THE DIRECT EFFECT OF SECONDARY LEGISLATION IN EUROPEAN COMMUNITY LAW

by

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"The people should fight for their law as for their city wall"

Heraclitus, Fr*agments*, 82, c 500BC

Introduction

The object of this paper is to present a thematic and analytical account of the present scope and limits of the doctrine of direct effect of secondary legislation in European Community Law. It is thirty years since the doctrine of direct effect was first clearly established in the leading case of NV *Algemene Transport en Expeditie Van Gend en Loos v. Nederlandse administratie der belastingen*[1] and hence it is appropriate that an analysis of the present day doctrine of direct effect is undertaken.

Many fields of judicial doctrine, whether in public law or private law, have been developed in an incremental or a*d hoc* basis where the courts first lay down the principles of the doctrine and subsequently refine them as the case law develops. As part of this process the criteria laid down by the European Court of Justice in determining whether or not a given provision of European Community Law has direct effect will be isolated. This will provide a spring-board then, to examine the types of secondary Community legal provisions which have direct effect.

This analysis will show the importance and emphasis placed by the European Court on the development and refinement of judicial doctrine giving content and application to the principle of direct effect. The outcome of this process will be to identify the factors and influences that contribute to the orderly and rational development, as well as enhancement, of European Community Law.

The doctrine of direct effect, in essence, deals with the question whether, and if so to what extent, provisions of Community law can be invoked by a natural or legal person (who, in this paper, will be referred to as an "individual") before courts of the Member States of the Community or even before the European Court of Justice itself.[2]

A subsidiary question based on this aspect of the doctrine of direct effect is how can provisions of Community law translate into concrete rights and obligations which individuals may invoke in their favour against the institutions of Member States and which individuals are obliged to respect in relation to other individuals. In the relevant literature, this is often described as the transformation of Community law into other legal orders or, variously, as the penetration of

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1 Case 26/62 [1963] ECR 1, CMLR 105.

2 The European Court of Justice ("the Court" or "the European Court" unless otherwise stated) is the court for the three European Communities established by the Treaty of Rome in 1957. The three Communities are the *European Economic Community* ("EEC"), the *European Coal and Steel Community* ("ECSC") and the *European Atomic Energy Community* ("Euratom"). In this paper references to "the Treaty" are to the Treaty establishing the EEC, unless reference is made to the other treaties establishing the ECSC or Euratom. Similarly, the term "the Community" will be used to refer to the body politic established as the EEC under Article 1 (EEC). An introductory account of the formation of the three Communities and of the function, operation and relationship of their principal institutions appears at TC Hartley, *The Foundations of European Community Law* 2nd ed, Clarendon Press Oxford (1988) (cited as "*Hartley*") at 3-48. The text of the Treaty itself (which has been amended many times since 1957) is reproduced in B Rudden & D Wyatt, *Basic Community Laws* 2nd ed, Clarendon Press Oxford (1986) at 19-111.

Community rules down to the level of the individual.[3] This should not, however, obscure the fact that the doctrine of direct effect is not the only means by which Community law has filtered down to the level of the individual, even if it can be characterised as an interpretative mechanism employed by the Court.[4] More obviously, Community legislation in the form of Treaty provisions at the primary level and regulations, directives, decisions, recommendations and opinions at the subsidiary level are two means by which Community law can be made effective. Korah has also identified a third method of incorporating Community law into the law of the Member States of the Community, which is the doctrine of pre-emption.[5]

A corollary to the nature of the direct effect principle as a judicial doctrine which can be invoked by an individual in the Community is the equally seminal principle that European Community law prevails over national law.[6] While this principle of supremacy of Community law over national law first emerged in *Van Gend en Loos*,[7] this principle was more forcefully and directly stated in *Costa v. ENEL*.[8] In *Costa v. ENEL* the Court said the pre-eminence of Community law was "confirmed" by Article 189, which prescribes that regulations have a binding effect and are directly applicable within each Member State. The Court observed that this principle was unqualified, and would be wholly ineffective if a Member State could unilaterally by domestic law nullify the purpose and binding effect of a Community legal provision. The Court reinforced these observations by stating that rights created by the Treaty would lose their Community character and hence lead to the undermining of the legal basis of the Community were it possible for a national legal provision to override a Community legal provision.[9]

It can be seen, accordingly, that the principle of supremacy of Community law over national law is a co-requisite of the principle of direct effect. The doctrine of direct effect would be deprived of all utility if it did not rest on the substratum of the supremacy of Community law over national law. In other words, these two principles constitute two of the foundational legal pillars of Community law.[10]

The central place which the doctrine of direct effect shares in Community law requires that its place in Community law be sketched with as much precision as possible. This process can be aided by briefly noting the scheme of what are termed general principles of law applicable as part of Community law. These general principles of Community law find their source neither in the Treaty, nor in subordinate legislation enacted under the provisions of the Treaty (as to which see Article 189). Rather, these principles are derived from jurisprudence of the Court and, in a sense, have an interstitial effect – that is they comprise the mortar to cement together the legislative 'bricks' of Community law. An analysis of these general principles and of their juridical nature is beyond the scope of this paper and it suffices for present purposes simply to catalogue these general principles.

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3 Academic literature abounds with definitions of the doctrine of direct effect. A small sample of these sources include:
A Dashwood, "The Principle of Direct Effect in European Community Law" (1978) 16 JCMS 229; *Hartley supra* n.2 at 183;
P Kapteyn, P Veloran Van Themaat & L Gormley, *Introduction to the Law of the European Communities* 2nd ed, Kluwer/Graham & Trotman, Deventer & London (1989) at 330 (cited as '*Kapteyn*'); and
J Usher, "The Interpretation of Community Law by the European Court of Justice" (1977) 11 *The Law Teacher* 162 at 174.

4 Usher *supra* n.3 at 174.

5 V Korah, "Sovereignty in the United Kingdom After Joining the European Economic Community" (1988) 4 QUTLJ 65 at 65-70.

6 "National law" is used throughout this paper to refer to the domestic law of the Member States of the EEC.

7 *Supra* n.1.

8 Case 14/64 [1964] CMLR 425.

9 *Ibid* at 456.

10 Hartley *supra* n.2 at 183-218 discusses these two principles in an integrated fashion. Lord Mackenzie Stuart, *The European Communities and the Rule of Law*, Stevens & Sons, London (1977) at 15-16 refers to both principles as stemming from a common source, viz. the process of integration of certain components of the Community.

Hartley lists these general principles of law as comprising fundamental human rights, legal certainty (which covers the related issues of retroactivity and vested rights), legitimate expectations, proportionality, the right to a hearing (the audi *alteram partem* rule), equality and legal professional privilege.[11] These general principles of law can be used to initiate and defend legal proceedings in Community law, that is they are both a shield and a sword. In certain circumstances, it is possible for the general principles of Community law to have a direct effect.[12] However, in the usual course of events these general principles of law ameliorate or modify the application of substantive provisions of both Community law and national law, although it is not denied that in some circumstances, some of these general provisions may have a substantive legal effect in their own right.[13]

Genesis of the Doctrine of Direct Effect

Van Gend en Loos is the *fons et origo* of the direct effect principle. The action itself began in what can only be described as common circumstances. The applicant for relief was a Dutch company (Van Gend en Loos) which imported into The Netherlands from the Federal Republic of Germany a quantity of ureaformaldehyde. At the time of importing this produce (9 November 1960), the rate of duty applicable to the product was an import duty of 8% ad valorem. Van Gend en Loos contended that an import duty of only 3% ad valorem should have been imposed on the basis that the relevant custom tariff had been increased improperly in contravention of Article 12 of the Treaty.[14] In particular, Van Gend en Loos submitted that Article 12 had been infringed by The Netherlands in that the tariff classification of the product amounted to an increase in customs duty contrary to the express terms of Article 12. An internal appeal to the Inspector of Import and Excise Duties was dismissed and the company appealed to a Dutch revenue tribunal (the Tariefcommissie).

After hearing argument by the parties, the Tariefcommissie referred to the Court two questions for consideration under the preliminary reference procedure set out in Article 177(3) of the Treaty. The first question posed was whether Article 12 of the Treaty had an effect within the territory of a Member State, in other words whether, on the basis of Article 12, citizens of Member States can enforce rights which the courts of the Member State should protect. This was in fact the crux of the case. The second question referred for the consideration of the Court at Luxembourg, if the first question was answered in the affirmative, was whether there was in fact an increase in customs duty contrary to the provisions of Article 12. The first question thus set the stage for the Court to pronounce on the issue whether Article 12 had direct effect.

The Court dealt summarily with submissions by The Netherlands and Belgian Governments

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11 Hartley *supra* n.2 at 129-152. See also Lord Mackenzie Stuart, "Control of Power Within the European Communities" (1988) 11 *Holdsworth Law Review* 1 at 8-14. A brief survey of the principle of proportionality appears in J Jowell & A Lester 'Proportionality: Neither Novel Nor Dangerous' *New Directions in Judicial Review - Current Legal Problems*, ed by Jowell and Oliver Stevens & Sons, London (1988) 51 at 56-58.

12 Hartley, *supra* n.2 at 212.

13 Hartley *supra* n.2 at 131 refers to these general principles of law as an independent source of law. Probably the best example of a substantive general principle of Community Law is the protection of fundamental human rights. A line of cases starting with *Stauder v. City of Ulm* Case 29/69 [1969] ECR 419 and culminating in *Hauer v. Land Rheinland-Pfalz* Case 44/79 [1979] ECR have firmly entrenched in Community Law the principle of fundamental human rights as part of the scheme of general principles of law which the Court recognises, upholds and enforces. In particular *Sadolin & Holmblad AS and Others (Members of the Transocean Marine Paint Association) v. EC Commission* Case 17/74 [1974] 2 CMLR 195 held that a legal act of the EC Commission extending an exemption under Article 85(3) on, inter alia, a condition of which the interested party had no foreknowledge was annulled on the ground that the principles of natural justice had not been observed by the Commission as the decision-maker. This evinces the process where a nominally procedural general principle can have a substantive effect to negate a Community legal act.

14 Article 12 provides: Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already, apply in their trade with each other.

that the Court had no jurisdiction to ascertain the application by Van Gend en Loos. The Court said its function was to interpret the meaning of Article 12 of the Treaty. By virtue of Article 177(1)(a) of the Treaty, the Court was thus properly seized of jurisdiction. From dealing with this jurisdictional point, the Court went on to consider the merits of the claim by Van Gend en Loos that the Treaty created rights and obligations that could be invoked by individuals. The Court referred to the purpose, scheme and text of the Treaty as the skeleton for its analysis.

The Court started from the premise that the purpose of the EEC Treaty was to create a common market and, as a corollary, this purpose implied that the Treaty extended beyond creating only mutual obligations which Member States may enforce and enjoy.[15] This dictum has been seen by some commentators as alluding to the well known principle of public international law of the Permanent Court of International Justice in the *Danzig Railway* case, where the Permanent Court laid down that an international agreement cannot, as such, create direct rights and obligations for private individuals since states, not private individuals, were the subjects of international law.[16] From the Court's perception of the purpose of the Treaty followed this often-quoted extract on the purpose of the Treaty as indicative of the fact that some of its provisions may have direct effect:

> We must conclude from this that the Community constitutes a new legal order in international law, for whose benefits the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also the nationals. Community law, therefore, apart from legislation by the Member States, not only imposes obligations on individuals but also confers on them legal rights. The latter arise not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on Member States and the Community institutions.[17]

In support of this contention, the Court was able to draw attention to, and place emphasis upon, the fact that the creation and functioning of the common market called for the participation of individuals, both in their own right and through the various institutions of the Community.[18] Thus the new legal order ushered in by the Court in *Van Gend en Loos* allows a number of propositions to be stated on the principle of direct effect, and which will be examined parenthetically.

First, underpinning this famous excerpt from *Van Gend en Loos* is the concept that Community law is at once pervasive and comprehensive, in the sense that Community law affects not only relations between the Member States of the Community at the primary tier, but also at the secondary tier, Community law confers on individuals rights which others must respect as well. Such a proposition is not necessarily surprising but its innovative quality is more readily appreciated when it is borne in mind that Article 12 of the Treaty specifically refers only to Member States and not to individuals as the addressee of the obligation contained in Article 12.[19]

The second key principle to flow from the new Community legal order is that the inception of the Community has as a necessary corollary the transference of sovereignty, in limited areas, from those Member States to the Community institutions themselves. This supports the principle of supremacy of Community law over national law.

Thirdly, and more pertinently for the principle of direct effect, the Court drew from the scheme

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15 *Supra* n.1.

16 Permanent Court of International Justice, No.1, Jurisdiction of the Courts of Danzig, Advisory Opinion of 3 March 1928, PCIJ (1928) Series B, No.15, Vol II 11(3), at 17-18, cited for the proposition stated by Walter Van Gerven, "The Legal Protection of Private Persons in the Law of the European Economic Community" *European Law and the Individual*, FG Jacobs North-Holland Publishing Company, Oxford (1976) at 4 and L Collins, "Remedies in the United Kingdom: Some Practical Problems of Direct Applicability" in FG Jacobs, *op cit*, at 169 and AG Toth, *Legal Protection of Individuals in the European Communities*, North-Holland Publishing Company, Amsterdam (1978) at 11.

17 *Supra* n.1 at 129 (CMLR).

