Neapolis University

HEPHAESTUS Repository **http://hephaestus.nup.ac.cy**

Department of Law Master in International and European Business Law (LLM)

2014

European Business Law: The Direct Effect of Directives And The Free Movement of Goods

Spyrou, Froso

International & European Business Law, Law school, Neapolis University Pafos

http://hdl.handle.net/11728/6699

Downloaded from HEPHAESTUS Repository, Neapolis University institutional repository

European Business Law:
The Direct Effect of Directives
And The Free Movement of Goods

της

ΦΡΟΣΩ ΣΠΥΡΟΥ

Μεταπτυχιακό Πρόγραμμα στο Διεθνές και Ευρωπαϊκό Οικονομικό Δίκαιο (LLM)

Πανεπιστήμιο Νεάπολης Πάφου

Πάφος, Κύπρος

2014

Υποβληθείσα στη Σχολή Νομικη Σχολή Πανεπιστημίου Νεάπολης Πάφου

σε μερική εκπλήρωση

των απαιτήσεων για την απόκτηση

του Πτυχίου του

LLM

Σελίδα εκ προθέσεως κενή

European Business Law:
The Direct Effect of Directives
And The Free Movement of Goods

Διπλωματική Εργασία

Επιβλέπων/ουσα Καθηγητής/τρια

Θωμάς-Νεκτάριος Παπαναστασίου

Εξεταστική Επιτροπή

Κοσμήτορας/Διευθυντής Προγράμματος

Αντώνης Μανιτάκης

Ευχαριστίες

Στην οικογένεια μου,

Ξένια, Μιχάλη,

Σπύρο και Νικόλα

Στον Καθηγητή μου,

Θωμάς Νεκτάριος Παπαναστασίου

European Business Law:
The Direct Effect of Directives
And The Free Movement of Goods

Table of Contents

1.	**Chapter 1 - Introduction**	**1**
2.	**Chapter 2 - European Business Law – European Directives**	**4**
2.1.	Action Plan to Modernise EU Company law And Corporate Governance	4
2.2.	Legal Basis of Business Law	6
2.3.	Company Law	7
2.4.	Environmental Business Law	7
2.5.	7th Directive	8
2.6.	8th Directive	9
2.7.	Directive 90/434/EEC Mergers and Acquisitions	9
2.8.	Directive 2007/36/EC: On the Exercising of shareholders rights	10
2.9.	Transparency Directive: Updating Directive 2004/109/EC	11
2.10.	Directive 2006/68/EC amending directive 77/91/EEC : Companies capital, formation, maintenance and alterations.	12
2.11.	Regulation No 596/2014 on market abuse (Market Abuse Regulation) and Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)	13
2.12.	Directive 2011/92/EU: Assessment of the effects of certain public and private projects	14
2.13.	Directive (2010/75/EU): Industrial emissions	14
2.14.	Directive 1999/31/EC Landfill	14
2.15.	Intellectual property	14
2.16.	Directive 98/71/EU industrial designs	14
2.17.	Capital requirements directive and Taxation on savings	15
2.18.	The new regulatory package on credit rating agencies (CRA) consists of a Regulation 462/2013 And Directive 2013/14/EU	15

3. Chapter 3 - Free Movement of Goods : Direct Charges 17

3.1. Elimination of border charges and fiscal barriers 17
3.2. Definition of Goods 18
3.3. Duties and equivalent charges, Purpose of Charges 20
3.4. Charges with Equivalent effect to a customs duty 22
3.5. Exceptions to the general rule 22

4. Chapter 4 - Free Movement of Goods : Indirect Charges 24
4.1. Art.110 (1) TFEU: Similar Products,
Direct Discrimination, Indirect Discrimination 25
4.2. Direct discrimination 25
4.3. Indirect Discrimination 25
4.4. Art.110 (2) TFEU: Protectionist 28
4.5. Competition Law 29

5. Chapter 5 - Direct Effect of Directives 33

5.1. The principle of Direct Effect 33
5.2. Direct effect 34
5.3. Treaty Articles 34
5.4. Regulations 34
5.5. Directives the early case law 35
5.6. The concept of direct effect 35
5.7. Member States holds sovereign powers 38
5.8. The reinforcement of vertical direct effect of directives 39

6. Chapter 6 - Conclusion 45

7. Bibliography 47

Abstract

This paper will examine the status of the current European Business Law regime among the Member States. This will be done by analyzing relevant directives and regulations of the European Business Law system. In order to complete a more deep analysis, a specific aspect of the European Business Law will be examined; this will be the Free Movement of Goods. The analysis will be based on the relevant Treaty Articles and decisions based on case law by the Court of Justice. Furthermore this paper will examine the effect that Treaties, Regulations, and Directives have on Member States and whether Member States have adapted this European Business Law regime in their national law system.

Chapter 1 - Introduction

In the last decades, there has been a continuance development of what is known now as the European Union (EU). Even though, it is an international organisation, it differ itself from the rest, considering the unique aspects that EU has with respect to the following: EU legal system, supremacy of EU law to national law, enforcement and implementation of EU law by member's states, common European business law policies and free movement of workers/goods/services.

European Business Law governs the legal parameters and standards that the European internal market and freedoms operate and it covers: The Fundamental freedom of movement, competition law, environmental and state aids law. Within this respect the free movement of goods will be examined in section II of the paper.

The strategy of EU is through the regulations and directives to provide to the market all those tools to operate competitively within the EU market and within the Globe. While the regulation provides for a uniform legislation throughout the market the directive provides for substantial flexibility to the individual countries, Member States, to tailor the particular legislation to its own market characteristics. The spectrum of the most business law oriented directives will be examined in section III of the paper.

In order to address the extent of the European Business Law in Member States, an examination in a specific subject has been made in order to examine how this doctrine is used along Member States. The examination was made on the "Free movement of Goods"; a vital chapter of EU, considering that it eliminates the borders and provides the foundations for trade to expand and develop.

Through the examination of case law in the free movement of goods section II it has been noted that Member States are reluctant to apply Treaty Articles; case law shows that the Member States interpret an article of a treaty in the most favourable way in order to succeed whatever they were aiming. The ECJ plays a substantial role in order to clarify the whole concept of free movement of goods. The Irony is these cases are that Treaty articles should be directly applicable among Member States.

The most striking feature of the relationship between EU law and national law is the application and enforcement of the first to the later.[1] The European Court of Justice has played a pivotal role in defining the above relationship. The principle of direct effects aims to ensure the proper implementation and enforcement of the EU rules[2]

With regard to the application of the direct effect of directives, the Court of Justice has generated an extreme amount of controversy over the proper application and enforcement of EC law[3]. Directives are always addressed to Member States and are *"binding as to the result to be achieved"* with the choice of *"form and methods"* left to the Member States.

Academics argue that the drafters of the Treaties never intended directives to have direct effect[4]. As they are not sufficiently precise by definition judicial enforcement at a national level might produce odd results and the discretion left to the Member States to adopt any implementation measures they see fit in order to attain the result prescribed in a directive might compromise the function of general legal principles such as legal certainty and equality before the law[5]. Despite the arguments to the contrary the ECJ declared that directives are capable of producing directly effective results under certain circumstances.

---

[1] Craig & Burca: EU Law Text, cases, and Materials 3rd ed. Oxford,p.179

[2] Eric F. Hinton: Strengthening the Effectiveness of Community Law: Direct Effect, Article 5EC and the ECJ 31 N.Y.U. J. INT'L L. & POL. 307 (1999).

