse Comparative des Problèmes Rencontrés en Droit Français, Anglais et Allemand**, Bruxelles, Bruylant, 1995, p. 177; Kovar, op.cit. footnote 2.

⁹⁶ Y. Galmot & J.C. Bonichot, "La Cour de Justice des Communautés européennes et la transposition des directives en droit national", **Revue Française de Droit Administratif**, Vol: 4, 1998, p. 1

It follows from the foregoing analysis that the concept of direct effect is pertinent to monistic legal systems merely. Direct effect is impossible for both non-monistic legal systems and non-directly applicable instruments. Without direct applicability of an instrument, namely without constituting an integral part of the domestic legal order or becoming the law of the land, its direct effect is futile. Direct applicability of a norm of external origin is thus a prerequisite, though not a sufficient condition for, to its direct effect, not *vice versa*. As a consequence, the relationship between EU law/EU legal order and national law/national legal system is monistic and so the entire corpus of EU law without any exception is directly applicable in the sense of constituting as such an integral part of the national legal systems. Any exception to any kind of instrument would make its being an element of EU law in question. In that regard the following statement of the CJEU in *Van Duyn* is illuminating: “the useful effect of such an act [directive] 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 [EU] law.”⁹⁷

Since regulations might also explicitly or implicitly require national implementing measures, the notion of implementation of directives in national law does not provide a convincing reason for the different treatment of directives from other sources of EU law, in particular from regulations.⁹⁸ The necessity of transposition of directives into national law should not be considered conferring the national implementing measures a character of receiving,⁹⁹ incorporating or transforming measures, since certain directives may acquire direct effect in the absence of such proper implementing measures. It is thus preferable to exclude in principle the terms of introduction, translation, transcription, reception or transformation which contain dualist connotations and give the impression that correspondent national act is the necessary condition for the penetration of directives into the national legal system. Directives, as all other EU law acts, have the privilege of immediacy in the sense of direct applicability that they integrate into the national legal systems with their own nature without any kind of transmutation or without any national measure of reception,¹⁰⁰ even though they do not immediately become directly effective. It should also be

⁹⁷ *van Duyn*, op.cit. footnote 6, para. 12; Emphasis added.

⁹⁸ M. Hoskins, “Tilting the Balance: Supremacy and National Procedural Rules”, **European Law Review**, Vol: 21, 1996, p. 365.

⁹⁹ J. Rideau, **Droit Institutionnel de l’Union et des Communautés Européennes**, Paris, L.G.D.J., 2006, p. 161, 912.

¹⁰⁰ Simon, op.cit. footnote 47, p. 34-35.

emphasised that the CJEU has never established an exception for directives to directly applicable corpus of EU law.

Why is the Establishment of Direct Applicability of Directives so Important?

Understanding of directives directly applicable is firmly connected with the justification of direct effect of directives and drawing its scope. The justification is primarily significant in terms of the legal basis on which direct effect of directives is established. The justification of direct effect of directives whether on the doctrine of estoppel or the principle of *effet utile* (effectiveness) is also connected with the issue of drawing the limits of direct effect of directives, in particular with the issue of recognition of horizontal direct effect of directives. In my opinion, recognition of direct applicability of directives is strictly associated with the doctrine of *effet utile*, whereas refusal of their direct applicability is strictly associated with the doctrine of estoppel. It would in fact be difficult to advocate refusal of horizontal direct effect of directives, which are considered directly applicable, in the sense of as such constituting an integral part of the national legal systems, and whose direct effect is established upon the legal basis of the principle of *effet utile*. For that reason, the CJEU shifted¹⁰¹ the underlying rationale of direct effect of directives from the doctrine of *effet utile*, which may have general application irrespective of the identity of the defendant, to the doctrine of estoppel. This fact that seems to have a connection with the refusal of horizontal direct effect of directives in the end leads to weaken the useful effect of directives, confine it to the vertical aspect only.¹⁰² It also gives the impression not only that the provisions of a directive, which are supposed to be applied between individuals, have less

¹⁰¹ In *Grad* although Roemer AG depicted reliance upon the provisions of a directive by individuals as a direct reflex effect or side effect in favour of individuals because of the failure of the Member State in implementing the directive, the CJEU placed instead the *effet utile* argument as the theoretical basis. See Opinion of Advocate General Roemer, Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 842; Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825; Later in *Ratti* having followed Opinion of Reischl AG, the CJEU incorporated the estoppel argument into case law besides the other arguments. It even dropped in *Marshall* the *effet utile* argument and used only the estoppel argument so as to justify denial of horizontal direct effect the fact of which gives an impression that there is a close connection between that argument and denial of horizontal direct effect of directives. See Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, para. 22; Opinion of Advocate General Reischl, op.cit. footnote 74, para. 5; Case 152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1985] ECR 723, para. 47.