18 *Ibid.*

19 P Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law" (1983) 8 EL Rev 155 at 157.

of Article 177 of the Treaty, the object of which is to secure uniform interpretation of the Treaty by national Courts and legal tribunals, evidence of the reception and authority of Community law in the domestic legal order of each of the Member States, which could be invoked by Community citizens.[20] Although the Court did not articulate it in such terms, it seems reasonably clear that the Court was advocating quite strongly that private enforcement of Community legal rights by individuals was to be encouraged rather than discouraged.[21]

The Court also invoked the economic aspect or general scheme of the Treaty as a possible source from which to answer the question posed by the Tariefcommissie whether or not Article 12 of the Treaty had direct effect. The Court did not dwell on this aspect for any length or in any detail. The Court was content to base, in part, the principle of direct effect upon the combined operation of Articles 9 and 12 of the Treaty (Article 9 establishes the objective of the customs union, with Article 12 one step along the path to realising the goal of the free movement of goods).[22]

The third source from which the Court drew inspiration for laying down the bedrock of direct effect was the *text* of a given Treaty provision, *in casu* Article 12. Of the three sources invoked by the Court in justifying the direct effect principle, this third source has proved both the most enduring and conducive to the continued development and expansion of the direct effect principle. An analysis of the Court's approach follows.

The textual justification put forward by the Court appears in the following excerpt from the judgment in Van *Gend en Loos*:

> The text of Article 12 sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the Member States to subordinate its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member states and their citizens.[23]

It emerges from this dictum that the direct effect principle was expressed to apply in rather narrow circumstances, that is, where a Treaty provision constitutes a prohibition rather than a positive obligation to act. Secondly, the execution of Article 12 was unqualified, in the sense it did not call for Member States to enact any legislation or to do any other legal acts to implement the requirements of Article 12. Thirdly, Article 12 set out a clear and unconditional obligation of a negative nature rather than containing a vague and indeterminate principle which would not admit of ready judicial application.

In aggregate, these attributes of Article 12 lent themselves to producing a direct effect in the legal relationship between Member State and subject citizen. With the benefit of hindsight V*an Gend en Loos* laid the foundation for the three propositions which have been taken by both the Court and commentators as constituting the test by which to determine whether a given Community legal provision[24] is capable of having a direct effect:

(a) the provision must be clear and precise;
(b) the provision must be unconditional; and
(c) community institutions or national authorities must not have any discretion whether to implement or give effect to the provision.[25]

Not unexpectedly, the direct effect principle was expressed in only a rudimentary form in *Van*

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20 *Supra* n.1 at 129 (CMLR).

21 *Ibid.* See too, J Usher, "The Scope of Community Competence - Its Recognition and Enforcement" (1985) 24 JCMS 121 at 135, who argues "Private enforcement of community law is inherent in the concept of direct effect ...".

22 *Supra* n.1 at 128-9 (CMLR).

23 *Supra* n.1 at 130 (CMLR).

24 The word "provision" is chosen deliberately to encompass primary Community legal provisions as well as the legally binding secondary Community provisions referred to in Article 189, viz. regulations, directives and decisions.

25 Hartley, *supra* n.1 at 188, Kapteyn, *supra* n.3 at 344, Dashwood, *supra* n.3 at 231 *et seq*, L Collins, *European Community Law in the United Kingdom* 4th ed, Butterworths (1990) at 48 *et seq* (cited as "*Collins*").

Gend en Loos and subsequent decisions of the Court have refined the doctrine. Van Gerven sums up the approach of the Court well, saying that the Court's decisions appear as successive applications of a general principle which in being applied is gradually expanded and better defined.[26] Regrettably, Van Gerven did not really articulate the general principle underpinning the doctrine of direct effect or, to express the same thing another way, what is the fundamental source of the direct effect principle?

It is one thing to expound the principle of direct effect, yet another to recognise the fundamental source from which it springs. What Van Gerven has left su*b silentio* is articulated more forcefully by Wyatt, who said the true basis of the direct effect of Community legal provisions is the legal obligation of a Member State to give effect to its obligations assumed under the Treaty, which of course is the corollary to enjoying rights under the same Treaty.[27] To some degree the Court in *Van Gend en Loos* proceeded on the footing that the direct effect principle was but a particular application of this more fundamental general principle, but here again such a principle appears *sub silentio* rather than being precisely or more fully articulated.

A number of themes concerning the direct effect principle derive their impetus from V*an Gend en Loos*. First, the case marks the application of Community law not just in the legal relations of the Member States inter se, but also demonstrates the penetration or filtering down of Community law to the level of those persons in the secondary legal tier below, that is, individuals. Secondly, and as a corollary to the first principle just stated, the source of the direct effect principle is a particular instance of the implementation of Community law throughout the Member States of the Community. Thirdly, the direct effect principle has the consequence of diffusing its related principle of the supremacy of Community law over national law by drawing that principle into the secondary legal tier within the Community legal infrastructure. In the analysis which follows later on in this paper, further consideration will be given to the development of these principles, as well as the emergence and refinement of other basic themes that hinge upon the direct effect principle.

Direct Applicability and Direct Effect

It is necessary to differentiate the principle of direct applicability from the direct effect doctrine. It is trite to record that the meaning of and relationship between these two principles has given rise to a certain amount of misunderstanding in both the case law of the Court and in academic literature.[28]

The source of the controversy is the text and meaning of Article 189 of the Treaty, which is in the following terms:

> **Article 189**: In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

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26 Van Gerven, *supra* n.16 at 5. See also Hartley *supra* n.1 at 194 who identified the same process.

27 D Wyatt, "The Direct Effect of Community Social Law - Not Forgetting Directives" (1983) 8 *EL Rev* 241 at 246.

28 G Bebr, "Directly Applicable Provisions of Community Law: The Development of a Community Concept" (1970) 19 *ICLQ* 257 (cited as "Bebr, *Concepts*"), JA Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law" (1972) 9 *CML Rev* 425 (cited as *Winter*), J Steiner, "Direct Applicability in EEC Law - A Chameleon Concept" (1982) 98 *LQR* 229, Dashwood *supra* n.3 at 230, Hartley *supra* n.2 at 196-7 and Collins *supra* n.25 at 45.

The point of the controversy is that regulations are said to be "directly applicable" in all Member States. In contra-distinction, directives and decisions while sharing with regulations the legal attribute of being binding, nonetheless are not expressed to be directly applicable in the same fashion as regulations are. This controversy did not arise for consideration in Van Gend *en Loos* for the reason that the subject matter of that decision was a Treaty provision (Article 12) not a piece of secondary Community legislation such as a regulation, directive or decision.[29] In this paper it is proposed to do no more than to set out the nature of the controversy and to compare and contrast some of the conflicting opinions expressed by some commentators on the meaning and relationship between the principles of direct applicability and direct effect.[30]

The direct-applicability direct-effect controversy has engendered three main streams of thought. First, there a ...mentators such as Bebr and Toth, who treat the direct applicability and direct ...each other.[31] The second camp comprises probably the most num... ...own who hold that the two principles are quite di... ...ors such as Hartley and Steine... of reconciling the tw...

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Reaction to ... published in 19... argued that th... process where ... be translated ... enact legislat... applies direct...

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29 Hartley *su*... ...lation. Recomme... ...gal acts have a pe...

30 Hartley *s*... ...ure and features ...

31 Bebr *sup*... "'Direct applicat... ...ms of the Membe...

32 Winter ...

33 Hartley ...

34 Bebr *s*... ...escriptive, appro...

35 Case ...

36 Case ...

37 Stein...

38 Wint...

39 Wint...

of the meaning of direct applicability meant, in the context of Article 189, that regulations, expressed to be directly applicable, were valid and binding in the form promulgated by either the Commission or the Council. There was no subsequent need for Member States to further incorporate these regulations into the domestic legal sphere as the device of a regulation made this requirement otiose, providing of course, as there was, the prospect of calling in aid the principle of the supremacy of Community law over national law which of course was not difficult since the *Costa v. ENEL* decision.

The *Grad* and *SACE* decisions of the Court clearly establish that a decision and directive respectively can have direct effect, providing the test for direct effect is satisfied.[40] The path to a true understanding of Winter's position, which it is submitted is correct, is to recognise that directives contemplate the enactment of complementary legislation by Member States in order to execute the directives in question. That is to say, Article 189 attributes a binding effect to directives, which has as its corollary, the reflex that Member States must abide by and actually implement those directives. In other words, regulations, directives and decisions all share the feature that they create binding obligations, a point expressly recognised by Steiner.[41]

However, Steiner fell into error in maintaining that Winter's assertion that directives or decisions may have direct effects even if they are not directly applicable (that is, not incorporated into national law) is incorrect.[42] This error emerged from Steiner's having overlooked the relationship between Community law and national law and the priority accorded to the former by the case law of the Court. The correct result comes down to what is meant by "incorporated". Winter's use of the expression "directly applicable" is, in substance, a reference to what may be termed functional incorporation, that is, by virtue of their binding effect, directives and decisions do form part of the domestic legal order. On the other hand, Steiner's analysis on this point strongly suggests that Steiner had in mind formal incorporation by an act of the competent organ of a Member State of the obligations imposed on it by a given directive or decision.[43]

For all the academic disquiet on the direct applicability/direct effect dichotomy, the Court's approach is to treat the two concepts as broadly synonymous and to use the two interchangeably. Pescatore, then a judge of the Court, remarked extra-judicially of Winter's analysis:

> No doubt Winter's analysis is right, but I am wondering whether this distinction is not too subtle to be carried through systematically. So much for the theory.[44]

Commentators have observed that the Court has adhered to this practice consistently over time.[45] A prime example of this elision is the case *Defrenne v. SABENA*.[46] However, there are also instances where the Court has used the term "directly applicable" in relation to regulations consistently with the interpretation advanced by Winter. One such case was *Variola v. Ministry of Finance* where the Court said in its judgment that:

> The direct application of a regulation means that its entry into force and its application in favour or against those subject to it are independent of any measure of reception of national law.[47]

With hindsight, direct applicability within Article 189 of the Treaty is better understood as

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40 See the text above surrounding note 25 above for the direct effect criteria.

41 Steiner *supra* n.28 at 234.

42 *Ibid*, citing Winter *supra* n.28 at 437.

43 Steiner *supra* n.28 at 234 said "How can a law be enforceable by individuals with [sic] a Member State if it is not to be regarded as incorporated in that State? Is it not rather the binding nature of these obligations that removes the need for incorporating?" Ironically, this second sentence more correctly reflects what the writer has termed "functional incorporation" (ie, Winter's view) than Steiner's "formal incorporation" argument.

44 Pescatore *supra* n.18 at 164.

45 Hartley *supra* n.2 at 196, Kapteyn *supra* n.3 at 330, Steiner *supra* n.28 at 234-5 and Collins *supra* n.25 at 45.

46 Case 43/75 [1976] ECR 455 at 474.

47 Case 34/73 [1973] ECR 981. Somewhat ironically even in this excerpt the Court used "direct application" to mean "direct effect".

meaning the transformation of Community law into national law is unnecessary.[48] On the other hand, the direct effect principle itself is concerned with what is the consequence or effect of a Community legal provision (whether primary or secondary) which applies either of its own force or as a result of Member State implementation, in the relationship between Member State and the individual and, on occasion, between individuals of Member States. Here the operative test is whether an individual can rely on a particular provision of Community law before national courts.[49] In other words, direct applicability and direct effect are two related but separate legal principles.

Direct applicability deals with the question – when and in what form is a given Community legal provision part of the legal order of a Member State? The direct effect principle deals with a secondary but by no means less important principle of what is the effect of the directly applicable provision. Direct applicability is the logical precursor to direct effect.

The Nature and Consequences of the Direct Effect Principle

In this section of this paper, it is proposed to examine the nature and consequences of the direct effect principle.

It is surprising, given the extensive volume of academic literature on the direct effect doctrine, that comparatively little, if any, attention has been given by commentators to the nature of the direct effect principle. For the most part, learned analysis has centred upon an examination of the three elements that comprise the direct effect doctrine. Important and helpful though this analysis is, this paucity of academic examination of the nature of the direct effect doctrine is perhaps all the more reason why there is a need in this paper to examine the nature of the direct effect doctrine.

The scope of the present inquiry into the nature of the direct effect doctrine needs to be clearly delineated. The Court said in Molkerei-*Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn* that:

> It is necessary and sufficient that the very nature of the provisions of the Treaty in question should make it ideally adapted to produce direct effects on the legal relationship between Member States and those subject to their jurisdiction.[50]

This is only a means of shorthand for describing the three elements of the direct effect principle. To understand the nature of the direct effect doctrine requires first that the complex of its essential attributes be identified. An inquiry into the nature of the direct effect principle calls instead for an analysis of the composite result produced by such a doctrine.

The inquiry into the nature of the direct effect doctrine can take place from a number of perspectives. The first is to determine its essential attributes from the sum of its components. Unfortunately, this does not provide the answer. It is submitted that a better mode of determining the nature of the direct effect doctrine is to consider instead its source and genesis. In Van Gend *en Loos* the Court emphasised that the new legal order ushered in by the Treaty was not only meant to create or bring into a legal relationship the Community institutions themselves, on the one hand, and the Member States, on the other hand, but also the subjects of the new legal order were individuals. This is the concept of the penetration of Community law from the primary legal tier to the secondary legal tier. Just as the Treaty confers rights and obligations on both Community institutions and Member States, so the direct effect doctrine confers rights upon individuals which, as the Court has expressed it, are to become part of individuals' "legal heritage".[51]

It is precisely because certain provisions of the Treaty (or of other Community legislation) bring the Member States and their individual subjects into a legal relationship that it can be said a direct effect is produced. In other words, the direct effect produced where the three-pronged

48 Kapteyn *supra* n.3 at 330 made this plain.
49 *Ibid.*
50 Case 28/67 [1968] ECR 143 at 152, [1968] CMLR 187 at 217.
51 *Supra* n.1 at 129 (CMLR).

direct effect principle is satisfied is to bring Member States and their subjects into a legal relationship under the aegis of the Treaty where previously none existed. To state this conclusion in this form recognises that because the Treaty brought in train the limitation and transference by Member States of components of their competence (or powers) and sovereignty respectively to community organs (within the classic *Van Gend en Loos* formulation), a new legal relationship between Member States and their subjects for the purposes of Community law has been irreversibly created.