[3] Grainne de Burca Giving Effect to European Community Directives, M.L.R Vol. 55, No. 2 (Mar., 1992), pp. 215-240

[4] T C Hartley, The foundations of European Community Law,4th edition (1998) p.206

[5] Sacha Prechal Directives in EC law 2nd Ed Oxford EC law Library p.217

However the ECJ only ruled the validation of direct effect to vertical disputes between Member States and private parties. The refusal on the horizontal direct effect of directives has caused fundamental uncertainties in relation to the legal position of individuals in the EU legal order which has frustrated the effectiveness of directives as a means of legislative form for the EU's laws.

The extent to which the case law has managed to mitigate the injustices resulting from the absence of horizontal direct effect and secure the effectiveness of EU law must therefore be addressed.

The implications of the jurisprudence of the Court on the direct effect of directives, the effect of the directives on the European Business Law and the examination of the doctrine on the free movement of goods will be the subject of analysis in the present paper.

Chapter 2 - European Business Law - European Directives

This chapter will examine the European Business legal system that exists between the Member States through relevant Directives and Regulations.

2.1. Action Plan to Modernise EU Company law and Corporate Governance

On December 2012 the EU Commission has adopted a plan to modernise Company law and Corporate Governance, European Commission - IP/12/1340 12/12/2012

Internal Market and Services Commissioner Michel Barnier said: "This Action Plan on company law and corporate governance sets out the way forward: shareholders should receive additional rights, but also fully assume their responsibilities to make sure that the company remains competitive over the longer term. Companies should also become more transparent in several respects. This will contribute to effective governance of companies."

In addition, to the key elements which are set out below, the action plan foresees merging all major company law directives into a single instrument. This would make EU company law more accessible and comprehensible and reduce the risk of future inconsistencies.

The Key elements of the action plan are:

1. **Increasing the level of transparency, and consequently improve corporate governance between companies and their shareholders. This will include the following:**

- Increasing companies' transparency as regards their board structures and value at risk management and operating policies;
- enhance corporate governance reporting and operations;
- More transparent and clear identification of shareholders ;
- Enhance transparency rules for institutional investors regarding their voting and engagement policies.

2. **Initiatives aimed at encouraging and enabling long-term shareholder participation, such as:**

- Transparency on remuneration policies of directors, as well as a shareholders' right to vote on remuneration policy;
- Shareholders' oversight and reporting on related party transactions, i.e. dealings between the company and its directors or controlling shareholders;
- Creating appropriate operational rules for proxy advisors, especially as regards transparency and conflicts of interests;
- Clarification and simplifying of the 'acting in concert' concept to make shareholder cooperation on corporate governance issues ;
- Encourage employee share ownership.

3. **Initiatives in the field of company law to support European businesses and encourage their growth and competitiveness:**

- Initiative on the cross-border transfer of seats for companies;
- Facilitating cross-border mergers;
- Clear EU rules for cross-border divisions;
- Follow-up of the European Private Company statute proposal (IP/08/1003) and improve cross-border opportunities for SMEs;
- An information campaign on the European Company/European Cooperative Society Statute;
- Targeted measures on groups of companies, i.e. recognition of the concept of the interest of the group and more transparency regarding the group structure.

2.2. Legal Basis of Business Law

The legal basis for the development of the business law is prescribed under Article 288 of the Treaty which provides that for the purpose if exercising the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. The regulation shall have general application, while the directives although binding allow the state the choice of forms. The effect that directives have on Member States will be been examined below.

Even though originally it was though that directives were not binding before they were adopted, in Francovich v Italy 1990 Case - 6/9, it was held that the state was liable, for non-implementing or badly implementing a directive. This will be examined in detail with the relevant case law in section IV.

In this section we would outline and examine, within the spectrum of the European Business Law, a number of the most important and known directives applicable to business. The list, which a summary is set out below, is not exhaustive and the criteria of importance are of course subjective.

2.3. Company law

- 7th Directive: 83/349/EEC of 29/6/83: Consolidated accounts of companies with limited liability
- 8th directive: 84/253/EEC: Qualifications of the people responsible for the statutory audits
- Directive 90/434/EEC: Mergers and Acquisitions
- Directive 2007/36/EC: On the exercising of shareholders rights
- Transparency Directive: Updating Directive 2004/109/EC
- Directive 2006/68/EC amending directive 77/91/EEC: Companies capital, formation, maintenance and alterations.
- Regulation No 596/2014 on market abuse (Market Abuse Regulation) and Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)

2.4. Environmental Business Law

- Directive 2011/92/EU: assessment of the effects of certain public and private projects
- Directive (2010/75/EU): Industrial emissions
- Directive 1999/31/EEC Landfill
- Other related areas
- Directive 98/71/EU: industrial designs
- Capital requirements directive and Taxation on savings
- The new regulatory package on credit rating agencies (CRA) consists of a Regulation 462/2013 and Directive 2013/14/EU

2.5. 7th Directive: 83/349/EEC of 29/6/83

Consolidated accounts of companies with limited liability

The directive provides that the Financial Statements of a group, parent company and its subsidiaries are presented in a consolidation basis in accordance with the International Accounting Standards 21 and International Financial Reporting standard 10. The term financial statement includes the presentation of Assets, Liabilities, Equity, Income and Expenses in the Balance sheet, Profit and Loss, statement of changes in equity and the Cash flow. Together with the Fourth Directive on the annual accounts of public limited liability companies, it belongs to the family of accounting directives, formed by the Community legal acts on company accounts.

The above directive provides a known standard of information reporting and assurance to the investors, lenders and other stakeholders of how the legal entities operate.

With respect to Cyprus and Greece, is worth pointing that although in Cyprus this directive is implemented basically to all the Companies that are subject to a legal independent audit, in Greece this is limited only where is absolutely legally necessary. More importantly the Cyprus Company Law provides that all limited Companies should implement and organize their legal framework by adopting the International Financial Reporting Standards.

2.6. 8th directive: 84/253/EEC

Qualifications of the people responsible for the statutory audits

In the same line as the 7th directive, this directive defines the qualifications of the people responsible for the statutory audits. The scope here is the same as the 7th directive and aims to provide stakeholder that Companies affairs are been audited by appropriate level of professional quite independent from its managers/directors.

2.7. Directive 90/434/EEC Mergers and Acquisitions

This directive has put in place a common system of taxation with regard to cross borders reorganization of companies and it includes: Mergers, divisions, transfer of assets, and exchange of shares. The objective of the directive is to allow Groups to reorganize their Corporate Structure in the most competitive forum without having to bear any taxation.

The directive has also introduced the rules regarding the transfer of the registered office of the European Company under the rules the Company transferring its registered office will enjoy tax deferred on capital gains where its assets remain connected with a permanent establishment located in the Member States.

In Cyprus and Greece, empirical evidence, Leptos Neapolis Project, suggests that the 'split off' named and partial division (new Article 2 (b)(a)), provides for the appropriate tool to make possible the split of a big project and thus attracting new interests and creating new business such as the NEAPOLIS University and Iasis hospital.

Under this article the splitting company is not dissolved and continues to exist. In practice this involves the transfer of the assets and liabilities, constituting one or more branches of activity to another company.

