

The Direct Effect of Community Directives: The Effect of the Unilever Judgment

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ABSTRACT

This article presents a general review of European Court of Justice's (the Court) case law on the direct effect of directives and specifically focuses on the incidental direct effect of directives against private parties. It will be argued that there exists inconsistency in the Court's approach to the horizontal direct effect of directives, which leads to legal and commercial uncertainty. Moreover, it is claimed that some interpretations to clarify the Court's approach on this issue are not satisfactory, particularly since the Unilever judgment.

ÖZET

Bu makale, Avrupa Toplulukları Adalet Divanı (ATAD)'nın yönergelerin doğrudan etkisi üzerine içtihad hukukunu genel olarak ele almakta, spesifik olarak ise yönergelerin özel şahıslara karşı doğrudan etkisini incelemektedir. Makalede, ATAD'ın yönergelerin yatay doğrudan etkisine yaklaşımında hukuki ve ticari belirsizliğe yol açan tutarsızlığı olduğu öne sürülmektedir. Ayrıca, ATAD'ın bu soruna yaklaşımını açıklamaya yönelik yorumların özellikle Unilever davasından sonra yetersiz olduğu iddia edilmiştir.

Keywords: *European Community Law, direct effect of directives, uncertainty, Unilever judgment, Directive 83/189*

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1. Introduction

The concept of direct effect, i.e. Community law can confer rights on individuals which they can enforce in national courts, is not explicitly contained within the EC Treaties. This concept was first stated in the European Court of Justice's (the Court) judgement in *Van Gend en Loos* in 1963¹. The Court indicated that the spirit, the general scheme and the wording of the EC Treaty produces direct effect and creates individual rights which national courts must protect².

The Court applied and expanded direct effect to encompass secondary legislation, most notably directives.³ It stated that the effect of a directive "would be weakened if individuals were prevented from relying on it before national courts and if the latter were prevented from taking it into consideration as an element of Community law."⁴ In later cases the Court, contrary to the "horizontal" application of directives, declared that a directive cannot impose obligations on an individual and that a provision of a directive cannot be relied upon against a person⁵. Although this statement was clear for the application of directives, some recent cases such as *CIA Security*, *Unilever Italia*, and *Panagis Pafidis* have blurred the boundaries. In this context, this article will examine the direct effect of directives generally and will specifically focus on the "troubled case-law" of the direct effect of directives i.e. incidental direct effect, by analysing the *Unilever* case.

2. Traditional Boundaries: Direct Effect of Directives

Article 249 (ex 189) declares that directives 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. The Court interpreted this article as meaning that directives have the capacity to be invoked by individuals before national courts in the *Van Duyn* case. The reasoning of the Court in this case was that, if directives were binding, then

¹ Stefan ENCHELMAIER, "Supremacy and Direct Effect of European Community Law Reconsidered or the Use and Abuse of Political Science for Jurisprudence", *Oxford Journal of Legal Studies*, 2003, vol. 23, pp. 281-299 at 294.

² Case 26/62, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, para 5.

³ Miriam LENZ, Dora TYNES and Lorna YOUNG, "Horizontal What? Back to Basics", *E.L.Rev.*, 2000, vol. 25, pp.509-522 at 509.

⁴ Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337, para 12.

⁵ Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para. 48.

relying on them directly before national courts couldn't be ruled out⁶. Thus whether a directive may be directly effective or not depends on the same criteria as the decision: it must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation⁷.

The Court has also interpreted article 249 to mean that directives can only impose obligations on Member States and consequently cannot be invoked against individuals⁸. This view can be clearly found in the Marshall case. Helen Marshall, an employee of Southampton and South-West Hampshire Area Health Authority, was dismissed on the ground that she had passed the retirement age applied by the Authority. The normal retiring age for a man was 65 and 60 for a woman. Marshall claimed that her dismissal was a violation of the 1976 Equal Treatment Directive. The Court, accepting the dismissal of Marshall as a discrimination on the grounds of sex, contrary to the Directive, pronounced that a provision of a directive cannot be relied upon against an individual and concluded that:

"... it must be pointed out that where a person involved in legal proceedings is able to rely on a Directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority"⁹.