Van Gend en Loos, then, stands as authority for the proposition that the essential attribute or element of the nature of the direct effect doctrine is the creation of a new legal relationship consequent upon the inception of the Treaty. Providing the three direct effect criteria are satisfied in any given instance, the nature of the direct effect doctrine is to act as a bridge between primary (and in some instances secondary) Community legislation and the domestic law of the Member States. In this sense, the direct effect doctrine is a conduit diffusing Community law throughout the Community legal order. Inherent in this understanding of the direct effect doctrine is the perception that the principle, as well as diffusing Community law, has also hastened or brought forward its penetration into the domestic legal orders of Member States.[52]

If it is correct to argue the essential nature of the direct effect doctrine is the creation of a legal relationship between individuals, as subjects of Member States, and the Member States themselves in the context of Community legal rights, then the next issue to be addressed is the effects and consequences of this new legal relationship.

Before the sequel of direct effect is analysed, it is important to bear in mind that the creation of the direct effect doctrine by the Court coincided with a period of political inertia on the part of Community institutions and, in particular, the Council of Ministers. Korah has summed it up well by saying that the combined effect of the direct effect principle and the supremacy of Community law over national law has "... enabled Community law to develop even when little legislation was being adopted by the Council of Ministers".[53]

The effect and consequences of the doctrine of direct effect flow from its juridical nature. If the juridical nature of the direct effect doctrine is to bring two parties within the Community legal order into a legal relationship, then the effect of that doctrine must be found in that new legal relationship. Although it is only a linguistic point, the direct effect doctrine is itself concerned with the direct effect it has produced in that new legal relationship.[54]

Perhaps the most obvious effect of the direct effect doctrine is to fill a legal void brought into existence as a result of the conception of the Treaty. This may be described as the primary effect of the direct effect doctrine. The secondary effect, or effects, must be determined to complete this mode of analysis. This subsidiary inquiry invokes issues of competence and identification. As to identification, what are those secondary effects of the direct effect doctrine? The competence issue resolves itself into the question as to which organ is competent to determine those direct effects.

Under the rubric of identification, the case law or the Court has isolated a number of elements which, in aggregate, shed light on what are the precise effects of the direct effect principle.[55] In Van G*end en Loos*, the Court was content merely to identify the prospect of direct effect. The Court did not go further and actually flesh out that principle. The process of identification was taken further in the cases *Luck v. Hauptzollamt Koln*[56] and *Simmenthal SpA v. Amministrazione*

52 Although this was delayed in the case of provisions, such as Article 16, which deferred the binding effect of a Community legal obligation until the end of the transitional period (as to which, see Article 8(7)).

53 Korah *supra* n.5 at 69.

54 This emerges from *Van Gend en Loos* itself where the Court said "The prohibition [in Article 12] is perfectly suited by its nature to produce **direct effects** in the legal relations between the Member States and their citizens" (emphasis supplied): [1963] CMLR 105 at 130.

55 *Van Gend en Loos* [1963] CMLR 105 at 130.

56 Case 34/67 [1968] ECR 245.

Dello Finanze Dello Stato.[57] In *Luck*, the Court was faced with a preliminary reference from a German court which wished to know how it would give effect to the principle that Article 95, as a provision of Community law, overrides or prevails over an inconsistent national rule. The response of the Court was to hold that Article 95, being directly effective, precluded the operation of any national legal provision inconsistent with it.[58] The Court went on to say that Article 95:

> ... does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law.[59]

The implication is quite clear. The European Court wished to preserve the flexibility of national courts to match up the most appropriate remedy from national laws to the wrong suffered by the individual complaining that a directly effective provision has been infringed.

Indeed, the reluctance of the Court to dictate to national courts how that task should be undertaken is perfectly understandable if one bears in mind that the Court, in hearing these types of cases, does so under the preliminary reference procedure available under Article 177 (which restricts the Court to interpretations of, for the most part, primary and secondary Community legislation). Even if this procedure did not militate against the Court directing national courts how to apply national legal remedies, the simple fact of the matter is the Court in Luxembourg is not as well placed as national courts in applying domestic legal remedies to remedy wrongs suffered by individuals.

A more important statement of the effect of the direct effect principle emerged from *Simmenthal's* case. In *Simmenthal* the Court retreated from its pronouncement in *Luck* that national courts themselves were to be the final arbiters of how to give effect to directly effective Community legal provisions (or for that matter any Community legal provision). The reason for this partial retreat was that Italian law reserved for the Italian Constitutional Court exclusive jurisdiction to rule on the issue whether any provision of Italian law was inconsistent with Community law.[60] According to Bebr, this retreat meant that Community law, not National law, was the source to which recourse must be had to determine the effect of the Community legal rule.[61] The outcome then is that *Simmenthal* impacts quite significantly on the proposition that the Court is prepared to leave to national courts to determine in accordance with National law the appropriate remedies to grant in favour of an individual claiming infringement of his Community legal rights. *Simmenthal* clearly suggests that this is left to be dealt within the umbrella of Community law only. While the Court did not explicitly state this, it seems clear that recourse to National law can only be made if that National law and, in particular, that national legal remedy, was consistent with Community law itself.

A central tenet which in fact preceded S*immenthal* but which supports the approach of the Court in that case was *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel*[62] where the Court had stated earlier that directly effective Community rules prevail over national legal rules even when those national legal rules are contained in statutes enacted later in time, or even in a national constitution.

The second issue posed was which organ is competent to rule on the direct effects produced by a directly effective Community rule. The answer is the court or tribunal of a Member State hearing the relevant action during which the preliminary reference is made. Even though *Simmenthal* signalled that the Court would itself apply Community law to declare that an

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57 Case 70/77 [1978] ECR 629, [1978] 3 CMLR 263.
58 Bebr *supra* n.28 at 285 and Bebr, *Development of Judicial Control of the European Community*, Martinus Nijhoff Publishers, London (1981) at 603 (Cited as "Bebr, *Judicial Control*").
59 *Supra* n.58 at 251.
60 Bebr *Judicial Control supra* n.58 at 604.
61 *Ibid* citing *Simmenthal supra* n.59 in particular para 24 of the judgment (CMLR).
62 Case 11/70 [1970] ECR 1125 at 1134.

inconsistent national rule would not prevail over the former, it is still true that notwithstanding *Simmenthal*, the application of the directly effective Community rule falls, in the final analysis, to the national courts themselves. What the preliminary reference achieves, resulting in a decision of the court declaring a Community rule directly effective, is a judicial order binding the national court to make a further ruling consistent with the terms of the Court's own ruling. in this sense, the national court hearing the action acts as a conduit for the implementation of Community law.

The effects, then, of declaring a Community rule directly effective are twofold. First, it creates for national courts the binding obligation to give effect to that provision in accordance with its terms. This calls for an application by a national court of that provision in responding to a claim by an individual that a Member State (and, exceptionally, an individual) has infringed that individual's Community legal rights. The second broad effect of a directly effective provision is closely related to the first, and that is an inconsistent national rule is not applied. This reinforces the concept articulated in this paper that a directly effective provision has brought a Member State and one of its subjects into a new legal relationship under the auspices of Community law.

The consequences which flow from the nature and effect of the direct effect doctrine can be summarised as follows. First, integration of the various components of the Community has been facilitated. The contribution of the direct effect principle to this process lies largely in the fact that the doctrine has succeeded where political initiatives have either faltered or even failed.[63] Secondly, and as a more particular instance of the integration process just identified, the direct effect principle has also cemented the participation and involvement of individuals in the scheme of legal relations created by the Treaty.[64] This is closely allied to the theme which has surfaced constantly in the direct effect cases, namely that individuals need to be particularly vigilant in protecting their own rights.

In combination, this analysis of the nature, effect and consequences of the direct effect doctrine reveals that the doctrine itself refers to the creation of a new legal relationship where the three-pronged direct effect elements are satisfied. Where the doctrine applies, the direct effects produced are new legal relationships operating in a vertical plane between the Member State and its subjects. The doctrine itself has reinforced European integration of Community institutions, Member States and individuals themselves and, at the same time, enhanced the protection of individual rights recognised under Community law.

Directly Effective Secondary Community Legal Acts

In this section of this paper, it is proposed to shift the focus from examining the criteria for direct effectiveness of a Community legal act, and the nature, consequences and effect of direct effectiveness, to examine instead which types of secondary Community legal acts (regulations, directives, decisions, recommendations and opinions) are directly effective. Much of the preceding discussion has simply referred to Community legal acts or rules in general without specifying which kind have direct effect. The accent will be on the nature of these various types of secondary Community legal acts to determine whether or not they are directly effective and, if so, under what circumstances and to what extent. This mode of inquiry is particularly useful given that both the Court and commentators have distinguished between the so-called "vertical effect" of certain Community acts and their "horizontal effect".

At the outset, perhaps the most obvious remark to make concerning the direct effectiveness of Treaty provisions themselves is that the Treaty itself does not prescribe direct effect to any Treaty provision.[65] The same can be said of secondary Community legislation. Mention has been

63 Dashwood *supra* n.3 at 232.

64 *Ibid.*

65 Hartley *supra* n.2 at 195. Collins *supra* n.25 at 122-126 has a convenient table of Treaty provisions which have been held either directly effective or not. Collins also sets out his views on the direct effectiveness of those Treaty provisions which have not been considered by the Court.

made earlier in this paper of the distinction between horizontal effect and vertical effect. The notion that a Community legal rule possess both vertical and horizontal effect is an important reflex of the scope of the direct effect doctrine. It was argued above in this paper that the central theme of the direct effect principle is that it brings into a legal relationship two persons who, before the inception of the Community, were not in that legal relationship. To state that, for example, a Treaty provision has both a vertical and horizontal effect in a shorthand means of expressing the principle that the direct effect doctrine operates in at least two planes. The vertical plane is a reference to the legal relationship between Member States and individuals as subjects of the Member States. The horizontal plane looks at the direct effect principle from the viewpoint of whether or not it can create or impose a legal relationship upon individuals.[66]

The celebrated *Van Gend en Loos* case itself illustrates the vertical effect of a Treaty provision such as Article 12, that is to say the Court recognised the existence of a legal relationship between The Netherlands and one of its legal subjects, and further, it gave effect to that legal relationship by holding that Article 12 prohibited The Netherlands exacting a higher customs duty on its subjects in contravention of Article 12. The vertical effect of Treaty provisions such as Article 12 is not in dispute. However, a question that is very much germane is whether Treaty provisions universally possess the attribute of horizontal direct effectiveness.

In this section of the paper it is proposed to consider whether regulations, directives and decisions contained within Article 189 may be directly effective and, if so, in what circumstances. No attention will be given to recommendations and opinions which Article 189 expressly states do not have any binding force (these may, however, have persuasive force).

Section 5(a) – Regulations

Article 189 empowers the Council and the Commission to promulgate regulations. Article 189 says further that regulations are to have "general application", by which it is meant the scope or ambit of a regulation is only to be restricted by its subject matter. In other words, there are no intrinsic spheres into which regulations cannot penetrate if their subject matter so admits. In the scheme of secondary Community legislation, a regulation may be equated in scope and nature to an act having legal force emanating from a legislature (although the analogy is not perfect or complete). The second feature ascribed to a regulation is its effect, which Article 189 says is "binding in its entirety". Superficially, the usual meaning of that expression might not be expected to give rise to any problems. It seems probable, however, that in the context of Article 189 the reference to "binding in its entirety" in the case of a regulation, is better understood by contrasting it with the position of a directive. Article 189 provides that a directive is binding as to the result to be achieved by that directive, but that Member States are granted a measure of discretion as to the forms and methods by which to carry out the otherwise binding result. This means that in the context of Article 189, the reference to "binding in its entirety" means that Member States and their organs do not have any choice in the forms or methods in which to implement a regulation. In other words, not only is the result dictated by a regulation binding, but so too are the forms and methods prescribed obligatory.[67]

Academic commentators are divided on the question whether a regulation must always be directly effective. Kapteyn argued that the nature and function of a regulation meant it has direct

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66 R Barents, "Some Remarks on the 'Horizontal' Effect of Directives" *Essays in European Law and Integration* ed D O'Keefe & HG Schermers Kluver-Deventer, The Netherlands (1982) at 97.

67 Manner and form requirements attach to regulations under Article 191. Regulations must be published in the Official Journal of the Community and unless a different date is specified, they enter into force on the twentieth day following publication. Usually regulations have prospective effect, but exceptionally, retroactive effect has been allowed providing retrospectivity is necessary for the purpose of the regulation to be achieved and the legitimate expectations of those persons affected are preserved or respected - see *Hartley*, supra n.2 at 141-142. Also, Article 190 imposes another formal requirement, namely that a regulation must state the reasons on which it is based and refer, where necessary, to any opinion or proposal of a Community institution leading to its adoption.

effect always.[68] In contrast, Winter argued that regulations are automatically directly applicable but that they are not necessarily directly effective.[69] It is submitted that Winter's view is to be preferred since to accept unequivocally Kapteyn's view would be to hold that the form of a Community legal rule, such as a regulation, is decisive in determining its legal nature or effect. This runs counter to the Court's holding in the case *Confederation Nationale des Producteurs de Fruits et Legumes v. Commission*,[70] where the Court laid down that the purpose and content (or in common law parlance, the substance) of a Community measure rather than its official description or designation (or form) is the determinant.[71]

The direct application that Article 189 enjoins in the case of regulations should not be allowed to obscure the fact that, on occasion, regulations do invoke the assistance of organs of the Member States in the implementation of the legislative programme enshrined in a regulation. Even though such a regulation is "binding in its entirety" within Article 189, in such a scenario the result is the creation of somewhat generally expressed legal norms or standards of conduct. Even if a regulation is couched in this fashion, it follows from Article 189 that a regulation dictates the forms or methods by which that regulation will be implemented.