2.8. Directive 2007/36/EC: On the exercising of shareholders rights

On April 2014 the EU Commission presented a proposal to tackle corporate governance deficiencies in listed companies and their boards, shareholders, intermediaries and proxy advisors. These proposals follow the 2012 Action Plan on European company law and corporate governance (IP/12/1340) and the Communication on the long-term financing of the European economy published on 27 March 2014 (IP/14/320). The key elements of the proposal were the following:

1. Mandatory transparency of institutional investors and asset managers on their voting and engagement and certain aspects of asset management arrangements;
2. Disclosure of the remuneration policy and individual remunerations, combined with a shareholder vote;
3. Additional transparency and an independent opinion on more important related party transactions and submission of the most substantial transactions to shareholder approval;
4. Binding disclosure requirements on the methodology and conflicts of interests of proxy advisors;
5. Creating a framework to allow listed companies to identify their shareholders and requiring intermediaries to rapidly transmit information related to shareholders and to facilitate the exercise of shareholder rights.

It is hoped that the above proposals would both make it easier and enhance the shareholders use of their existing and future rights over companies where necessary. This would also induce the shareholders to be more participative in the business; better hold the management of the company to account and act in the long-term interests of the company. A longer term perspective creates better operating conditions for listed companies and improves their competitiveness and performance.

2.9. Transparency Directive: Updating Directive 2004/109/EC

The Council adopted in June 2013 a directive updating transparency requirements introduced in 2004 for issuers of securities on regulated markets (37/13).
The transparency directive to ensure high level of investor confidence and it imposes on the issuers of securities traded on regulated markets to publish periodic financial information about their performance as well on-going information on major holdings voting rights.

The agreed improvements are aimed at:

1. To make the markets more attractive, for raising capital, for small and medium-sized companies, by simplifying certain obligations and regulations,
2. Improving legal clarity and effectiveness, with regard to the disclosure of corporate ownership and structure.
3. Providing for sanctions that are sufficiently dissuasive in the event of transparency requirements being breached.

The directive also includes a requirement for listed companies operating in the oil, gas and mineral extractive as well as the forestry industry, to disclose payments to governments in countries where they operate. This follows a commitment made by members of the G8 at Deauville in May 2011

2.10. Directive 2006/68/EC amending directive 77/91/EEC: Companies capital, formation, maintenance and alterations.

Under this directive, which falls under the EU plan to modernise the Company law, there are substantial proposals regarding the capital maintenance regime while concurrently providing the safeguards for adequately protecting the creditors and shareholders of the Company.

The Key elements of the directive are the following:

- Public Companies to be able to acquire their own shares up to the limit of the Company's distributable reserves.
- Public companies to be able to allot shares for consideration other than in cash without requiring obtaining expert's valuation.
- Public Companies to be allowed to grant financial assistance for the acquisition of their shares by a 3rd party up to the limit of their distributable reserves.
- Concurrently to enhance standardised creditor's protection so they would be able to resort to judicial or administrative proceedings where their interest is impaired as a result of capital reduction.

In order to minimise market abuse it is recommended to consider the provisions of the Directive 2003/06/EC on insider trading and market manipulation, the commissions Regulation (EC) No 2273/2003 with regard to exemptions for buy-back programmes and stabilisation of financial instruments and Commissions Directive 2004/72/EC regarding what is an accepted market practice, the definition of inside information in relation to derivatives on commodities , the drawing the list of insiders and the notification of the manager's and suspicious transactions.

2.11. Regulation No 596/2014 on market abuse (Market Abuse Regulation) and Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)

The Market Abuse Regulation ensures regulation keeps in line with market developments such as the growth of new trading and electronic platforms, over the counter (OTC) trading and new technology such as high frequency trading (HFT), strengthens the efforts against market abuse across commodity and related financial instruments and derivative markets, explicitly bans the manipulation of benchmarks (such as LIBOR), reinforces the investigative and administrative sanctioning powers of regulators and ensures a single rulebook while reducing and mitigating , where possible, the administrative burdens on SME issuers.

The Directive on criminal sanctions for market abuse (Market Abuse Directive) complements the Market Abuse Regulation by requiring all Member States to provide for harmonised criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties of not less than 4 and 2 years imprisonment for the most serious market abuse offences. Member States will have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence, punishable with effective sanctions everywhere in Europe.

Environmental Business Law

There are a number of directive covering areas such as: Environmental impact assessments, Birds, Floods, Landfill, Unban waste, individual emissions.

2.12. Directive 2011/92/EU: assessment of the effects of certain public and private projects

Relates to the assessment of the effects of certain public and private projects in the environment and requires a submission of and approval by the authorities of a detailed impact on the environment study. The International Association (IAIA) defines such study as to include the process of identifying, predicting and evaluating the biophysical effects of the development.

2.13. Directive (2010/75/EU): Industrial emissions

Commits the EU states to control and reduce the impact on industrial emissions. It provides also a system of incentives and or penalties to the industries/ countries that meet or do not meet the quota.

2.14. Directive 1999/31/EEC Landfill

The directive's objective is to prevent or reduce as possible the negative effects on the environment in particular the soil, water and air, including the greenhouse effect, from the landfill of waste, through its whole-life cycle.

2.15. Intellectual property

There are a number of directives in this area including: legal protection of designs, trademark directive, and database directive

2.16. Directive 98/71/EU: industrial designs

On the legal protection of industrial designs set the standards of eligibility and protection of most types of registered designs. Under this directive the holder of the right has the exclusive right to authorize or prohibit form using the design in any way, notably by producing, improving, selling or using products based on the design.

2.17. Capital requirements directive and Taxation on savings

A list of some other important business oriented directives is listed:

Capital requirements directive has introduced for the financial services industry a new supervisory framework which reflects the 'Basel II and III' rules on capital measurement and capital standards.

Taxation on saving income, in forms of Internet payments under which, the EU States have concluded a multilateral agreement of information exchange. This was done under the corporation of the OECD. A recent study by the EU has confirmed that double taxation remains a problem and a major obstacle for cross border trade and investments.

2.18. The new regulatory package on credit rating agencies (CRA) consists of a Regulation 462/2013 and Directive 2013/14/EU

The main elements of the new rules are:

1. Reduce over-reliance on credit ratings

   In addition the European Supervisory Authorities should avoid references to external credit ratings and will be required to review their rules and guidelines and where appropriate, remove credit ratings where they have the potential to create mechanistic effects.

2. Improve quality of ratings of sovereign debt of EU Member States

   To avoid market disruption, rating agencies will set up a calendar indicating when they will rate Member States. Such ratings will be limited to three per year for unsolicited sovereign ratings. Furthermore, investors and Member States will be informed of the underlying facts , parameters and assumptions on each rating which will facilitate and enhance to the market a better understanding of credit ratings of Member States.

3. Make credit rating agencies more accountable for their actions

   The new rules will make rating agencies more accountable for their actions as ratings are not just simple opinions but a serious mechanism of influencing the market mechanisms. Therefore, the new rules ensure that a rating agency can be held liable in case it infringes intentionally or with gross negligence, the CRA Regulation, thereby causing damage to an investor.

4. Reduce conflicts of interests due to the issuer pays remuneration model and encourage the entrance of more players on to the credit rating market

   The Regulation will also improve independence of credit rating agencies to eliminate conflicts of interests by introducing new rules for complex structured finance instruments and shareholders of rating agencies. Issuers of structured finance instruments will be required to be more transparent on the underlying assets of these instruments.