As a result, the Court underlined the distinction between horizontal direct effect i.e. "the applicability of a Community law provision to legal relationships between individuals" and vertical direct effect i.e. "the applicability to relationships between Member States and individuals"¹⁰. Craig argues that the authority for the limitation of direct effect was the Marshall case and states that in general the Court has used three arguments to justify the direct effect of directives: 1- It would be inconsistent with the binding effect of directives to exclude that they can confer rights, 2- The Court has declared that questions relating to directives can be raised by individuals before national courts from the generality of article 177 (now 234), which allows questions concerning the interpretation and the validity of Community law to be referred by national

⁶ Paul CRAIG and Grainne de BURCA, *EU Law Text, Cases, and Materials*, 3rd Ed., Oxford University Press, United Kingdom 2003, p.202, 203.

⁷ Jo STEINER and Lorna WOODS, *Textbook on EC Law*, 8th Ed., Blackstone Press, United Kingdom 2003, p.94.

⁸ LENZ, TYNES and YOUNG, 2000, p. 513.

⁹ Case 152/84, para.49.

¹⁰ René BARENTS., "Some remarks on the "horizontal" effect of directives", in D. O' KEEFFE and H. SCHERMERS (ed.), *Essays in European Law and Integration*, Kluwer-Deventer, Netherlands 1982, at 97

courts to the Court of Justice. 3- The peremptory force of directives would be weakened if individuals could not rely on them before national courts¹¹.

In a later case, *Faccini Dori*¹², the Court was again faced with the question of the application of horizontal direct effect. Miss Faccini Dori contracted with Interdiffusion Srl for an English language correspondence course. But later, she informed the company that she had decided to cancel her order. The firm responded that it had assigned its claim to Recreb Srl, which sued her in an Italian court for the agreed sum with interest and costs. She stated that she had withdrawn from the contract under the conditions laid down by the Directive 85/577/EEC, which Italy had failed to transpose into national law.

In *Faccini Dori*, differently from *Marshall*, the dispute was between two private contracting parties. The Court confirmed in *Faccini Dori*, consistent with *Marshall*, that unimplemented directives, lacking horizontal direct effect, cannot be used as the basis for a legal action intended to enforce the rights contained in the directive as against another private party¹³. Although Advocate General Lenz urged the Court to recognize the horizontal effect, it rejected departure from its earlier view.

3. Beyond the Traditional Approach: Incidental Direct Effect

Unfortunately, the debate on the horizontal direct effect of directives was not concluded by the *Faccini Dori* rule. The recent development of case law may show that provisions of directives can, at least in certain circumstances, produce a direct effect in disputes between two individuals.¹⁴

For instance, the *CIA Security* case concerned a dispute between three competitor companies, whose business was the manufacture and sale of alarm systems and networks. The defendants alleged that CIA was not authorized as a security firm by the Belgian authorities to market alarm systems. CIA brought an action for unfair trading practices on the grounds that Belgium's adoption of its regulation without notification was a breach of Article 8 (the obligation to notify) of Directive 83/189. The Court of Justice interpreted that an infringement of Article 8 of Directive 83/189 was capable of being relied upon

¹¹ Paul CRAIG., "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation", *EL Rev.*, 1997, vol. 22, pp.519-538 at 519.

¹² Case C-91/92, *Faccini Dori v. Recreb Srl* [1994] ECR I-3325.

¹³ Michael DOUGAN, "The "Disguised" Vertical Direct Effect of Directives?", *The Cambridge Law Journal*, 2000, vol. 59(3), pp.586-612 at 587

¹⁴ Maciej SZPUNAR, *Direct Effect of Community Directives in National Courts – Some Remarks Concerning Recent Developments*, Centrum Europejskie Natolin, Warszawa 2003, p.3.

by individuals before the national court¹⁵. This interpretation by the Court that a provision of a directive could be relied upon even in proceedings between private parties, has blurred the prohibition of the horizontal direct effect of directives laid down in *Marshall/Dori*. For this reason, Advocate General Elmer distinguished *CIA* from *Dori* on the basis that the notification procedure in Directive 83/189 imposed a number of obligations on the Member States, therefore it didn't aim to impose duties on individuals, whereas Directive 85/577/EEC regulated the contractual relations between individuals¹⁶.