Even though one might expect that a regulation is normally directly effective because it can create a binding legal obligation by imposing a new legal relationship between the legal persons subject to that regulation, it is still necessary for the Court to evaluate the direct effectiveness of any given regulation before an individual can rely upon that regulation in proceedings before a national court. Advocate General Warner said in the case *R v. Secretary of State for Home Affairs, ex parte Santillo*[72] that "one can point to numerous examples of provisions of regulations that confer no direct rights on private persons",[73] the corollary to which is that the direct effect principle is all the more necessary if individuals are to gain the protection of legal rights enshrined in those regulations.

It is submitted that as a rule of thumb, regulations should be generally considered directly effective, providing of course they satisfy the direct effect principles laid down in the case law of the Court. The Court's general approach to regulations, as much as to any other Community rule, on the question of its direct effectiveness is summed up in the Court's dictum in the *Van Duyn v. Home Office*[74] decision where the Court said: "... it is necessary to examine, in every case whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member-States and individuals".[75] This dictum throws into sharp relief the question whether a regulation always has horizontal effect. The case law of the

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68 Kapteyn *supra* n.3 at 339. Some support lies in the dictum of the Court in *Bussone v. Minister for Agriculture & Forestry* Case 31/78 [1978] 3 CMLR 18 at 31 where at para 28@ the Court said "a regulation shall have general application and shall be directly applicable (para 29). By reason of its nature and its function in the system of the source of Community law, therefore, a regulation has direct effect".

69 Winter *supra* n.28 at 436. The Opinion of Warner AG in Case 31/74 *Filippo Galli* [1975] ECR 47 at 70 also recognises this possibility.

70 Cases 16-17/62 [1962] ECR 471, [1963] CMLR 160.

71 Bebr *supra* n.28 at 290 expressed this point thus: "In other words, the material content of a regulation and not its form assures its direct application [sic]." Cf N Green, "Directives, Equity and the Protection of Individual Rights" (1984) 9 EL Rev 295 at 302 who said "It is submitted that it is a mistake to envisage the legislative instruments permitted by the Treaty in terms of their substance" in the midst of developing a convincing argument to the effect that a Community institution might adopt a directive to implement a detailed or exhaustive legal regime because it wanted the Member States to re-cast that regime in the most appropriate domestic legal framework and yet might also adopt a regulation in similarly exhaustive terms to circumscribe circumvention by the Member State.

72 Case 131/79 [1980] ECR 1585, [1980] 2 CMLR 308. On the role of the Advocate General in the European Court of Justice, see A Dashwood, "The Advocate General in the Court of Justice of the European Communities" (1982) 2 *Legal Studies* 220, J-P Warner, "Some Aspects of the European Court of Justice" (1976) 16 *Journal of the Society of Public Teachers of the Law* 15 and Hartley *supra* n.2 at 52-54.

73 *Santillo* case 131/79 [1980] ECR 1585 at 1608.

74 Case 41/74, [1974] ECR 1337, [1975] 1 CMLR 1.

75 *Ibid* at 16 (CMLR).

Court does not support such a proposition to be stated in such wide terms. *Gemeenschappelijke Verzekeringskas 'de Sociale Voorzorg' v. WH Bertholet*[76] admits that regulations can have a horizontal effect but this is only where the nature of the regulation brings two Community individuals into a legal relationship that national courts are bound to recognise and uphold.

It is not the horizontal effect of regulations which has excited the attention of both the Court and commentators, but rather the question whether, and if so to what extent, the institutions of a Member State may be authorised to re-enact the provisions of regulations in the form of domestic law. The reason this issue is germane at all is a product of Article 189 which provides that regulations are directly applicable and binding in their entirety. If regulations can be both vertically and horizontally directly effective, then the capacity of Member States to either promote or inhibit the broad effect of those regulations if transformation into the domestic law of Member States is permitted, is obviously of major importance. The issue then, shifts from the more fundamental level of inquiry of exploring and determining the nature of a regulation to the secondary plane of inquiry to consider the consequences of a regulation on the legislative competence of a Member State in giving effect to that regulation.

Although regulations are generally applicable and are binding, not only as to the result to be achieved but as to the forms and methods to achieve that result, at the same time regulations may invoke the assistance of the institutions of a Member State to achieve that objective. The issue is not whether it is improper for a regulation to invoke the assistance of the authorities of the member State, but rather what effect does this have on the third element of the direct effect principle, which is concerned with the extent to which a Community regulation may be subsumed in the exercise of a measure of discretion by a Member State authority before it loses its direct effectiveness.

This issue is not one the Court has addressed directly. Rather, it is masked behind another line of principle which holds, in effect, that a regulation does not usually call for a Member State to transform its content and binding effect into national law. This resolves itself further into the proposition, supported by the Court's judgment in *Politi Sas v. Ministero delle Finanze*,[77] that the effect of a regulation is to "... prevent the implementation of any [national] legislative measure even if it is enacted subsequently, which is incompatible with its provisions".[78] It should be recognised, however, that, in the main, regulations do not call for the Member States to pass complementary legislation or to facilitate the application of the regulation since Article 189 ascribes to a regulation both a binding result and a binding mode of implementation. In other words, it is only in marginal cases that this problems is likely to arise.

These remarks allow the result of the metamorphosis of the implementation issue to be readily seen. Can a regulation allow a Member State to adopt or implement measures to carry into effect the purpose or scheme of a regulation without infringing the third element of the direct effect principle? A qualified affirmative answer can be given to this question. The starting point is the Court's pronouncement in *SpA Eridania-Zuccherifici Nazionali v. Minister of Agriculture and Forestry*.[79] In this case the Court pointed out that the concept of direct applicability did not by itself prevent a regulation from empowering a Community institution or a Member State from taking implementing measures to effectuate that regulation. In that process, there is a hidden policy agenda, from the standpoint of the Court, that those national implementing measures must not obscure or mask the position of the regulation as emanating from Community law.[80] This policy became more overt in the case *EC Commission v. Italian Republic*,[81] where the Court held that:

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76 Case 31/64 [1966] CMLR 191.
77 Case 43/71 [1971] ECR 1039, [1973] CMLR 60.
78 Ibid at 82 (CMLR).
79 Case 230/78 [1979] ECR 2749.
80 Hartley *supra* n.2 at 197. Collins *supra* n.25 at 75 expresses a similar idea saying "No procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it".
81 Case 39/72 [1973] ECR 101

> ... all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community regulations and of jeopardising their simultaneous and uniform application in the whole Community.[82]

In this case, the Court was saying that implementation per se is not prohibited, although, one needs to read into this statement the obvious qualification that implementation is only possible where the regulation itself expressly or impliedly requires implementation.[83]

Drawing the threads of this analysis together, it is clear that the implementation question does not directly relate back to whether or not the third element of the direct effect principle is satisfied. The central question has been redefined and as recast it is: what effect are implementing measures allowed to have on the Community nature of a regulation? The answer is fairly obvious – none. If implementing measures are called for, whether expressly or by implication, in a regulation, it is because the subject matter of the regulation necessitates the assistance of the Member States. In practical terms, this particular problem has not been measured up against the direct effect elements and, in particular, the third element, principally because the Member State in truth has not been given a measure of discretion in deciding whether or not to implement the regulation. Because the regulation is binding in its entirety, then a Member State is obliged, as the corollary of that binding nature, to give effect to the regulation and implement it in the manner called for by the regulation itself.

The major concern of the Court has been to ensure that the "*effet utile*" of Community law has not been diminished because of a possible uneven implementation by less zealous Member States. To sum up: in the context of regulations themselves, the direct effect principle is normally satisfied. However, where on occasion the assistance of Member States is called for in the implementation of a regulation, then to reinforce the direct effectiveness of a regulation, the Court focuses instead on dismantling any barriers erected by Member States to inhibit a complete and uniform application of Community law. This suggests that the principal concern of the Court is not the nature of the direct effect doctrine in the context of regulations, but rather the consequence of a directly effective Community regulation in the domestic legal order.

Section 5(b) – Decisions

Article 189 provides that a decision of the Council or Commission be binding in its entirety upon those to whom it is addressed. A decision may be differentiated from a regulation in terms of its addressee. The subject of a decision is, more often than not, an individually addressed legal obligation binding only on the intended recipient, which can be a Member State or an individual. Regulations tend to be addressed at large. The type of direct effect produced by a decision, whether horizontal or vertical, depends on the identity of the addressee. A decision addressed to an individual by its nature poses the question whether or not a directive can be horizontally directly effective.[84] On the other hand, a decision addressed to a Member State raises the prospect whether or not a decision can be both vertically and horizontally directly effective.[85]

In the case *Grad Franz v. Finanzamt Traunstein*,[86] the Court held that a decision could have direct effect. At issue in *Grad* was whether a decision addressed to Member States created direct

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82 *Ibid* at 112.

83 Hartley *supra* n.2 at 199, Kapteyn *supra* n.3 at 338-339 makes the same point.

84 Kapteyn *supra* n.3 at 339 (at n.341) submits that one should eschew using the term "direct effect" in the case of individually-addressed decisions since the decision, by its nature, is expressed in concrete terms and with a high degree of specificity, and thus impinges directly in the relationship between the issuing Community institution and the individual.

85 A decision, under Article 191, needs only to be notified to its addressee. It takes effect upon notification. Interestingly, Collins *supra* n.25 at 82 asserts that a decision addressed to an individual partakes of an administrative character, rather than a legislative or quasi-legislative nature. This observation seems to overlook the binding nature of a decision under Article 189.

86 *Supra* n.38.

effects that could be relied upon by individuals. A Council decision of 1965 determined that when a common turnover tax system (or value added tax system) had been adopted by the Council and brought into force in the Member States, that common turnover tax system was to be applied to many economic sectors including road freight haulage. Consequently, a directive in 1969 delayed the introduction of the common turnover tax system until 1 January 1972. In the meantime, the Federal Republic of Germany had introduced a value added tax with effect from 1 January 1968. The plaintiff argued that the introduction of the common turnover tax system was designed to replace specifically imposed taxes on the road freight haulage industry and that this should, in the case of the Federal Republic of Germany, be effective from the date that State introduced such a tax system notwithstanding that the relevant Council directives enjoined that the common turnover tax system was only to be applied uniformly throughout the Community when the relevant deadline had passed (1 January 1972). The Court did not accept the plaintiff's argument on this point, which meant that despite the timely introduction of the common turnover tax system by the Federal Republic of Germany, the plaintiff could not rely on its provisions unless and until a directive issued by the Council came into effect on 1 January 1972.

Although the plaintiff's main submission was unsuccessful, the Court did lay down a number of propositions which have given subsequent litigants some comfort on the issue of whether or not decisions can have direct effect. Two relevant portions of the Court's judgment may be extracted to show the basis for and development of the Court's reasoning:

> It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision.
>
> Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the Courts, may be the same as that of a directly applicable provision of a regulation.[87]

Some observations on these dicta are not inapposite. First, the Court used the common element of binding effect attributed to both decisions and regulations to infer that, as a matter of principle, a decision might be directly effective. Interestingly, the Court used the formula "persons affected" as suggesting, in a loose sense, some form of *locus standi*. Secondly, despite their separate natures, the Court assimilated the "end result" of both decisions and regulations to each other. Thirdly, despite the difference in the scope of the binding nature of a regulation and a decision, both are capable of being directly effective. The obvious question to flow from this analysis is what are the criteria the Court has prescribed in determining whether or not a decision could be directly effective? The formulation the Court adopted was in line with earlier case law of the Court on the threshold criteria for a directly effective provision, namely that the obligation had to be unconditional and sufficiently clear and precise to be capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction. On the facts, the entry into force of the Council decision was deferred until 1 January 1972 which meant that direct effectiveness of that Council decision was deferred, not impeded, which did not militate against the decision's direct effectiveness.[88]

The direct effect produced in *Grad* was of the vertical direct effect nature. Can a decision produce a horizontal direct effect? Article 189 itself says that a decision is only binding on those to whom it is addressed. There appears to be no decision of the Court where the Court has ruled that a decision may have horizontal direct effectiveness, although there is a statement by Advocate General Reischl in *Unil-it SpA v. Amministrazione Dello Finanze Dello Stato*[89] to support such a proposition. In principle, it seems that because of the narrowly-focussed binding

87 *Ibid* at 837 (ECR).
88 Kapteyn *supra* n.3 at 340.
89 Case 30/75 [1976] ECR 1419 at 1434. See too Hartley *supra* n.2 at 212.

nature of a decision, that it should only be able to be relied upon by an individual who is directly affected or directly concerned with the subject matter of the decision addressed to the Member State.