   Furthermore, all available ratings will be published on a European Rating Platform which will improve comparability and visibility of all ratings for any financial instrument rated by rating agencies registered and authorised in the EU. This should also help investors to make their own credit risk assessment and contribute to more diversity in the rating industry.

The European Business Law is constantly expanding and growing through directives and regulations. As it was examined above, the European legal system consists of directives created even before the creation of EU, like Directive 84/253/EEC. Along with more recent directives like, Directive 2013/14/EU, they form together a complete European Business Law system.

Chapter 3 – Free Movement of Goods: Direct Charges

This chapter will examine the current trade system that exists in EU, according to the applicable treaty articles and case law.

As mention above, Treaty of Lisbon which came into force on 1st of December 2009 has replaced both the TFEU (Treaty on the Functioning of the European Union, previously known as EC Treaty) and the TEU (Treaty of European Union).

One of the main goals of the European Union was to create an internal market where there are no obstacles like taxes and custom duties; the result of this free market will be the increase and the development of trade between member states. Since the Single European Act 1986, all tariff barriers between the Members states have been eliminated, along with the border controls on goods.

3.1. Free movement of Goods-Elimination of border charges and fiscal barriers

Art 28(1) TFEU, previously Art 23(1) EC Treaty:
"The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries."

Art 30 TFEU, previously Art. 25 EC Treaty:
"Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature."

3.2. Definition of Goods

The court of Justice gave an analytical definition of the term goods in *Commission v Italy (Case 7/68)* and clarified the distinction between goods and services in *Jagerskiold v Gustafsson (Case C-97/98).*

Commission v Italy (Case 7/68)

Facts

Italy imposed tax, on the exports of 'artistic, archaeological or historical' articles and the Commission then, took proceedings against Italy based on Art.258 TEFU, stating that the tax which was imposed was a breach of Art.30 TFEU. Then Italy argued that the tax was not imposed on goods considering that the articles were not goods.

Decision

The Court of Justice discarded this argument and held that according to Art.30 TFEU, the member states of the Union cannot impose taxes in the trade of goods. Furthermore the Court of Justice stated that:

"By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions".

Jagerskiold v Gustafsson (Case C-97/98)

Facts

Mr. Gustafsson paid for a fishing licence on 27 May 1997, according to Finnish law, in order to be able to practise any fishing activity in public and private waters. Mr. Gustafsson practised his fishing rights in the private waters of Mr. Jagerskiold.

Then Mr. Jagerskiold brought an action, stating that Mr. Gustafsson could not exercise his fishing rights without taking permission by him. Furthermore in support to his action, Mr. Jagerskiold claimed that Finish Law was in contrary with the free movement of goods according to the rules of the Treaty.

Decision

The Court of Justice held that the granting of fishing rights could be valued in money and were capable of forming the subject of a commercial transaction. The fishing rights, are not tangible goods, they are classified as intangible advantage/benefit/right. According to Art.56 TFEU fishing rights constitute a service considering that services can be the subject of commercial transaction. Famous types of services in Union are legal and auditing services.

3.3. Duties and equivalent charges

Purpose of Charges

The question in regards to duties and charges is not why any member state has imposed the charge, but the fact that this charge has been imposed on imports or exports on goods in trade transactions between the member states of European Union. This issue was examined in the cases as shown below:

Commission v Italy (Case 7/68)

The court of Justice decided that Art.30 TFEU applies in all charges applied in goods and that "This provision makes no distinction based on the purpose of the duties and charges the abolition of which it requires".

Commission v Italy (Case 24/68)

Facts
Italy imposed a charge on goods which were exported to other Member States to finance the collecting of statistical data relating to trade patterns.

Decision
The Court of Justice held that "The justification of this prosecution is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods".

Sociaal Fonds voor de Diamantarbeiders v SA Ch. Brachfeld & Sons(Joined Cases 2 & 3/69)

Facts

A small levy was imposed on imported diamonds, under Belgian Law, and was argued that it was not in breach under Art.28 & Art.25 TFEU for two reasons:

1. Belgium did not produce any diamonds, so it was not a protectionist levy.
2. The purpose was to provide social security benefits for Belgian citizens diamond workers.

Decision

The Court of Justice held that "The justification of this prosecution is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods".

The Court of Justice emphasized that the purpose that a Member State impose a levy, a tax, a charge is irrelevant. The question here is not the purpose but whether there is a direct effect of this charge on goods and weather it creates obstacles in the free movement of those goods between the European Union.

3.4. Charges with Equivalent effect to a customs duty

Art. 30 TFEU prohibit any type of charge which has an equivalent effect as a customs duty. This was examined in *Commission v Italy (Case 24/68)* where the Court of Justice stated that "any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge, having equivalent effect within the meaning of Art.28 & Art.30 TFEU".

3.5. Exceptions to the general rule

As it was stated above the Court of Justice has ruled that any type of charge which has an equivalent effect to a custom duty will not be allowed. However the case law shows that there are exceptions to the general rule.

In *Commission v Belgium (Case 132/82)* the Court of Justice held that "when the payment of storage charges is demanded solely in connection with the completion of customs formalities, it cannot be regarded as the consideration for a service actually rendered to the importer".

"Consequently, it must be declared that, by levying storage charges on goods which originate in a Member State or are in free circulation, and which are imported into Belgium, and presented merely for the completion of customs formalities at a special store, the Kingdom of Belgium has failed to fulfil its obligations under [Art. 28 and Art.30 TFEU]".

In contrast if the importer decided to use the storage for an extended period, the charge that the Member State will imposed on the imported will be regarded as a private dealing of providing services and will not be regarded as a breach under Art.28 and Art.30 TFEU.

In general the Court is unwilling to accept that a charge is specifically imposed on an importer, and that it falls out of Art. 30 TFEU. In *Ford Espana v Spain (Case 170/88)* the Court of Justice held that "the flat way that the charge was calculated, was therefore a breach of Art.30 TFEU".

In *Bresciani v Amministrazione Italiana delle Finanze (Case 87/75)*, where Italy imposed a charge of a veterinary and public health inspection, it was held by the Court of Justice that this did not constitute a charge to the importer, considering that this benefited the general public and they were supposed to cover the expense of this charge.

Chapter 4 – Free Movement of Goods – Indirect Charges

There are two ways of importing charges: direct and indirect. When a charge is imposed directly, then this is in breach of Art.28 and Art.30 TFEU. On the other hand when the charge was imposed indirectly, then Art.110 of TFEU (previously Art.90 EC Treaty) is in breach. In order to establish that an indirect tax is unlawful, it must be established that this type of indirect charge is protective on domestically produced goods or discriminatory against imported goods.

Comparing to direct charges, it is really difficult for the European Union to examine and rule whether there a Member State unlawfully used an indirect charge in the trading of goods between the Member States. The burden is on the Court of Justice to examine and rules in regards to this subject. The following analysis is based on the relevant treaties and case law, in order to obtain the correct conclusions.

Art.110 TFEU:

"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

The purpose of Art.110 TFEU was stated by the Court of Justice in *Commission v Denmark (Case 171/78)*. The Court held that: "Their aim is to ensure the free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States…Art.110 TFEU must guarantee the complete neutrality of internal taxation as regards completion between domestic products and imported products".

The point to emphasize here is the different tax system, which exist between the Member States. Even though the Member States gave some of their sovereign powers to the European Union, this does not include the tax system. European Union does not have a harmonised, tax system. Each member state is free to set the tax system according to the needs of each country.