But in a different case, the Advocate General's interpretation became insufficient. In the *Panagis Pafidis* case, the former shareholders of a Greek Bank, *Panagis Pafidis* and others, brought proceedings against the bank and its new shareholders. They objected to the increases in the capital of the bank which had been ratified pursuant to the relevant Greek legislation and claimed this to be a contravention of Council Directive 77/91. The Court interpreted the directive in favour of the plaintiffs and ruled that the said Directive precluded national legislation¹⁷. Therefore, the reasoning of Advocate General Elmer cannot explain *Panagis Pafidis*, because Directive 77/91 regulates the capital of public limited liability companies.

Although the directives do not impose legal obligations on defendants in cases such as *CIA* or *Panagis Pafidis*, they have an exclusionary effect on them, i.e. they remove from defendants the protection of the national technical regulation and expose them to potential liability under other provisions of national law¹⁸. On the other hand, the *Lemmens* case does not include the exclusionary effect. Mr *Lemmens* was charged with driving a vehicle while under the influence of alcohol. The question of whether an individual could rely upon the fact that the national regulation on breath-analysis apparatus which had not been notified to the Commission in accordance with Article 8 of the Directive came into consideration¹⁹. The Court of Justice underlined the aim of the Directive as promoting the free movement of goods by the preventive control of unjustified technical obstacles to trade and declared that a failure to notify technical regulations could render such regulations inapplicable inasmuch as they hinder marketing of a product, but it could not render unlawful any use of a product. It can be concluded that the reasoning of the Court, in distinguishing *CIA* from *Dori* and *Lemmens* from *CIA*, depends on

¹⁵ Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* [1996] ECR I-2201, para. 13-15.

¹⁶ Para. 71 of the Opinion.

¹⁷ Case C-441/93, *Panagis Pafitis v. Trapeza Kentrikis Ellados AE* [1996] ECR I-1347.

¹⁸ *CRAIG* and *de BURCA*, 2003, p. 221.

¹⁹ Case C-226/97, *Lemmens* [2000] ECR I-3711.

the aims of the directives and does not give a clear explanation of the application of the direct effect of directives.

4. The Unilever Ruling

Steiner and Woods²⁰ interpreted Lemmens as a limitation on the principles of direct effect as effected by CIA and argued that the CIA principle confirmed and extended to a contractual relationship between two companies in the Unilever case. In this case, Unilever had supplied Central Food with virgin olive oil, but later Central Food informed Unilever that the olive oil supplied to it was not labelled in accordance with the relevant Italian law and refused to pay. Although Italy had notified the draft labelling rules to the Commission, it had not observed the standstill requirement of Article 9 of Directive 83/189. Unilever disputed with Central Food on the basis that the contested law should not be applied and sued. The Court asserted that the national technical regulation that had been adopted in breach of Directive 83/189 was inapplicable and thus unenforceable against individuals²¹.

In his Opinion²², Advocate General Jacobs distinguished Unilever from CIA on the basis of the fact that in Unilever, the inapplicability of technical regulation arose in civil proceedings between individuals concerning rights and obligations within a contractual relationship, and not between competitors about unfair trading practices. He also stated that Unilever did not involve a failure of notification but a breach of standstill requirements²³.

The Court ruled completely contrary to the Opinion of Advocate General Jacobs and declared that the obligation to observe periods of postponement must be treated in the same way as those of notification procedures under Directive 83/189 and stated that “there is no reason to treat disputes between individuals relating to unfair competition, as in the CIA Security case, differently from disputes between individuals concerning contractual rights and obligations”. Directive 83/189 also does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it, and creates neither rights nor obligations for individuals²⁴.

²⁰ STEINER and WOODS, 2003, p. 102.

²¹ Case C-443/98, *UnileverItalia SpA v. Central Food SpA* [2000] ECR I-7535.

²² Para. 69-71 of the Opinion.

²³ But this reason is inconsistent with the Court’s decision on CIA that it indicated that breach of the suspension period set out in Article 9 renders national technical regulations inapplicable. See Case C-194/94, para. 40-43.

²⁴ Case C-443/98, para. 37-39, 49, 51 respectively.