Finally, there is a class of case where Community rules are implemented by a combination of, say, a regulation and a decision. Such a combination was at the heart of the decision of the Court in *Toepfer KG and Getreideimport Gesellschaft GmbH v. EEC Commission*.[90] The facts were that a decision was taken pursuant to the provisions of a Council regulation. That regulation further provided that the decision was effective immediately. The Court held, in effect, that the directly effective nature of the regulation was "grandfathered" (to adopt a form of speech appearing in tax jurisprudence) down to the level of the decision and, therefore, the decision itself was directly effective. Commentators such as Bebr and Collins have treated *Toepfer v. Commission* with some reserve, on the basis that the case actually turned on the issue of *locus standi* of an individual in challenging the lawfulness of a secondary Community legal act (such as a regulation or decision) for the purposes of Article 173 where the formulation is that *locus standi* does exist if the regulation or decision is of "direct and individual concern" to the Community individual.[91] It may therefore be concluded that there is no direct authority in point establishing that a decision, by its terms and effect, is horizontally directly effective standing alone. Nonetheless, in concert with a regulation, a decision may be directly effective because it is within the umbrella of an enabling piece of secondary Community legislation which is itself directly effective.

In summary, *Grad* clearly establishes that decisions may be vertically directly effective. There are no cases of the Court where it has ruled that a decision may be horizontally directly effective, which is a result that, in essence, flows from the basic nature of a decision as being an individually addressed secondary Community legal act intended to be binding only on those to whom it is addressed.

Section 5(c) – Directives

From an intellectual viewpoint, the direct effectiveness of directives provides the most fertile source for analysis of the three types of secondary Community legislation considered in this paper. It is trite to record that the direct effect doctrine in the context of directives has been the most closely examined area of the direct effect doctrine in the academic literature. Although it is fair to say that the area that has received the most attention in this controversy is the so-called horizontal effect of directives, there are also, at the same time, other areas of the direct effect principle in the field of directives that are equally deserving of attention, including the theoretical basis for directly effective directives. The approach that will be adopted in this section of this paper is to consider, first, the nature of and the juridical basis for the direct effectiveness of directives. This will provide a platform for the subsequent examination of the scope of the direct effect doctrine in the realm of directives, including the related concepts of vertical direct effect, inverse vertical direct effect and the controversial horizontal direct effect. This study will then allow an analysis of and proper recognition of the themes that are interwoven in the minutiae of both case law and academic opinion on the direct effectiveness of directives.

The starting point of any discussion on the direct effectiveness of directives must be the nature of directives and their place in the scheme of secondary Community legislation. Once again, Article 189 must be invoked and it sets out in rudimentary form both the nature and the effect of a directive in the following terms:

> **Article 189(3)**: A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

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90 Cases 106-107/63 [1965] ECR 406, [1966] CMLR 111.

91 Bebr *Concepts* 297-298 and Collins *supra* n.25 at 82.

This legal formula for a directive, by its terms, invites immediate comparison with the nature and effect of a regulation. Directives and regulations share this attribute, namely that they are binding. However, it is the binding scope of a regulation and a directive which provides the point of departure between the legal effect of both types of provisions. What separates regulations from directives is that the binding scope of a regulation is much wider than that of a directive. A regulation is binding in its "entirety" (Article 189) and, in contrast, a directive is only binding as to the result to be achieved and not the means to that end.[92] This difference in nature has led one commentator, Morris, to conclude that directives are a much weaker form of legislation than regulations.[93] Although there is this structural weakness inherent in directives, in that the choice of forms and methods a Member State has in implementing those directives is within its discretion, at the same time it should be appreciated that in a functional sense what unifies both directives and regulations (and for that matter decisions) is the fact that they are binding Community legal acts.

There is no utility in arguing about the immediate effect of a directive. Article 189 clearly lays down that a directive imposes on a Member State to which it is addressed a binding obligation to carry into effect the matters enshrined in that directive.[94] In contrast, there is greater opportunity for debate in considering the theoretical basis for directly effective directives. This inquiry eschews arguing from the standpoint of what are the effects of a directly effective directive (which is a matter going to the scope of the issue) to looking behind the self-evident binding nature of a directive to isolate and understand those factors which, in the first place, result in a directive having a binding effect, apart from simply the text of Article 189(3). Before this aspect of the inquiry is developed further, however, it is necessary to digress briefly and establish a basis for arguing that directives can have a direct effect in the first place.

The Court's decision in *SACE v. Italian Ministry of Finance*[95] established that a directive could, in principle, have direct effect. Commentators have differed as to what they consider is the correct theoretical basis for the direct effect of a directive. To some extent, this difference has been a reflex of what has been seen to be a fundamental shift in the Court's thinking on the issue. It needs to be borne in mind that the reason why the Court would need to find such a theoretical foundation for the direct effect of directives is the requirement that a directive is addressed to Member States under Article 189. The shape of the problem is quite self-evident – if a Member State is an addressee of a directive, how is it that a direct effect (that is, the creation of a legal relationship between a Member State and one of its subjects) is created, and how consistent with the definition of directives in Article 189 is the direct effect doctrine.[96]

The first theoretical model advanced by the Court to justify the direct effectiveness of directives was to expand the application of the "*effet utile*" principle which was a ground relied on to hold that Treaty provisions themselves could have a direct effect.

Although by no means the first case to rely on the effectiveness principle, it is probably true to say that the *Simmenthal* case represents the high-water mark of this theoretical foundation so far as it underpins the direct effectiveness of Treaty provisions.[97] It is only a small step from applying the effectiveness principle to Treaty provisions to applying it to directives, and this

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92 PE Morris, PW David, "Directives, Direct Effect and the European Court: The Triumph of Pragmatism" [1987] *Business Law Review* 85 and 116 at 85.

93 PE Morris, "The Direct Effect of Directives - Some Recent Developments in the European Court" [1989] *Journal of Business Law* 233 and 309 at 234.

94 Morris & David *supra* n.94 at 85.

95 Case 33/70 [1970] ECR 1213, [1971] CMLR 1. Dashwood *supra* n.3 at 239 argued that *SACE* established a narrower principle, viz that the use of a directive to fix a deadline for the entry into force of another Community legal instrument from having direct effect: See too Hartley *supra* n.2 at 201 in the same vein. *Van Duyn supra* n.76 marks the development of the direct effect of a directive on a "stand alone" basis.

96 S Prechal, "Remedies After *Marshall*" (1990) 27 CML Rev 451 at 453.

97 *Supra* n.59 at 284 para 24 (CMLR) of the Court's reasons for judgment.

emerged, in a nascent form in any event, in *SACE* itself. Given the aggressive expansion and use by the Court of the direct effect principle in the first two decades of the Court's existence, it is not really surprising, when viewed in hindsight, that a theoretical justification for the direct effect of directives is the effectiveness principle. After all, this period can be rationalised as an attempt by the Court to use the twin principles of the supremacy of Community law over national law and the direct effect of certain Community legal principles to stamp its authority upon Community law and, at the same time, to secure, as it were, a diaspora of the Court's European ethos throughout the layers of the Community legal order.[98]

A second theoretical model on which the Court has come to rely upon as a theoretical basis for the direct effect of directives is what has been termed the estoppel theory of directives.[99] This shift in theoretical basis first emerged in *Pubblico Ministero v. Ratti*[100] in 1979. Ratti was an Italian national who was the principal of a firm selling solvents and varnishes in Italy. Two directives had been adopted governing the packaging and labelling of solvents and varnishes. Both directives laid down a deadline as the outer limit of the time period within which the Member States, to whom the directives were issued, had to comply with its terms. Signor Ratti decided that his firm would comply with both directives, even though neither had been implemented by the Italian Government and so, accordingly, there was no corresponding Italian legislation in force adopting the requirements of the directives. As events turned out, Ratti was prosecuted for failure to comply with existing Italian law and in his defence he argued that it was only necessary to comply with the directives and not the provisions of Italian law.[101] It is also material to note that at the time of the prosecution, the deadline for the solvent directive had passed but the deadline for the implementation of the varnish directive had not.

On a reference from the Milanese Court before which Ratti was prosecuted, the European Court held that the Italian Government was unable to rely on its prosecution founded on the directive which it had failed to implement, and which directive the deadline for implementation had passed. The Court said:

> ... a Member State which has not adopted the implementing measures required by the directive within the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.[102]

This particular dictum has been seen as the genesis of the estoppel theory of directives.[103] This theoretical justification put forward in *Ratti* has also been characterised as an instance of inverse vertical direct effect.[104] This inverse vertical direct effect aspect of the direct effectiveness of directives generally has come to the fore of other decisions of the Court, including *Pretore di Salo v. Persons Unknown*[105] and in *Officier van Justitie v. Kolpinghuis Nijmegen BV*.[106]

Wyatt has argued that the basis upon which a Community measure, be it a Treaty provision, regulation or directive, is directly effective is not estoppel but rather, in effect, Article 5 which obliges Member States (including courts) to take all appropriate measures to fulfil the Treaty and any act done pursuant to the Treaty.[107] More particularly, Wyatt argued that the estoppel theory

98 Pescatore *supra* n.19 at 157 referred to the Court's ethos of "une certaine idee de l'Europe" as a "motivating factor in the Court's reasoning in *Van Gend en Loos* in laying down the doctrine of direct effect in the first place".

99 Green *supra* n.73 at 302-309, D Curtin, "The Province of Government: Delimiting the Direct Effect of Directions in the Common Law Context" (1990) 15 EL Rev 195 at 196-197, Morris *supra* n.95 at 310, Kapteyn *supra* n.3 at 342 (at n.355) noted the Court has not actually employed the word "estoppel" consequently, the principle is used in a functional, not descriptive, sense.

100 Case 148/78 [1979] ECR 1629, [1980] 1 CMLR 96.

101 Hartley *supra* n.2 at 204-205.

102 *Ibid* at 110 (CMLR).

103 Green *supra* n.73 at 303, Morris & David *supra* n.94 at 116, Curtin *supra* n.101 at 197.

104 A Arnull, "Having Your Cake and Eating it Ruled Out" (1988) 13 EL Rev 142 at 44.

105 Case 14/86 [1989] 1 CMLR 71.

106 Case 80/86 [1989] 2 CMLR 18.

107 Wyatt *supra* n.27 at 246.

directives masked the application of the doctrine of legal certainty, meaning that a directive ught not be horizontally directly effective because where a directive has not been implemented in individual should only observe corresponding national law, not the unimplemented directive.[108] It is possible to rationalise Wyatt's argument on the basis that Article 5 and the doctrine of legal certainty are not necessarily inconsistent with the estoppel principle. The latter is a correlative or reflex of the Article 5 thesis since a Member State is not permitted to rely on its own wrong in denying vertical direct effect. In other words, the estoppel principle is directed primarily to vertical directly effective directives. The Article 5 thesis is really a more abstract paraphrase of the estoppel principle, except that it applies in the horizontal dimension.

The most obvious question which flows from these first two competing models for the theoretical basis of the direct effect principle in the context of directives is whether any different consequences flow from whichever model is preferred. One commentator, Curtin, has argued that if the effectiveness principle is seen as the theoretical underpinning of the direct effect doctrine in the context of directives, then this is an indicator that a directive may well be seen by the Court as invested or endowed with horizontal direct effectiveness. By way of contrast, if the theoretical basis for the direct effectiveness of directives is held to be the estoppel principle, then it flows from the nature of estoppel that the estoppel can only be asserted against the person who has generated it, which as Ratti shows, is the Member State as the addressee of the directive.[109] As will be shown below, it was this restrictive estoppel justification which provided the intellectual framework for the Court to hold in the later seminal decision of *Marshall v Southampton & South-West Hampshire Area Health Authority*[110] that directives lacked horizontal effect. The M*arshall* case will be examined in more detail below.

Article 189 plainly invests Member States with a measure of discretion in implementing the otherwise binding result contained within a directive issued by a Community institution. It will be recalled that the third element of the direct effect test adopted by the Court is that the Community legal provision must not confer any discretion in its implementation which, if present, detracts from the direct effectiveness of that Community measure. Consequently, it becomes necessary to focus upon the Court's attitude to the application of this third element of the direct effect test in the context of directives. The elements of the direct effect test for directives emerge clearly from *Marshall's* case, where the Court said:

> Wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.[111]

It is clear from this dictum that the discretion element which is normally a hallmark of the direct effect test for Community measures is absent. Again, although the Court has not used the language of estoppel, in a functional sense the principle which underpins this dictum uses estoppel as the justification for the direct effectiveness of a directive. Although some commentators have seen the adoption of the estoppel as the theoretical basis for the direct effectiveness of directives as a retrograde step, it is also possible to view this development as an instance of the maturation of the direct effect principle.[112] Two reasons may be advanced for this view. First, in the first two decades or so of the Court's existence, the Court was mainly concerned to ensure that the principles of Community law were firmly established in the Community legal infrastructure. This process, of course, took some time to be achieved and so far as the direct effect test is concerned,

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108 *Ibid.*

109 Curtin *supra* n.101 at 197.

110 Case 152/84 [1986] ECR 723, [1986] 1 CMLR 688.

111 *Ibid* at 748 (ECR), and at 711 para 46 (CMLR) citing in particular Case 8/81 *Becker v. Finanzamt Munster-Innenstadt* [1982] ECR 53, [1982] 1 CMLR 499 as support for this proposition.