Even though most of the European Union Member States are part of the EMU (Economic and Monetary Union), it is a fact that there are substantial differences on the economic characteristics of each country and that EMU is not stable enough, in order to propose an equivalent tax system in all Member states.

The substantial economic differences each Member state has, like different lines of industries, production and education development, does give the option to the European Union to establish one indirect tax system. For instance United Kingdom is not part of Eurozone and Cyprus and Greece are currently under the inspection of IMF.

Regardless of the freedom that each member state has in regards to their tax policies, these policies have to be in line with Art.110 TFEU, so that they are not in any way protectionist or discriminatory.

4.1. Art.110 (1) TFEU: Similar Products

Direct Discrimination / Indirect Discrimination

Commission v France (Case 168/78)
The definition of similar products was established by the Court of Justice as "similar characteristics and meet the same needs from the point of view of consumers".

The court of Justice applied this definition in *John Walker v Ministeriet for Skatter (Case 243/84).* The Court of Justice analysed that "the objective characteristics of the products, including their alcoholic contents, methods of production and consumer perceptions as to the nature of the products. It was held that the products in this case were not relevant.

Product similarities was examined in *FG Roders BV ea v Inspecteur der Inverrechten en Accijnzen(Joined Cases C-367 and 377/93),* where the Court of Justice held that fruit wines and grape wines were similar. In Commission v Italy (Case 184/85) the Court of Justice held that the products (bananas and other fruit) were not similar, after examining the objective characteristics of the products.

4.2. Direct discrimination

Applying different tax rates on similar products is rare, considering that it is very easy to recognise the breach of Art.110 TFEU.

4.3. Indirect Discrimination

The issue with indirect effect is that it may not differ between domestic and imported goods but the actual effect it might be a huge burden on the imported goods.

Hamblot v Directeur des Services Fiscaux (Case 112/84)

Facts

France had two different types of car tax system. Below 16 CV the tax was up to 1100 francs and above 16 CV the tax was a flat rate of 5000 francs.

Decision

The Court of Justice held "the reluctant additional taxation is liable to cancel out the advantages which certain cars imported from other Member States might have in consumer's eyes over comparable cars of domestic manufacture, particularly since the special tax constitutes to be payable for years. In this respect the special tax reduces the amount of competition to which cars of domestic manufacture are subject and hence is contrary to the principle of neutrality with which domestic taxation must comply. France then amended its legislation regarding the tax systems.

Chemial Farmaceutici v DAF Spa (Case 140/79)

Facts

Italy's tax was higher in synthetic ethyl alcohol, than in fermented ethyl alcohol.

Decision

The Court of Justice stated that there was no discrimination direct or indirect considering that the tax that was imposed on fermented ethyl was the same regardless if it was domestic or imported goods.

Specifically the Court of Justice state: "The detailed provisions of the legislation at issue before the national court cannot be considered a s discriminatory since, on the one hand, it is not disputed that imports from other Member States of alcohol obtained by fermentation qualify for the same tax treatment as Italian alcohol produced by fermentation, and on the other hand, although the rate of tax prescribed for synthetic alcohol results in restraining the importation of synthetic alcohol originating in other Member States, it has an equivalent economic effect in the national territory in that it also hampers the establishment of profitable production of the same product be Italian industry".

4.3. Art.110 (2) TFEU: Protectionist

The other reason, for imposing indirect taxes on products, is to protect the domestic products in compare to the imported products.

Commission v UK (Case 170/78)

Facts

UK imposed taxes on certain wines, at that time UK produced huge amounts of beer but very little in wine. The tax on the wine then was about 38% of its sale price, compared to the 25% that was imposed on beer to its sale price.

Decision

The court of Justice established that to clarify whether there was a breach of Art.110 (2) TFEU by UK they should adopt a two-stage test policy. Firstly the Court of Justice established that there was a competitive relationship between wine and beer and secondly it was established that this tax system had a protective effect on beer.

In situations where the Court has to examine specific and detailed characteristics of tax systems and products characteristics, everything is taken into consideration. Courts' decision will be taken very carefully, according to the facts in order to establish that there was a breach of Art.110 (2) TFEU. If the differences on the tax system applied are not huge then this will not result in breaching Art.110 (2) TFEU for Indirect discrimination.

It is important to establish that the rules regarding the free movement of goods exist in practise and not just in theory. As it was examined above the Member States were reluctant to accept and adopt the rules regarding Free Movement of Goods under the treaties, and they were trying to avoid them by giving the most favourable definitions of the treaties in order to succeed their statements. However as was shown above the Court of Justice did not accept all these interpretations, and clarify the concepts behind the treaties, and set the legal regime in order to promote and protect trade among the Member States.

4.5. Competition Law

A healthy competition legal regime between the Member States will result in the continuing development of demand and supply structures in EU. Competition promotes entrepreneurs to continuously improve their efficiency and gives the opportunity to new players to take part in the market. A European competition policy is essential in order to guarantee the success of the economic activity among Member States and 3rd countries.

For EU to succeed this dream of the "genuine integrated market", Member States have to adopt and follow the rules as they are stated in Art.101 and Art.102 of TFEU.

Art. 101 states that:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Art.101 TFEU prohibits any trading agreements among entrepreneurs/players which result in affecting the competition within the internal market of a Member State, and trade among Member States. Leading case in this subject is *Consten and Grudig v Commission (Case 56/64)*. The Court of Justice held that "it was not necessary to wait to see if trade was in fact affected by the way in which the agreement was intended to operate. The Court said that 'there is no need to take into account the concrete effects of an agreement once it appears that it has as its objects the prevention, restriction or distortion of competition''.

Article 102 (ex Article 82 TEC) states that:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Art.102 TFEU prohibits the abuse of dominant position in an internal market, which affects trade among Member States. In order to establish that there is a breach of Art. 102 TFEU, it must be satisfied that three elements below exist:

1. A dominant position
2. An abuse of that position
3. The abuse must affect trade among Member States.

Art.102 TFEU does not examine whether there is a monopoly but if there is an abuse of that monopoly power for the favour of few entrepreneurs. However it is up to the Court to establish the breach of Art102 TFEU, always in accordance with the facts of each case.

In *Sot. Lelos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proionton (Cases C-468/06 to C-478/06)* it was held that the pharmaceutical companies who refused to meet 'ordinary orders' would constitute an abuse of dominant position in accordance with Art. 102. However the Court stated that pharmaceutical companies could legally refuse to supply orders of medicinal products which are 'out of the ordinary' in order to prevent parallel exports. That case would not be an abuse of a dominant position, which will not breach Art.102 TFEU. In this case, the Court provided some protection for the pharmaceutical companies.

The set of one competition regime in EU is necessary for the survival and development of full competition in the market. Art.101 and Art.102 TFEU aim to provide protection to small players and promote the development of this "one competition regime". However as it was examined above it is always up to the facts and the discretion of the Court to clarify any trading agreements and abuse of dominant positions in the EU trading market.

Chapter 5 - The Direct Effect of Directives

Treaty of Lisbon came into effect on 1st of December 2009, and has replaced both the TEU and TFEU. Declaration 17 states:

"In accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the Law adopted by the Union on the basis of the Treaties have primacy over the Law of Member States, under the conditions laid down by the said case law."

5.1. The principle of Direct Effect

The principle of direct effect was developed in *Van Gend en Loos v Nederlandse Administraties der belastingen (Case 26/62)*. The Court of Justice addressed whether Treaties have direct effect on individuals of the Member States and it was stated that:

"The Community constitutes a new legal order of international law for the benefit of which States have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only the Member States but also their National. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage.