How is it possible to interpret cases such as *Panagis Pafidis*, *CIA* and *Unilever* with the rule in *Marshall/Dori* that a directive has no horizontal direct effect? Although the Court did not intend to overrule the basic principle of “vertical but not horizontal direct effect” in those cases, the fact that the provisions of an unimplemented directive could produce limited legal effects in a dispute between private parties is contrary to the rule in *Dori*²⁵. Some commentators justified these cases by claiming that the existence of a public law element. *CIA* and *Panagis Pafidis* might be explained under the “public law” rationale, but it is obvious that this does not clarify *Unilever*, which concerned a dispute between private parties rather than public-law requirements²⁶. Another interpretation divides cases into two categories: the first includes the classic situation of an individual seeking to have Community law applied instead of the less favourable national provision and the second covers briefly the disapplication of a national provision without any accompanying Community measure²⁷. Although this approach can explain some cases such as *CIA* and *Panagis Pafidis*, the distinction between the two categories is unclear and the categorization of a case depends on the interpretation.

In analysing this question, Advocate General Jacobs argued that Directive 83/189 is of an entirely different nature and that its purpose is the protection of the free movement of goods, not the approximation of laws and it lays down the respective rights and obligations of the Member States and the Commission within a procedure in which individuals are in principle not involved. Therefore, it is not intended to confer rights on or to create obligations for individuals²⁸. But the effect of rendering national regulations inapplicable is precisely to create rights and obligations for private parties such as *Unilever* who could enforce entitlements and *Central Foods* would be bound by duties not recognised under existing national law²⁹. A different approach justifies that these cases have only exclusionary effect in that they remove the enforcement of national law, but do not substitute any substantive EC obligations for either party³⁰. To that extent it is true: the directives do not directly impose obligations on parties. But their indirect effect may lead to unfair decisions: one party may be liable because of other provisions of the national law, as was the legal position of *Central Food* in *Unilever* or the new shareholders in *Panagis Pafitis*.

²⁵ DOUGAN, 2000, at 596.

²⁶ CRAIG and de BURCA, 2003, p.222, 225.

²⁷ LENZ, TYNES and YOUNG, 2000, pp. 517-522.

²⁸ Case 443-98, para. 79-86 of Opinion.

²⁹ Michael DOUGAN, “Community Directives: Explaining *CIA Security?*”, *The Cambridge Law Journal*, 2001, vol.60, pp.231-264 at 254.

³⁰ CRAIG and de BURCA, 2003, p. 226.

The inapplicability of offending national laws may also lead to legal and commercial uncertainty. After the ruling in *Unilever*, as Advocate General Jacobs stated, “an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA* [and *Unilever*], to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive.” To obtain such information is very difficult, although it is crucial for commerce. In this context, Weatherill argued that Unilever has shifted the risk associated with the possession of goods that violate national law from the seller to the buyer, therefore it has injected disturbing uncertainty into commercial transactions³¹. On the other hand, there exists the legal certainty issue. Although legal certainty provides one of the strongest arguments against accepting the horizontal direct effect of directives, it is endangered by the line of cases in which Unilever forms the latest part³².

5. Conclusion

The analysis shows the difficulties in interpreting *CIA*, Panagis Pafidis and *Unilever* with *Marshall/Dori* in which the prohibition of the horizontal direct effect of directives is laid down. Although there are some attempts to explain these difficulties, such as the public law element, case categorization, the nature of Directive 83/189 or the exclusionary effect in academic writings, still the Court’s approach is not so clear. As the Court extended the “*CIA* principle” to the private contractual dispute in *Unilever*, private parties suffer because of the Member State’s failure and legal and commercial certainty is imperilled. Ironically, legal certainty was the main reason against the application of the horizontal direct effect of directives. The position now seems to be that private parties must accept the “different nature” of Directive 83/189 as Advocate General Jacobs stated, although his reasoning is unpersuasive, and “to establish whether or not the Member State had complied with all the procedural requirements of the directive”. As Dougan claimed, to describe consequent “sanction of inapplicability” in these cases is to dress the operation of judicial policy “in the garb of logical exigency”³³. It is, in short, difficult to detect the principle from the Court’s approach to the direct effect of directives in the recent cases which lead to uncertainty and unfair decisions.

³¹ Stephen WEATHERILL, “Breach of Directives and Breach of Contract”, *EL Rev.*, 2001, vol.26, pp.177-186 at 182.

³² *Ibid*, at 184.

³³ DOUGAN, 2001, at 255.