112 Green *supra* n.73 at 305, Curtin *supra* n.101 at 197, Morris & David *supra* n.94 at 86.

decisions such as *Ratti* and *Becker v. Finanzamt Munster-Innenstadt*[113] mark the point at which the Court felt it was able to dispense with the effectiveness principle as a theoretical basis for direct effectiveness. Secondly, in cases such as *Ratti* and *Pretore di Salo*, the Court was faced with the particular circumstances where Member States were purporting to rely upon their own failure to implement directives. This gave the Court occasion to isolate and rely on a narrower basis for the direct effectiveness of directives. Ironically, however, as leading commentators have recognised, the estoppel basis for the direct effectiveness of directives is, at the same time, the Court's response to hostile national courts and tribunals who particularly in the field of directives have, in some instances, been loathe to recognise even the vertical direct effect of directives.[114]

It remains to consider one further aspect relating to directives. In contrast to the position of non-implemented directives (such as *Ratti*), where the directive has been implemented it is not to be expected that it need have direct effect. After all, the authorities of the Member States have implemented the directive and hence done what is required of them by Community law. However, even in such a circumstance the Court has laid down that the manner in which a discretion of a Member State has been exercised in implementing a directive is subject to judicial review. This emerged from *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen* and *Enka BV v. Inspecteur der Invoerrechten en Accijnzen Arnhem.*[115] In the *Verbond* case, the Court held that even where a directive has been implemented by a Member State, it is still possible for an individual to rely on that directive to see whether or not the Member State has strayed beyond the boundaries of its discretion endowed by such a directive, which process of judicial review takes place not at the Community level of proceedings, but rather in the proceedings before the national court.[116] In other words, this is an instance of indirect judicial review on the part of the European Court of Justice.

In light of this analysis on the basis of the direct effectiveness of directives, it is now possible to turn from its juridical nature, and to consider the scope of the direct effect principle in the context of directives. In this field three areas present themselves for study: vertical directive effect, inverse vertical direct effect and the horizontal direct effect of directives.

In *Enka*, the Court had occasion to consider whether or not a provision in a harmonisation directive was directly effective. This provided the Court with the opportunity to hold that a directive could be directly effective in its own right, and not when it was a derivative provision to a fundamental Community right embodied in the Treaty, such as the free movement of persons (such as was at issue in the *Van Duyn* case).[117] It is now a matter of history that the Court in *Enka* followed its earlier reasoning in the *Verbond* decision, and held that a provision of a directive could be directive in the vertical sense, that is, it could create a legal relationship between Member State and the individual which the individual could invoke in his, her or its favour in proceedings before a national court.

An antecedent legal development to the direct effectiveness of "stand alone" directives exemplified by cases such as *Verbond* and *Enka*, is the situation whether a directive based on a fundamental Treaty provision which has been held to be directly effective, also endows its

113 Becker *supra* n.113.

114 In particular M Simon & FE Dowrick, "Effect of EEC Directives in France: The Views of the Conseil D'Etat' (1979) 95 *LQR* 376. The basis for this approach on the part of the French Conseil D'Etat is the view that Community law does not prevail over national law. However, since the study by Simon & Dowrick, the Conseil D'Etat has reversed its earlier position. In the case *Re Boisdet* [1991] 1 CMLR 3 the Conseil D'Etat recognised the supremacy of Community law (*in casu* Regulation 1035/72/EEC) over subsequently enacted French law. A similar situation prevailed in Italy also until comparatively recently with the Italian Constitutional Court. However, even that Court has now accepted the supremacy of EEC law over Italian law - see the study by G Gaja, "New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law" (1990) 27 CML Rev 83.

115 *Verbond* Case 51/76 [1977] ECR 133, 1 CMLR 413, *Enka* Case 38/77 [1977] ECR 2203, 2 CMLR 212.

116 See too, *Enka* Case 38/77 [1977] ECR 2203, [1978] 2 CMLR 212.

117 Morris & David *supra* n.94 at 85-88 note this point, and also the significance of the directive in *Enka supra* n.117 as a "stand alone" directive.

offspring, the directive, with that same effect. In other words, can it be universally stated that if a Treaty provision is directly effective, therefore its progeny, a directive, is also directly effective? The question whether or not a Treaty provision which is itself directly effective can "grandfather" a directly effective directive seems to have first been raised by Easson in 1979, who argued in the affirmative.[118] In a similar vein, Wyatt argued that a Treaty provision which is itself horizontally directly effective should invest the offspring directive also with horizontal direct effectiveness.[119] So far, there do not appear to have been any cases decided by the Court which have held that a horizontally directly effective Treaty provision can embue its offspring directive with horizontal direct effectiveness. Even the leading *Marshall* case and subsequent decision in *Johnston v. Chief Constable of the Royal Ulster Constabulary*[120] have denied horizontal direct effectiveness to directives which were not directly based on horizontally directly effective Treaty provisions. By parity of reasoning from the *Marshall* and *Johnston* cases, it is likely that the Court would hold that a horizontally directly effective Treaty provision will not automatically endow its offspring directive with that same quality, despite the compelling argument advanced by Wyatt.[121] Although a negative answer seems likely to this question, as a matter of legal theory, *Marshall* and *Johnston* were concerned with vertical direct effectiveness and, theoretically at least, the position must be left open.

The concept of inverse vertical direct effectiveness extends the scope of the direct effect principle in the context of directives. This principle has been consistently applied by the Court in a number of decisions, the best example of which is the *Kolpinghuis* decision.[122] In the writer's view there is some confusion in the academic legal literature concerning the principle of inverse vertical direct effect. Commentators such as Arnull and Prechal use the description to apply to the situation where a Member State cannot invoke the directive against an individual where the Member State itself has failed to implement the directive and because an individual cannot have an obligation imposed on that individual per medium of a directive then, consequently, the Court in *Kolpinghuis* has been held to deny directives the quality of inverse vertical direct effect.[123] It is submitted that the better view is to confine the use of the term inverse vertical direct effect to the situation where a Member State has failed to implement a directive, yet seeks to invoke it against one of its own subjects. Conceptually, this also is aligned with the estoppel principle. There is no need to apply the label inverse vertical direct effect to a situation which, in truth, is but a particular instance of the principle that a directive may not have horizontal effect.[124] It is submitted, then, that a proper understanding of the principle of inverse direct effectiveness is that

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118 AJ Easson, "Can Directives Impose Obligations on Individuals?" (1979) 4 EL Rev 67 at 78. Easson did not attempt to answer the question posed, at least directly.

119 Wyatt *supra* n.27 at 245.

120 *Marshall supra* n.112 and *Johnston* Case 222/84 [1986] 5 ECR 1651, 3 CMLR 240.

121 Wyatt *supra* n.27 at 245. Prechal *supra* n.98 at 456 questioned whether "grandfathering" is necessary if the parent provision has horizontal direct effect. The rejoinder to this argument is that a directive contains a higher degree of specificity than a Treaty provision has - compare Council Directive 75/117/EEC implementing the equal pay for equal work principle enshrined in Article 119 of the Treaty (the equal pay for equal work principle) with the text of Article 119 itself (the Directive is reproduced in Rudden & Wyatt *supra* n.2 at 385-386). Accordingly, a directive for this reason alone might engender a more precise and concrete obligation which by its nature is susceptible to horizontal direct effectiveness.

122 *Kolpinghuis supra* n.102.

123 Arnull *supra* n.106 at 43-44 Prechal *supra* n.98 at 454.

124 Arnull *supra* n.106 at 44 argued that the question whether a directive may impose an obligation on an individual is both separate to and broader than saying a directive lacks horizontal direct effect. The study of this first question by Easson *supra* n.120 at 69-70 suggests that the two questions are but two ways of stating the same concept (citing *Grad* and *Verbond*). As a matter of principle, Easson's view is to be preferred to Arnull's as Arnull did not lay down a convincing argument for saying that a directive cannot have direct effect in the horizontal plane yet impose an obligation on an individual. A legal relationship between Community individuals (or for that matter any two persons) must be presaged on mutual rights and obligations, otherwise the parties are not in a legal relationship: see generally AM Tettenborn, *An Introduction to the Law of Obligations*, Butterworths, London (1984) at 2.

it is a synonym for the estoppel principle and, moreover, it extends the scope of the direct effect principle in the context of directives in the sense that it allows the creation of a vertical direct effect even where a Member State has failed to implement the directive.

It remains to consider the highly contentious issue of horizontal direct effectiveness. The principle that a directive may or may not have the capacity to confer on an individual rights which that individual may invoke before a national court has been the subject of extensive academic debate.[125] It is not proposed in this present study to engage in an analysis of the positions justifying a defence of either the affirmative or negative views that directives may have horizontal direct effect, as this has been done expertly, in any case, by a number of leading commentators.[126] Instead, analysis will centre upon the Court's decision in the *Marshall* case, where the Court held that a directive did not engender a horizontal effect, and the consequences which flow from that holding.[127]

The *Marshall* case arose out of a preliminary reference from the Court of Appeal in the United Kingdom to the European Court under Article 177 of the Treaty, which is of course the ubiquitous route under which the Court has consistently pronounced on the direct effect of Community legal measures. Miss Marshall was employed as a senior dietitian by the Southhampton and South-West Hampshire Area Health Authority. Shortly after attaining the age of 62, Miss Marshall was dismissed from her employment on the basis that her employer applied strictly its policy of insisting that its female employees retire at the age of 60. The corresponding age limit for male employees was 65. Miss Marshall instituted proceedings before an industrial tribunal contending that her dismissal at the age of 62 and the reason justified for this course of action by her employer amounted to discriminatory treatment on the ground of sex and, accordingly, unlawful discrimination contrary to the *Sex Discrimination Act* 1975 (UK), and the Equal Treatment Directive.[128] The industrial tribunal adjudicating Miss Marshall's complaint at first instance upheld the claim based on the infringement of the principle of equality of treatment laid down by Directive 76/207 but dismissed the contention that s.6(4) of the *Sex Discrimination Act* 1975 had been infringed, which provision was a derogation from the principle that discrimination on the ground of sex was unlawful, the derogation applying in the circumstances which related to the termination and post-termination consequences of employment.

An appeal to the Employment Appeal Tribunal confirmed the industrial tribunal's dismissal of the claim based on s.6(4) of the *Sex Discrimination Act* 1975. However, the Tribunal set aside the decision of the industrial tribunal based on an infringement of Directive 76/207 on the ground that an individual could not rely upon that directive in proceedings before a United Kingdom Court or tribunal. It was this particular holding which was the subject of the appeal to the Court of Appeal, which in turn made a reference to the European Court under Article 177. Two questions were posed for the Court's determination. First, was Miss Marshall's dismissal after the age of 60 but before the age of 65 an act of discrimination prohibited by the Equal Treatment Directive? Secondly, assuming the answer to the first question was in the affirmative, could Miss Marshall rely upon the Equal Treatment Directive in her proceedings before the United Kingdom courts?

One critical feature of the *Marshall* case needs to be highlighted, and that is the respondent was an area health authority constituted under the provisions of the *National Health Service Act*

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125 A brief sample of the pre-*Marshall* legal literature includes: Dashwood *supra* n.3 at 242-243, AJ Easson, "The 'Direct Effect' of EEC Directives" (1979) 28 ICLQ 319, Easson *supra* n.120 at 70-78, Wyatt *supra* n.27 at 245-248, Barents *supra* n.68 passim, Pescatore *supra* n.19 at 167-171; Arnull, "Reflections on Judicial Attitudes at the European Court" (1985) 34 ICLQ 168 at 175-176, Green *supra* n.73 at 309-311.

126 *Ibid.* A brief survey of the post-*Marshall* legal literature includes: Kapteyn *supra* n.3 at 342-343, Hartley *supra* n.2 at 208-211, Morris & David *supra* n.94 at 116-118, Morris *supra* n.95 at 309-318, Prechal *supra* n.98 at 452-455, Curtin *supra* n.101 at 195-200 and Arnull *supra* 125 at 44.

127 The sources cited in the preceding footnote also draw out some of the implications of *Marshall.*

128 Council Directive 76/208/EEC. This statement of the facts of *Marshall* relies heavily upon para 9 of the Court's judgment.

1977 and as such, the respondent was an "emanation of the State" or otherwise within the shield of the Crown. Therefore, as regards the scope of the direct effect principle, the material facts of *Marshall* clearly place the case within the framework of the vertical component of the direct effect principle.[129] On the face of it, the horizontal direct effect issue was hardly relevant to the proceedings. However, delving below the surface of this issue is necessary if the Court's pronouncement on the horizontal direct effectiveness of directives is to be set in its proper perspective. Both the respondent and the United Kingdom argued that there was a valid distinction between a Member State acting qua public authority and a Member State acting *qua* employer. Favouring the second possibility, both of these parties argued that a directive could not impose obligations directly on an individual and, equating a Member State acting as an employer to the position of an individual, so the argument went, Directive 76/207 could only be directly effective against the respondent acting as and in its capacity of a Crown body.[130] The Court's response to this attempted bifurcation was to reject it decisively. The Court held that the capacity in which the Member State was acting was immaterial.[131] It is of some interest to note that the Court coupled its holding on this point with a statement that the basis for an individual relying on the directive was to prevent a Member State from relying on its failure to implement the directive or, in other words, the estoppel principle was explicitly put forward.[132] A corollary of the estoppel principle, although not articulated in such terms, was that if the estoppel could only be asserted against a Member State, it did not at the same time have a "reflex" or "side-effect"[133] such that another individual was obliged to observe the directive. In so far as the scope of the direct effect principle is concerned, the Court's comments on the horizontal direct effect issue may be characterised as *obiter dicta* as those comments were not strictly necessary for the Court's holding that Article 5(1) of Directive 76/207 was directly effective. In truth the Court's analysis of the horizontal direct effect issue was unnecessary because the estoppel justification, in effect, channelled the Court's reasoning into an analysis only of the vertical direct effect component of the direct effect doctrine. In other words, although the estoppel principle produces the tendency that a Community directive will not be held directly effective, at the same time this estoppel justification also confines proper analysis to the vertical plane and eschews unnecessary reference to the horizontal direct effect of directives.