These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon institutions of the Community."

It is a landmark case, considering that the Court of Justice created the principle of direct effect, which gives the rights to citizens of the Member States to claim their rights to the national courts.

5.2. Direct effect

5.3. Treaty Articles

As a general rule, treaties and international agreements are not capable of becoming binding on the national courts by a way of allowing individuals to confer their rights in national courts. However the Court of Justice has created in *Van Gend en Loos* the concept of Direct Effect. However it took 13 to clarify whether there this concept of direct effect could be established. In *Defrenne v Sabena Case (43/75)* the Court of Justice clarified the situation and set that Treaties could be either vertically or both vertically and horizontally effective.

Vertically Effective: According to a treaty, individuals can claim their rights against the member state.

Horizontally Effective: According to a treaty, individuals can claim their rights against any other individual.

5.4. Regulations

According to Art.288, para 2 TFEU, 'A regulation shall have general application, It shall be binding in its entirety and directly applicable in Member States'.

5.5. Directives the early case law

The starting point was that Directives were not creating direct effective rights to the individuals of the Member States.

In the last decades, it has been examined comprehensively whether the EU directives are capable of having direct effect on the Member States and if so to what extent. The European Court of Justice has developed significantly and it gives the opportunity to individuals to claim their rights as it arise from a directive at a national level under certain circumstances.

Nevertheless the issue has not yet been resolved; there is still debate as to the extent, their exact scope of the doctrine and the power of the direct effect of the provisions of the EU directives[6].

5.6. The concept of direct effect

The effectiveness of EU laws requires the consistent collaboration of national authorities due to the magnitude of the EU's duties and obligations[7].The ECJ responded to this necessity with its most important judicial creation- the doctrine of direct effects[8].

Individuals have been made a direct participant, in the development of the European Legal System, considering the power the direct effect has provided them, as they can invoke EU provisions before national Courts.

---

[6] A.J.Easson "The Direct Effect of EEC Directives" I.C.L.Q Vol.28, No3 (Jul., 1979) pp.319-353

[7] Eric F.Hinton: Strenghtening the Effectiveness of Community Law: Direct Effect, Article 5EC and the ECJ 31 N.Y.U. J. INT'L L. & POL. 307 (1999).

[8] Luu Quo Thai:The relationship between EC law and National Law p.45,2002,Lund University

Having been allowed to invoke EU provisions before national Courts, individuals have been made a direct participant in the European integration process thanks, in large part, to the principle of direct effects, featuring the impact of EC law on Member States[9].

In *Van Gend en loos*[10] the ECJ conceived the idea of direct effect and largely on the basis of chance appearance of appropriate cases before it; it has developed its criteria for determining whether particular treaty provisions or secondary legislation had direct effect, and if so against whom. The doctrine of direct effect waives the need to implement these rules in order to be applicable in domestic court proceedings.

Immediately after the development of the concept of direct effect, the Court of Justice was compelled to determine the legal position of directives in relation to the doctrine. The idea of directives acquiring the status of a directly effective provision gave rise to some of the most complicated issues for both EU and national laws.

It appears that no question of direct effect should arise in relation to directives as they are not described as directly applicable, compared with other measures such as regulations and decisions, requiring national implementing legislation to give effect to them. However the Community's internal market legislation consists mainly of directives and the promotion of legal harmonization among the member states which depends on the adoption and implementation of directives[11] would be seriously undermined if the courts refused to allow them to be directly effective.

[9] Brunno de Witte, Direct Effect, Supremacy and the Nature of Legal Order ,note 40,p.205

[10] Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR1

[11] Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1

Fortunately the ECJ has consistently established possible circumstances where direct effect of directives is possible. The issue was resolved in *Van Duyn*[12]. The Court held:

"it would be incompatible with the binding effect attributed to a directive by Art.189(now249) to exclude the possibility that the obligation which it imposes maybe invoked by those concerned".

Each provision must be examined in its context to see whether the obligation imposed is sufficiently clear and exact to be capable of being applied directly by a national court[13].

The ECJ did not allow to Members States to use their discretion on matters of public policy and found that the directive in question imposed a "clear, precise and complete" obligation for the Member States. The Court emphasised its desire to make directives an effective form of European Union Law, in order to enable them to be invoked directly by individuals before national courts.

In this way the EU ensures that the interests of the individuals of any Member State are not adversely affected due to the failure of a Member State to perform its duties and obligations. In a way it provides protection and stability in the development of EU as one legal entity regardless the political influences that exist in any Member State.

EU is expanding, and many countries are applying for becoming members of EU; so it is crucial for the continuance and the expansion of the EU, that the existing member states adopt the EU policies in order to promote and create one harmonised legal European system.

[12] Van Duyn v Home Office(41/74)[1974] ECR 1337

[13] Craig & Burca EU Law Text, Cases,and Materials 3rd edition Oxford p.203

5.7. Member States holds sovereign powers

An important limitation of the doctrine was established in *Pubblico Ministero v Ratti*[14]. The Court put forward the famous "estoppel argument" under which the Member States are prevented from relying on their own failure to implement a directive. The Court refused to disregard the discretion given to Member States, in regards to the way as to how to implement a directive; and added that individuals could invoke their rights arising from the provisions of a directive:

"at the end of the prescribed period and in the event of the member states default."[15]

Therefore in addition to being sufficiently "clear, precise and unconditional", the circumstances under which a directive may produce direct effects were limited to where the period for implementation had been expired and the Member State had failed to implement the directive or had done so incorrectly. The Court held that:

"It is not possible for an individual to plead the principle of 'legitimate expectations' before the expiry of the period prescribed for its implementation."[16]
"a sanction for Member States non-compliance with their obligation under the directive"[17]

This demonstrated the reluctance of the Court to allow individuals to invoke their rights as arising from a directive in horizontal situations.[18]

---

[14] Case 148/78,Ratti [1979] E.C.R.1629

[15] Ibid [43]

[16] Case 148/78,Ratti [1979] E.C.R.1629 [46]

[17] Giorgio Gaja Beyond the reasons stated in judgments *Michigan Law Review*, Vol. 92, No. 6, 1994 Survey of Books Relating to the Law (May, 1994), pp. 1966-1976 doi:10.2307/1289624

[18] Ibid

The decisions of the Court only have a declarative effect until such time as Member States accept their validity and apply them. To this effect significant steps ought to be made towards the effective application of directives through the medium of national courts and at the same time to secure a comprehensive scheme of remedies in the failure of a Member State to fulfil its obligations under Community laws[19].

5.8. The reinforcement of vertical direct effect of directives

The expansion of the concept of direct effect to directives has been regarded as one of the most antagonistic developments of the European Court of Justice[20]. Nevertheless since the court had established that the doctrine was an essential condition for the "effet utile" of EU law, the only reasonable direction would have been the advancement of the doctrine in order to allow directives to be invoked horizontally as well as vertically[21].

However following the intense criticism of the application of the doctrine in relation to directives, the ECJ held that directives only have vertical as opposed to horizontal direct effect that treaty provisions and regulations have as they are not addressed to individuals.

This was established in the *Marshall* case[22] and it was reaffirmed by the ECJ's judgment in *Dori*[23].