¹⁰² *van Duyn*, op.cit. footnote 6, para. 12.

binding effect than any other rule of EU law,¹⁰³ but also that direct effect of directives is regarded merely as a reflex effect which occurs whenever a Member State does not comply with its obligations and which accordingly consists of deprivation of the possibility of relying on them as against individuals on its failure.¹⁰⁴ The establishment of direct effect of directives upon the conception of the doctrine of estoppel in that regard has connotation of a 'defective principle'¹⁰⁵ and makes direct effect a sanctioning remedy or right arising from the failure of the Member State. The doctrine of estoppel accordingly gives a wrong impression that national default in the implementation of directives constitutes the reason of their direct effect rather than triggers or activates it.

Direct effect of directives, like that of the rest corpus of EU law, must not nevertheless be regarded as a reflex and as being tied to the defaulting conduct of the Member States in the transposition of directives under the doctrine of estoppel, but as a legal consequence in their own right and by their very nature under the doctrine of *effet utile* in order to ensure effectiveness, uniform application of EU law and the effective legal protection of individuals. The doctrine of *effet utile* as a legal basis in that regard reflects the teleological interpretative method of the CJEU which has always been prevalent in the construction of the EU legal order, including in establishing (vertical) direct effect of directives. The dominant preoccupation of the CJEU, when establishing the EU legal order through its judicial activism, has thus been to ensure the operative character or effectiveness of the rules of EU law, which is the very soul of legal rules.¹⁰⁶ As declared by the CJEU the Treaty has established its own system of law, integrated into the legal systems of the Member States, and must be applied by their courts. The binding force of the Treaty and of measures taken in its application must not differ from one State to another as a result of internal measures capable of prejudicing the practical effectiveness of the Treaty, lest the functioning of the EU system should be impeded and the achievement of the aims of the Treaty is placed in peril.¹⁰⁷ Comprehension of direct applicability of directives therefore helps direct effect of directives be emancipated from the *ex post* rationalising doctrine of estoppel. It enables to

¹⁰³ Case 79/72 *Commission v. Italy* [1973] ECR 667, para. 7; Case 52/75 *Commission v. Italian Republic* [1976] ECR 277, para. 10.

¹⁰⁴ Opinion of Advocate General Reischl, *Ratti*, op.cit. footnote 74.

¹⁰⁵ Wyatt, op.cit. footnote 31.

¹⁰⁶ P. Pescatore, "The Doctrine of "Direct Effect": An Infant Disease of Community Law", *European Law Review*, Vol: 8, 1983, p. 155.

¹⁰⁷ Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt* [1969] ECR 1, para. 6.

fill the gap in the effectiveness of EU law, strengthen the effective legal protection of individuals and foster integration from the bottom-to-bottom.

Moreover, some arguments would lose their significance whenever direct applicability of directives is established, such as the real addressees of directives and blurring the differences between directives and regulations. Although directives are considered addressed to the Member States, their content is addressed to individuals. The argument that directives bind the Member States as their addressees and cannot impose obligations on individuals confuses their binding force with their possible legal effects. The obligation on the Member State to transpose a directive should be differentiated from the obligations which the rules in the text of the directive impose. The addressee of an instrument is decisive only for the former issue, but not for the latter. The general obligation incumbent upon the Member States to enact implementing measures should therefore be distinguished from the actual substantive obligations of the directives, which can involve individuals who are not the addressees of the obligation to implement.¹⁰⁸

With regard to blurring the differences between regulations and directives, assigning horizontal direct effect to directives would not still deprive the discretion of the Member States as to the choice of form and method of transposition, since direct effect as a minimum guarantee neither affect the binding force of directives for the Member States, nor absolve the Member States from the obligation of transposition. Besides, even though they are both directly applicable, the recognition of horizontal direct effect of directives will not lead to application of directives in their entirety, unlike regulations, but in terms of results prescribed therein. Recognition of horizontal direct effect may only mean that obligations could not be imposed immediately, but after expiry of period prescribed for transposition, on individuals unlike in the case of regulations. Ascribing horizontal direct effect to directives would not therefore eliminate the differences between regulations and directives and cannot blur their differences.

Conclusion

Directives, with their *sui generis* characteristics best fitting the EU legal order, constitute a litmus paper in depicting the relationship between EU

¹⁰⁸ G. Betlem, "Medium Hard Law – Still No Horizontal Direct Effect of European Community Directives after *Faccini Dori*", *Colum. J. Eur. L.*, Vol: 1, 1995, p. 469; R. Mastroianni, "On the Distinction between Vertical and Horizontal Direct Effects of Community Directives: What Role for the Principle of Equality?", *European Public Law*, Vol: 5, 1999, p. 417.

law/legal order and national law/legal systems and accordingly the *sui generis* and autonomous quality of that legal order within the constitutionalisation process. That is because, comprehension of directives directly applicable in the sense of as such constituting an integral part of the national legal systems, which is the very nature of elements of the entire corpus of EU law, is firmly connected with the justification of direct effect of directives. The latter, namely the justification of direct effect of directives whether on the doctrine of estoppel or the principle of *effet utile* (effectiveness) is further connected with the issue of drawing the limits of direct effect of directives, in particular with the refusal of horizontal direct effect of directives.

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