Be that as it may, the Court also relied upon textual justifications concerning Article 189 to buttress its view that directives do not possess horizontal direct effect. The Court specifically referred to the binding nature of a directive as extending only in relation to Member States to which it is addressed (Article 189(3)). According to the Court, the corollary of this was that a directive could not of itself impose obligations on an individual and, co-relatively, the provision in a directive could not be relied upon by one individual against another.[134]

It has been remarked that the reliance by the Court on textual considerations as justifying its restrictive view on the horizontal direct effect of directives is anomalous in light of the teleological method of interpretation employed by the Court.[135] Taken to its logical extreme textual nuances would have justified, in any event, an interpretation of Article 189(3) which denied any direct effect to directives, whether in the vertical or horizontal sense.[136]

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129 Morris & David *supra* n.94 at 118, Morris *supra* n.95 at 309-318.

130 *Marshall supra* n.112 at 710 paras 43-44 (CMLR).

131 *Ibid* at para 49 (CMLR).

132 *Ibid.* See the discussion of this aspect of *Marshall* by Morris *supra* n.95 at 310.

133 Curtin *supra* n.101 at 197.

134 *Supra* n.112 at para 48 (CMLR).

135 Morris & David *supra* n.94 at 118, Morris *supra* n.95 at 310, Hartley *supra* n.2 at 208-209. On the Court's method of interpretation generally, see the study by A Bredimas, *Methods of Interpretation and Community Law*, North-Holland Publishing Company, Amsterdam (1978) Collins *supra* n.25 at 130-134 and Hartley *supra* n.2 at 76-77.

136 Hartley *supra* n.2 at 209 Of course the Court could not have proceeded to deny directives vertical effectiveness, since this would have over-ruled decisions such as *Grad*, *SACE*, *Van Duyn* and *Verbond*, and thus created legal uncertainty.

In *Marshall*, the Court affirmed the principle that an implemented directive, although outside the umbrella of the direct effect doctrine, is subject to judicial review by the national courts.[137] The Court said also that this procedure was particularly apt where the directive embodied a derogation from a right, and in such an instance the competent national court had the capacity to adjudicate whether the domestic legal measure implementing the directive went beyond the derogation permitted by the directive. The inference is quite clear: the prospect of individual reliance on a directive is not extinguished simply because the directive has been implemented. This is quite significant if one bears in mind the theoretical basis of a directly effective directive is estoppel, behind which lies a failure on the part of a Member State to implement a directive. The Court, in this holding, has enhanced the protection of individual rights, and this through a process of indirect judicial review. In a sense, an indirect direct effect has been produced.

In light of its reasoning in *Marshall*, it is not surprising that the Court reached the result that directives were not invested with horizontal direct effect. To some extent, the Court had foreshadowed such an outcome in its earlier decisions in *Ratti* and *Becker*. What is disturbing about the *Marshall* case is the fact that the court seized upon an opportunity that did not squarely raise the issue to state decisively once and for all that directives cannot be relied on by one individual against another individual. This principle was reaffirmed in the Court's later decision in *Johnston*.[138] In part, *Johnston's* case concerned also the direct effectiveness of provisions of the Equal Treatment Directive 76/207. So far as is relevant, the facts in *Johnston* were materially similar to *Marshall* in that the respondent in *Johnston* was a public authority (the Chief Constable of the Royal Ulster Constabulary). Although there was some argument that the Chief Constable was not an emanation of the State in an institutional sense, the Court nonetheless held that the Chief Constable was a public official or authority charged by the State with the maintenance of public order and safety and, in that guise, the Chief Constable was a public authority.[139] Of interest to a common lawyer is the question whether or not the Court was obliged to follow in *Johnston* its earlier decision in *Marshall* which, of course, invokes the doctrine of *stare decisis*.[140] Koopmans has argued that even though the Court does not have an entrenched system of *stare decisis* in the sense that English courts have such a doctrine (and *a fortiori* Australian courts), nonetheless as a rule the Court adheres to its earlier case law.[141] In his exhaustive study of the principle of *stare decisis* in Community law, Toth noted that the trend was that the Court did adhere to its earlier decisions but he concluded that there was no principle of *stare decisis* in Community law and, moreover, the conditions necessary to germinate such a doctrine were absent in the Community legal order.[142] On the former basis alone then, some justification could be put forward for the Court's future adherence to the views it laid down in *Marshall* denying directives the attribute of horizontal direct effectiveness. On the other hand, the absence of *stare decisis* would allow the Court to over-rule *Marshall* in the future. For the present, this seems unlikely and the prognosis for the medium to long term hinges on factors of judicial policy (as much as anything else).

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137 Supra, n.112.

138 Case 222/84 [1986] 3 CMLR 240.

139 *Ibid* at para 86. Curtin *supra* n.101 at 198-220 is a valuable study of what constitutes the "State" for the purposes of vertical direct effect. Debate on this aspect relates to the **scope** of the vertical direct effect principle, a point made expressly by Hartley *supra* n.2 at 210.

140 The English account of *stare decisis* is stated and analysed in R Cross, *Precedent in English Law* 3rd ed, Clarendon Press, Oxford (1977) at 103-152. An Australian analogue appears at C Enright, *Legal Research and Interpretation*, The College of Law (1988) at 251-263 and Campbell *et al*, *Legal Research - Materials and Methods* 3rd ed, Law Book Company (1988) at 10-24 and Morris *et al*, *Laying Down the Law* 2nd ed Butterworths 1988 at 78-95.

141 T Koopmans, "*Stare Decisis* in European Law" in O'Keefe & Schermers eds, *Essays in European Law and Integration*, Kluver Deventer (1982) 11 at 18. See also Hartley *supra* n.2 at 280, who submitted that the Court does not hold to a strict doctrine of precedent.

142 AG Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects" (1984) 4 *Yearbook of European Law* 1 at 43-44.

The post-*Marshall* regime is characterised by a marked change of direction. In broad terms, two trends can be discerned. First, academic debate has centred upon the issue of what is the connotation of the concept of the "State".[143] Secondly, can or must national courts interpret national legislative measures promulgated pursuant to a directive in such a dynamic manner so as to effectuate the policy of the directive?[144] Because neither of these post-*Marshall* sequelae are central to this paper, only passing reference will be made to each of these developments.

Debate about what constitutes the "State" for the purpose of the direct effect of directives is not without significance because if the direct effect of directives is only in the vertical plane, then it is necessary to determine the extent to which a directive can be vertically effective.[145] Taking this issue one step further, an anomaly has been created by the Court's holding in *Marshall* that directives lack horizontal direct effect. The anomaly is that it is necessary for an individual to somehow bring himself or herself within a legal relationship with the State if a direct effect of a directive is to be relied upon.[146] In both *Marshall* and *Johnston* the legal relationship between the State and subject was an employer-employee relationship, although there is nothing in principle to confine vertically directly effective directives to only an employment context.

The rejoinder to denying the horizontal direct effectiveness of directives is for the Member States to actually implement those directives in full so that, where the subject matter of the directive so allows, once implemented, the directive has what may be termed a derivative horizontal effect. The Court made this point in *Marshall* somewhat curtly when an argument based on that type of reasoning was put forward by the United Kingdom Government.[147] To paraphrase what has just been stated, clearly Prechal is correct when he stated that the scope of protection of an individual's rights under the umbrella of the direct effect doctrine is entirely dependent on the interpretation of the term "State".[148]

It is unnecessary to explore and analyse all the nuances surrounding the juristic concept of the "State" in this present paper.[149] An avowedly "State" or governmental function such as the maintenance of law and order, would be placed at the very centre of the denotation of the concept of the State. It is in marginal cases that this definitional problem becomes more acute. One such case is *Foster v. British Gas plc*.[150] In *Foster*, the Court was called upon to provide an interpretation of what is the State, and there were two tests that were the subject of analysis in Advocate General Van Gerven's opinion.[151] First, a functional test where a body carries out a public function or is entrusted with a public duty, that body should be considered as part of the State.[152] Curtin has commented that in the absence of precision, this functional test leaves unstated the denotation of what are State functions.[153] The second legal test considered by the Advocate General in *Foster* was the control test, which is predicated on the State controlling a body, such

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143 Green *supra* n.73 at 311-313 presciently discussed this issue before *Marshall*. Commentators taking up the point since *Marshall* was decided include Hartley *supra* n.2 at 210, Morris *supra* n.95 at 314-319; Morris & David *supra* n.94 at 135-136, Collins *supra* n.25 at 314-319, Curtin *supra* n.101 at 200-220 (a particularly detailed and useful study) Prechal *supra* n.98 at 457-462, and GG Howells, "European Directives - the European Dilemmas" (1991) 54 *MLR* 456 at 457-460.

144 Morris & David *supra* n.94 at 118 and 135, Morris *supra* n.95 at 240-241, Hartley *supra* n.2 at 211, Curtin *supra* n.101 at 220-222 and Prechal *supra* n.98 at 457-462. Again, Green *supra* n.73 at 316-321 pre-empted this issue to some extent.

145 Green *supra* n.73 at 311.

146 Morris *supra* n.95 at 315.

147 *Marshall supra* n.112 at 711 para 51 (CMLR). Morris *supra* n.95 at 315 characterised the Court's response as "legalistic and insensitive". Nevertheless, the Court's rejoinder is valid.

148 Prechal *supra* n.98 at 457.

149 Curtin *supra* n.101 at 200-220 comprises a full and useful study of this issue.

150 Case 188/89 [1990] 2 CEC 598.

151 *Ibid* at 613-614 paras 9-10 and 21-22 of the Advocate General's opinion.

152 Prechal *supra* n.98 at 457 and see also *Johnston supra* n.140.

153 Curtin *supra* n.101 at 215.

as by controlling the issued capital of a corporation performing some kind of commercial or entrepreneurial activity.[154] A parallel control test, apart from the economic one just stated, is the control by direction test.[155] The Advocate General came down in favour of the functional test, although in a sense the Advocate General's formulation is a hybrid between the functional test and the control by direction test.[156]

In a short and characteristically cryptic judgment delivered just over two months after the Advocate General's opinion was given, the Court ruled that a directly effective directive could be invoked by an individual against a "body" (irrespective of its legal form or nature) constituted by the State for the purpose of providing a public service under State control and endowed with special powers over and above those prevailing between individuals in a private law legal relationship.[157] In this ruling the Court has sided with the functional test, which also left unresolved the residual problem of what are State (or public) functions.[158] Presumably this issue was left undetermined on the basis the Court considered *sub silentio* that the predecessor to British Gas Plc (the British Gas Corporation) was providing an avowedly public service in the monopolistic supply of gas for domestic and business purposes before it was privatised.[159] If this is correct, then this unstated proposition is highly contentious. It suggests, if nothing else, that Community law will defer to national law for a determination of the denotation of a public service or function.

Moreover, a public service or function under British law is one entrusted to a public authority under Crown ownership or control (or both) even if the service or function is inherently commercial in nature (such as distribution of gas). Although there is room for debate in this analysis, there can be no doubt as to the conclusion this analysis leads to: the enhancement of Community law in the context of the direct effect principle. If the nature of the entities against whom the direct effect doctrine is liable to be invoked is broadly stated, then the doctrine is maximised. This is exactly in keeping with the Court's articulated premise that the direct effect principle is protective of and effectuates individual rights.

The second consequence of the Court's ruling in *Marshall's* case has been to divert attention from the direct effect of directives and to concentrate on an area one step removed from directives themselves, that is the legislation adopted by a Member State in consequence of a binding directive. This invites inquiry into the teleological approach to the interpretation of Treaty provisions and secondary Community legislation by the Court and its efforts to impress on national courts the same purposive approach when interpreting domestic legislation enacted in reliance on a directive. Before that endeavour on the part of the Court is analysed, it is necessary first to state what are a Member State's obligations in response to a directive. *EC Commission v. Belgium*[160] laid down two important principles governing the implementation of directives. The first principle relates to the form of implementation of the directive, and the Court said that a change in administrative practices was insufficient compliance with a directive: legislation is the normal mechanism by which to implement directives. The argument is untenable – and this is the second principle – where a directive is directly effective it need not be implemented. In *EC Commission v. Germany*,[161] the Court resiled from this second principle but said this could only be done exceptionally where pre-existing constitutional or administrative law already provided

154 *Supra* n.152 at 620 para 22 of Advocate General Van Gerven's opinion. See also Prechal *supra* n.98 at 458 and Curtin *supra* n.101 at 207-214.
155 *Ibid.*
156 *Supra* n.152 at 620 para 22.
157 *Supra* n.152 at 624 para 20 and in the *dispositif.*
158 See the discussions surrounding n.148 above in the text.
159 British Gas Plc succeeded to the rights and liabilities of the British Gas Corporation, which Corporation had engaged in the conduct complained of by Mrs Foster and the other plaintiffs.
160 Case 102/79 [1980] ECR 1473, [1981] 1 CMLR 282.
161 Case 29/84 [1985] ECR 1661 at 1673. See generally on these points Collins *supra* n.25 and Morris *supra* n.95 at 238.

the same kind or nature of legal protection as that sought to be implemented by the directive.