---

[19] Grainne de Burca Giving Effect to European Community Directives**,** M.L.R Vol. 55, No. 2 (Mar., 1992), pp. 215-240

[20] Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1

[21] Ibid

[22] Marshall v Southampton and SW HA HA(Teaching) (152/84) [1986] ECR 723

[23] Dori v Recreb SrL (C-91/92) [1994] ECR I-3325.

In Marshall the Court stated that:

"a provision of a directive may not itself impose on an individual and that *a provision of a directive may not be relied upon as such against such a person".*

The readiness of the Court to uphold the vertical dimension of the direct effect of directives and distinguish its horizontal effect arises from the principle of estoppel as explained in the *Ratti* case.
The Court held in *Marshall* that it was up to the national courts to determine whether or not a directive had a direct effect on national law. The above ruling was influenced by the reluctance of national courts to surrender their sovereignty and accept the direct effect of directives in general[24].

Furthermore the notion to horizontal situations, would have hurt the relationship of national courts with the ECJ, causing irreversible damage to the effectiveness of EU rules[25].The national courts would have been less reluctant to accept this limited kind of the concept, despite the fact that the above doctrine weakened the protection of certain fundamental rights especially in relation to equality rights between men and women.[26] However the denial of the horizontal effect of directives had further implications in the enforcement of EC law.[27]

The Court distinguished the legal position of Member States and individuals under EU laws; in the absence of any obligation on behalf of private parties under EU laws, the reasoning upholding vertical direct effect of directives could not be applied in horizontal situations so as to protect individuals from acquiring liability for duties actually set on Member States[28].

---

[24] Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1 p.27

[25] Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1 p.28

[26] Ibid

[27] Ibid

[28] Jason Coppel Rights duties and the end of Marshall *The Modern Law Review*, Vol. 57, No. 6 (Nov., 1994), pp. 859-879

By restricting the effectiveness of directives within the national legal orders, the uniform application of EC law was being frustrated. The enforcement of the rights of the individuals was being prejudiced in a way that it produced discriminatory result for the citizens of a Member State that had failed to implement a directive compared to the ones in a Member State which had in fact implemented it, and also among citizens of the same Member State in situations where the State had failed to implement a directive regulating private relationships, whereas those in the same relationship with an organ of the Member State could invoke the rights conferred to them by the relevant directive.[29]

The controversial reasoning of the Court in *Marshall* has been analysed in a latter case *Dori*.[30] The Court reinforced the position adopted in *Marshall* and declared that to allow individuals to invoke the provisions of a directive horizontally:

"*Would be to recognize a power in the Community to enact obligations for individuals with immediate effect whereas it has competence to do so only where it is empowered to adopt regulations.*"

It was suggested that "the Court did not simply reject horizontal direct effect but more importantly it was adjudicating on the division of competences between the EU and Member States."[31]

---

[29] Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1

[30] C-91/92,Dori v.Recreb Srl [1994] ECR I-3325

[31] Pablo V.Firueroa Regueiro Invocability of Substitution and Invocability of Exclusion:Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives Jean Monnet Working Paper 7/02 NYU School of Law New York,NY 10012, ISSN 1087-2221

However the rationale of the Court is utterly frustrating. Having rejected that the explicit distinction between regulations and directives as contained in the wording of Art 249 excludes directives from having directly effective results, it seems inconsistent to interpret the Article so narrowly as to deny the direct effect of directives in horizontal situations especially when no other judicial development was based "in the enumerated competences of the Community under the Treaty of Rome"[32].

In contrast *"to give what is called horizontal effect to directives would totally blur the distinction between regulations and directives which the Treaty establishes in Art.189 and 191"*[33].But following *Ratti* it could be argued that after the limit has expired there is no longer a realistic distinction between regulations and directives because at that time the discretion allowed to Member States is succumbed and the directive becomes directly effective.[34]

The analogy between the two instruments as the basis of the distinction between vertical and horizontal direct effect can no longer be sustained as it produces illogical results. The correct approach would be to consider the obligation of the result to be achieved and the discretion given to the forms and methods allowed to Member States to attain that result.

"In case of private employers national legislation was still necessary but where the Member State were the employer the result to be achieved was already clear. The need to decide on form and methods in the case of private employers could not affect the obligation of the Member States to comply with the requirements of the directives In respect of their own employees"[35].

---

[32] Jason Coppel Rights duties and the end of Marshall *The Modern Law Review*, Vol. 57, No. 6 (Nov., 1994), pp. 859-879

[33] Marshall v Southampton and SW HA HA(Teaching) (152/84) [1986] ECR 723 by Advocate General Slynn

[34] (n/a)

[35] Prinssen & Schrauwen (eds.), Direct Effect: Rethinking a Classic of EC Legal Doctrine, Hogendorp Papers (3), Europa Law Publishing, Groningen, ISBN 9076871094,2002, pages 1-13.

Following those controversial arguments towards horizontal direct effect of directives the ECJ, was keen to develop individual rights in an alternative approach by widening the definition of the State (*Costanzo v Comume di Milano Case 103/88*) to include universities, privatised companies etc. to allow as many people as possible to rely on directives and subject the above cases to the rules of full direct effect.[36] Yet the position is still unclear and the results are confusing. In *Marshal* it was stated 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."*

Consequently the Court was urged to provide a broad definition of the State. *Foster*[37] laid down certain criteria:

"a body, whatever the legal form, which has been responsible [...] for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

No definition of what an organ of State includes was accurately given though and national courts are having a large margin of appreciation which may adversely affect the consistent application of Community rules.[38] The rule does not accommodate employees in the private sector and the result was again incoherent and discriminatory. Moreover to held entities indirectly responsible for the State's failure to implement a directive seems absurd and unreasonable.[39]

---

[36] Vassilios Skouris Effet Utile Versus legal Certainty:The case law of the Court of Justice on the Direct Effect of Directives E.B.L.R, 2006 ; 17 (2)

[37] A.Foster and Others v British Gas plc (C-188/89) [1990] ECR I-3313

[38]Carmen Plaza Martin Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder [1994]ICLQ Vol 43, No 1

[39] Vassilios Skouris Effet Utile Versus legal Certainty:The case law of the Court of Justice on the Direct Effect of Directives E.B.L.R, 2006 ; 17 (2)

The above analysis of the jurisprudence of the ECJ following the force of the *Marshall* limitation demonstrates that the distinction between vertical and horizontal direct effect of Directives has caused serious problems in the effectiveness of EU law and the protection of individuals' rights. However it has been argued that the Court's rationale that individuals cannot invoke rights under directives horizontally because unlike Member States, they have no duties under directives is no longer viable.[40]

Where national legislation had failed to implement the directives properly, individuals could not be granted their rights. The mechanism of direct effect was regarded as a condition, providing the circumstances for individuals to confer their respective rights. It is in this respect that the *Marshall* principle which distinguished the vertical and horizontal direct effect was formulated and following the above way of thinking the rule seemed reasonable.[41]

[40]Jason Coppel Rights duties and the end of Marshall *The Modern Law Review*, Vol. 57, No. 6 (Nov., 1994), pp. 859-879

[41] Jason Coppel Rights duties and the end of Marshall *The Modern Law Review*, Vol. 57, No. 6 (Nov., 1994), pp. 859-879

Chapter 6 - Conclusion

The role of the European Court of Justice in the creation of an effective framework for the proper application and enforcement of EU laws, including business laws and freedoms of movement, in the national legal orders is unequivocal.

It has been concluded on the basis of this research that the development of the principle of direct effect waives the need to implement EU laws in order to be applicable in domestic court proceedings. However it has been noted that particular problems arose in relation to the direct effect of directives. This research suggests and indicates that provisions of directives may be directly effective after the expiry of the implementation period; they are capable of conferring rights upon individuals to be enforced in national courts against Member States.

On the question of the horizontal direct effect of directives and the extent to which directives are capable of conferring rights and imposing obligations upon private parties our paper suggests that this has grown to be one of the most controversial aspects for the jurisprudence of the Court.

The ECJ has somehow managed to limit the weaknesses of its initial prohibition by construing further mechanisms to allow individuals to invoke their rights in horizontal disputes without departing from the traditional approach established in the *Marhall/Dori* case law that directives are not capable of having horizontal direct effect.

As it was examined in free movements of goods section III and IV, the operation of the principles is far from specific. In this specific subject, where the law regime is based on Treaty Articles, Member states should simply apply the articles in a straight forward way. However it has been concluded from the case law that this is far of what actually happened. In fact ECJ is the reason behind the stable regime that exists now in the free movement of goods, which leads to the continuing development of trade among the Member States. As it examined above, Member States are reluctant to apply EU decisions and try to avoid implementing them. However they cannot disregard ECJ rulings.

The development of ECJ through the last decades, gives the opportunity to individuals to bring any action against a Member State, an entrepreneur or even an individual. The unbiased rulings of the ECJ, gives confidence to individuals that they will be judged fairly, equally and objectively in accordance with the law.

It has been identified in the paper that it is widely accepted that the jurisprudence of the ECJ enhanced not just the protection of private parties' rights (as arising from the provisions of directives), but the development of EU Business law regime as well. Furthermore the presence of legal uncertainty, as to the application of the rules, demands the reconsideration of the ECJ's case law on the direct effect of directives and treaties. There is certainly enough room for improvement.

The fact remains though whether all these changes and application of laws, through regulations or directives, are been applied impartially for the good of all the States and not for the interests of only the few powerful ones. This issue concerns not the effect behind all regulations, directions and decisions taken the EU, but the purpose behind all these decisions. This paper has examined specifically regulations, directions and treaties which are relevant to the Business and Competition Law. For succeeding this harmonised European Union it is a vital to have one system, in order to promote trade and the development on the economic activity among the Member States. Taking into consideration the actions that have been taken in the past by GAAT and the World Trade Organization, it will be difficult to argue that all these decision regarding competition and business law favours only specific Members states. We hope that our paper has managed to bring out at least the most important issues.

The legal framework and how this is practically implemented is a matter that is continuously under review. Business law, environmental issues, free movement, competition and competitive advantage, are issues that also affected by politics and interests, and not always Justice and Equal Rights. Smaller States like Cyprus and Greece look in to applying this framework in a fair way. While this political struggle goes on the legal jurisprudence is called to set out the parameters of a fairer Europe. We hope and look forward to this New Europe.

Bibliography

Books & Articles

1. A.J.Easson "The Direct Effect of EEC Directives" I.C.L.Q Vol.28, No3 (Jul., 1979) pp.319-353
2. Brunno de Witte, Direct Effect,Supremacy and the Nature of Legal Order ,note 40,p.205
3. Carmen Plaza Martin, Furthering the Effectiveness of EC Directives and the Judicial Protection of Individuals Rights Thereunder[1994]ICLQ Vol 43, No 1
4. Eric F.Hinton: Strengthening the Effectiveness of Community Law: Direct Effect, Article 5EC and the ECJ 31 N.Y.U. J. INT'L L. & POL. 307 (1999).
5. Giorgio Gaja Beyond the reasons stated in judgments: The Legal Reasoning of the European Court of Justice : Towards a European Jurisprudence, *Michigan Law Review*, Vol. 92, No. 6, 1994 Survey of Books Relating to the Law (May, 1994), pp. 1966-1976 doi:10.2307/1289624
6. Grainne de Burca Giving Effect to European Community Directives**,** M.L.R Vol. 55, No. 2 (Mar., 1992), pp. 215-240
7. Ian Loveland,2009,Constitutional Law Administrative Law and Human Rights A critical Introduction, 5th edition, Oxford University Press
8. Jason Coppel Rights duties and the end of Marshall *The Modern Law Review*, Vol. 57, No. 6 (Nov., 1994), pp. 859-879
9. John Fairhurst, 2010, Law of the European Union,8th edition, Longman-Pearson
10. LS Sealy &RJA Hooley, 2009, Commercial Law Text Case and Materials, 4th edition, Oxford Press University
11. Luu Quoc Thai:The relationship between EC law and National Law p.45, 2002,Lund University
12. Mayson French &Ryan, 2011-2012, Company Law, 28th edition, Oxford University Press
13. Nigel Foster, 2010, EU Law Directions (Directions Series),2nd edition, Oxford University Press

14. Pablo V.Firueroa Regueiro, Invocability of Substitution and Invocability of Exclusion:Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives, Jean Monnet Working Paper 7/02 NYU School of Law New York,NY 10012, ISSN 1087-2221
15. Paul Craig, Grainne de Burca, EU Law text cases and materials,5th edition, Oxford University Press
16. Prinssen & Schrauwen (eds.), 2002, Direct Effect: Rethinking a Classic of EC Legal Doctrine, Hogendorp Papers (3), Europa Law Publishing, Groningen, ISBN 9076871094
17. Sacha Prechal,2005, Directives in EC law, 2nd edition, Oxford University Press, EC law Library
18. T C Hartley, (1998) ,The foundations of European Community Law,4th edition, Oxford University Press
19. Vassilios Skouris, Effet Utile Versus legal Certainty:The case law of the Court of Justice on the Direct Effect of Directives E.B.L.R, 2006 ; 17 (2)

Web Pages

1. European Legislation TFEU http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN [18/08/2014]
2. European Union Website, http://europa.eu/index_en.htm[20/08/2014]
3. European Union Website, EU law http://europa.eu/eu-law/index_en.htm [22/08/2014]
4. European Union Website Treaties, http://europa.eu/eu-law/decision-making/treaties/index_en.htm [22/08/2014]
5. European Union Website – Legal Acts, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm [23/08/2014]
6. European Union Website, Legislation, http://europa.eu/eu-law/legislation/index_en.htm [24/08/2014]
7. European Union Website, Case Law, http://europa.eu/eu-law/case-law/index_en.htm [23/08/2014]

8. European Union Website, Decision Making - Procedures, http://europa.eu/eu-law/decision-making/procedures/index_en.htm [22/08/2014]
9. European Union Website, Taxation, http://ec.europa.eu/taxation_customs/taxation/gen_info/tax_conferences/tax_thesis_award/index_en.htm [22/08/2014]
10. Giving Effect to European Community Directives, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1992.tb01872.x/abstract [01/08/2014]
11. Horizontal Direct Effect of Directives, http://www.jeanmonnetprogram.org/archive/papers/02/020701.pdf [05/08/2014]
12. Rights, Duties and the End of Marshall http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1994.tb01981.x/pdf [09/08/2014]
13. The Direct Effect of EEC Directives, http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1503196 [21/08/2014]
14. The relationship between EC law and National Law http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1554583&fileOId=1563375 [18/08/2014]
15. The Legal Reasoning of the European Court of Justice : Towards a European Jurisprudence, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=92+Mich.+L.+Rev.+1966&key=b6729aefd6e03bea936f334041410ca9 [10/08/2014]