The teleological approach to interpretation enjoined by the Court is not a process confined simply to directives. It is, however, in the context of directives which lack direct effectiveness that the Court has urged national courts and tribunals to interpret these directives and implementing measures teleologically. The teleological approach to interpretation of Community legal measures (sometimes known as the functional approach[162]) is a method of interpreting treaties and legislation which seeks to distil the purpose or purposes of the measure and adopts those solutions which tend to reinforce or promote the judicially articulated purpose or purposes expressly or impliedly inherent in the legal measure.[163]

The teleological approach to interpretation of Community legal measures pre-dates *Marshall*. Two decisions which exemplify the Court's approach are *Von Colson and Kamann v. Land Nordrhein-Westfalen* and *Harz v. Deutsche Tradex GmbH*.[164] In *Von Colson* the Court said that Article 5 of the Treaty was the source of a Member State's obligations to fulfil any obligation arising out of the Treaty, including the implementation of a directive, and from this it followed:

> In applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in Article 189(3).[165]

There can be no doubt as to what the Court was attempting to achieve in laying down this principle. Even though a directive endowed a Member State with a margin of discretion to carry out the binding result dictated by such a provision, in reality, the Court attempted to place a stricture around not the exercise of the discretion, but rather the effect of the national legal measures adopted pursuant to that directive. In other words, if the purposive approach to interpreting a directive is passed through to the implementing legal measures when a national court is interpreting and applying those secondary legal measures, then this may be characterised as an indirect means of judicial control. This, as one commentator, Curtin, has recognised provides the conduit for the provisions of a directive to be carried out in an indirect manner.[166] From the standpoint of Community law, even the purposive approach to the interpretation of implementing national legislation back-to-back with a directive does have the result of masking the Community nature of the impetus for the implementing measure even if its genesis does lie in a Community directive.[167]

There are some recent judicial signs in the United Kingdom that its courts are beginning to adopt a purposive approach to the interpretation of United Kingdom domestic legislation introduced pursuant to the terms of a directive. In *Litster v. Forth Dry Dock & Engineering Co*,[168] Lord Oliver said that United Kingdom implementing domestic legislation should be given a purposive construction even if this involved some departure from the strict and literal application of the words which the United Kingdom legislature had elected to use in order to give effect to the directive.[169]

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162 Bredimas *supra* n.137 at 77.

163 *Ibid*. See also Morris & David *supra* n.94 at 118 and the European Court's dictum in Case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415 at 3430, [1983] 1 CMLR 472 at 491 where the Court said "every provision of Community law must be placed in its context and interpreted in the light of provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

164 Case 14/83 [1984] ECR 1891, [1986] 2 CMLR 430 and Case 79/83 [1984] ECR 1921.

165 [1986] 2 CMLR 430 at 453 para 26.

166 Curtin *supra* n.101 at 221. Morris *supra* n.95 at 241 noted of this approach that "something approaching horizontal direct effect may be achieved by a circuitous route".

167 A similar point is made by Morris *supra* n.95 at 241 where he argued: "Direct effect, in contrast, entails a far more visible infiltration of Community law into the national legal systems". The underlying issue is recognition, not so much interpretation.

168 [1989] 2 WLR 634, [1989] 1 All ER 1134.

169 *Ibid* at 641 (WLR) & 1140 (All ER).

Drawing the threads of this discussion of the post-*Marshall* regime together reveals that a common denominator to both areas studied is the question of interpretation. So far as the vertical-horizontal issue is concerned, analysis for the near future will resolve itself into a question of what is the State for the purpose of that dichotomy. As much as anything else, this is a matter of interpretation. The second field of interpretation is the approach that national courts must take when directives are actually implemented, and that is to interpret the implementing national legal measures in a manner consistent with the purpose of the Community directive. The first outcome will, of course, revolve around the doctrine of direct effect. Future case law on the issue of what is the State for the purpose of the vertical direct effect principle will probably be introspective, in the sense that it will be largely internal and not significantly broaden the scope of directly effective Community provisions. In contrast, the teleological approach to the interpretation of national legislation derived from enabling Community directives is likely to be more enduring and dynamic.[170] This purposive approach applies not simply to directly effective directives but also to directives that do not possess this quality. It is ironic to note that where the Court jettisoned the effectiveness principle as the theoretical justification for the direct effect of directives, this led to the attenuated dogma laid down in *Marshall*, yet that effectiveness principle has, in essence, undergone a renaissance of sorts in the purposive approach to the interpretation of national legislative measures implementing directives. Admittedly, this is somewhat tenuous, but, it is evident from the nexus between a purposive interpretation of legislation at the same time effectuating or distributing Community legal principles albeit in a diluted form, masked by domestic legislation.

This analysis of the direct effectiveness of directives has identified a number of themes which should be eclectically stated. The predominant view that the theoretical basis for directives is the estoppel principle is dualistic in nature, in that it is a principle which enhances the doctrine of direct effect in the context of directives where the effectiveness principle cannot be invoked, but at the same time, that principle also set the stage for the Court to rule in *Marshall* that directives lack the quality of being horizontally effective. Thus mixed results have flowed from this theoretical justification. Another hallmark which characterises the direct effect doctrine is judicial conservatism.[171] This judicial conservatism has manifested itself in the Court's decision in *Marshall* where it denied horizontal direct effect to directives. At the same time, this judicial conservatism has also branched into what Morris has described as pragmatism, which itself is a reflex of the fact that some national courts and tribunals felt that the Court had been activist in its willingness to invest directives with vertical direct effect, which had the consequence that there was a corresponding diminution in the effectiveness and operation of national laws.[172] Recognition of this pragmatism must also be tempered by noting that its shortcomings can only be made up through the teleological method of interpretation of implementing measures taken pursuant to a directive if national courts and tribunals throughout the Community adopt and employ such an interpretative technique with equal vigour. If not, there will be a differential application of directives.[173]

Now that the debate about the capacity of directives to have a horizontal effect, for all intents and purposes, has been conclusively settled, present indications are from cases such as *Foster v. British Gas plc* that the Court will be faced with a series of cases that seek to extend the ambit of the vertical component of directives. This process will not be insignificant. To the contrary, with the developments related to the completion of the internal market within the Community by 31 December 1992, more and more reliance will be placed upon Article 100 of the Treaty which

170 Contrast Morris *supra* n.95 at 241.
171 Morris & David, *supra* n.94 at 85. Curtin *supra* n.101 at 195 described this process as judicial minimalism, citing Koopmans, "The Role of Law in the Next Stage of European Integration" (1986) 35 ICLQ 925.
172 Morris & David, *supra* n.94 at 136.
173 *Ibid.*

empowers the Council, acting unanimously on a proposal from the Commission, to issue directives for the harmonisation of laws, regulations or administrative conduct which directly affect the establishment or functioning of the Common Market.[174] Pitched against the central thesis advanced in this paper, that is the essence of the direct effect doctrine is the creation of a legal relationship between Community individuals, on the one hand, or between Member State and individuals, on the other, the denial of horizontal direct effect to directives has stunted the development of intersecting planes of legal relationships between the various *dramatis personae* who make up the Community. In the final analysis this can be rationalised as an unfortunate by-product of the legal nature of a directive and the weaknesses inherent in a directive.

Conclusions

This paper has essayed the present scope and limits of the doctrine of direct effect in European Community law with particular emphasis on secondary Community legislation. As might be expected with a principle that constitutes one of the two foundational pillars that support the edifice of European Community law, the Court's thinking and perspectives on the doctrine reveal a great deal about the Court's approach to European Community law as a coherent system of jurisprudence. It remains now to draw together the key themes and perspectives that have emerged from the analysis of the direct effect doctrine undertaken on this paper.

The thesis of this paper is that the direct effect doctrine is a reflex of the legal relationships that Community law has created between Member States and their subjects, on the one hand, and, on the other hand, between Community individuals. It is these legal relationships that constitute the essence of the direct effect doctrine. On the face of it, this should not come as a surprising conclusion. Yet when this is coupled with the fact that the Treaty is a compact between the Member States of the Community, it is a fairly significant achievement that the Court has brought individuals within the scope of the Community legal order ushered in by the Treaty through the guise of the direct effect principle. From this flow a number of consequences and factors which the Court has employed at varying stages of its development of the direct effect principle.

The first important principle which follows is that the direct effect doctrine has reinforced the protection of individual rights within the Community legal order. This principle was, of course, given explicit judicial recognition in the *Van Gend en Loos* decision itself and the many cases since *Van Gend en Loos* on the direct effect principle can be rationalised as reinforcing this very important theme. A twin principle to the protection of individual rights is the penetration of Community law throughout the legal fabric of the Community. Community law has penetrated into the domestic legal orders of each of the member States and this has been facilitated by the direct effect doctrine. Indeed, it is possible to state that the direct effect doctrine is one of the two anchors for the pervasiveness of Community law (the other is the supremacy of Community law over national law). This pervasiveness of Community law, in turn, has provided the spring-board for the integration of various legal components of the Community, that is the Community institutions, the Member States and the individuals of those Member States. This is an important consequence. Integration is a preserving rather than a destructive force and in the context of the direct effect doctrine, this means that the Community institutions, Member States and individuals are maintained in a series of intersecting legal relationships. Integration, the same time, also serves to preserve the unity of the Community.

When the direct effect principle is atomised into its three elements, in turn, these are reducible to one basal concept that is justiciability. Justiciability is the touchstone that renders the direct effect doctrine one that is capable of attracting legal recognition and hence application by the courts of the Community. The concept of justiciability is integrated in both a vertical and

174 See generally G Moens, "The 1992 Challenge: The Right of Establishment and the Free Movement of Goods in the European Community" (1990) 16 UQLR 70 at 71-73 for a discussion and analysis of the completion of the internal market within the common market.

horizontal sense throughout the direct effect doctrine. There is also another dimension to the principle of justiciability in the direct effect context, and that is justiciability applies laterally also in the spheres of the protection of individual rights under Community law and the effectiveness and enhancement of Community law. These two latter objectives are achieved precisely because concrete legal issues and elements of Community law can be invoked by affected Community individuals throughout the Community legal order. The attribute of justiciability, then, infuses the direct effect doctrine and, because of this feature, it extends the operation of and application of the direct effect doctrine throughout the Community legal order. This tendancy, it is submitted, at the same time also maximises Community law.

The direct effect doctrine has developed incrementally. This is an attribute that the doctrine shares in common with many other fundamental principles of a legal system. However, it is the rate of development of the direct effect principle which is of some significance and, as a corollary to this, this also impacts on the limits or scope of the doctrine. This process can be illustrated in the case of Community directives. For some time, the Court shied clear of pronouncing on the question whether or not directives could have horizontal direct effect. Academic opinion was divided on this point and the court had merely signalled in advance of the *Marshall* case that it would, as likely as not, hold that the directives could not be invested with horizontal direct effect. This was despite the fact that the Court did have several opportunities to adjudicate on the issue. When the time came for the Court to decide *Marshall*, approximately twenty-five years after the direct effect doctrine was first laid down in *Van Gend en Loos*, the legal culture in the national courts on the vertical effect of directives had changed. This change in legal culture is typified by the Conseil D'Etat and the Italian Constitutional Court where respectively French administrative and Italian legal antipathy to the vertical direct effect of directives was quite strong. The failure by the Court to "grasp the nettle"[175] of the horizontal direct effect of directives earlier, allowed these two quite significant tribunals to develop a significant degree of inertia to the prospect of directives having horizontal direct effect. In an endeavour to placate this antipathy, this led the Court in *Marshall* to rule, when it was strictly unnecessary for the decision, that directives could not have horizontal direct effect. This does not deny that the European Court should not seek to maintain a special relationship with the courts and tribunals of the Member States, a special relationship which the European Court is at pains to preserve.[176] Yet it is interesting to speculate that a different result may have ensued in *Marshall* if the Court had countered the resistance of the Conseil D'Etat much earlier.

The dichotomy between the vertical and horizontal direct effect of Community legal measures has continued down divergent legal paths. It is axiomatic that Treaty provisions and secondary legal measures such as regulations, decisions and directives can be vertically effective. The vertical component of the direct effect doctrine then is well developed. In contrast, the horizontal component of the direct effect doctrine is truncated. Where the direct effect criteria are satisfied, it has been held that only Treaty provisions and regulations are capable of having a horizontal effect. This lack of symmetry suggests that the infusion of Community law between Member States and their subjects is quite strong and effective, whereas the attenuated horizontal limb reveals that the Court has not been able to translate the effectiveness of Community law throughout the fabric of private legal relations of individuals *inter se* in the Community.

What has been seen as the theoretical basis for the direct effect doctrine has influenced the scope of the doctrine. This is nowhere better illustrated than in the case of directives. The original theoretical justification advanced for the direct effectiveness of directives was the *effet utile* principle, that is the effectiveness of Community law would be diminished if directives were not

175 The metaphor is borrowed from A Arnull, "The Direct Effect of Directives: Grasping the Nettle" (1986) 35 ICLQ 939.

176 A remark made extra-judicially by Chief Justice Slynn of the Court in an address to the Faculty of Law and Legal Practice, University of Technology, Sydney on 23 May 1991.

invested with vertical direct effect. The development of the case law on the direct effect principle gave the Court an opportunity in the *Ratti* case to substitute the principle of estoppel as the theoretical justification for the direct effect principle. This in turn gave the Court the intellectual justification for holding in *Marshall* that directives lacked horizontal direct effect. Consequently, the scope of the direct effect principle is attenuated.

Present indications are from cases such as *Foster v. British Gas plc* that the immediate future efforts of the Court in the context of the direct effect of directives will concentrate on attempting to enlarge the concept of what is the "State". This will indirectly extend the scope of the vertical component of the direct effect doctrine and, although probably only in a small part, ameliorate the M*arshall* decision.

In the final analysis, the doctrine of direct effect in European Community law stands as a significant testimony to the Court's attempt to achieve a unified Europe under the rule of law.[177] The doctrine was conceived in bold terms in *Van Gend en Loos*, and from this beginning gradually other Community legal measures besides Treaty provisions were brought under the umbrella of the direct effect doctrine. The direct effect doctrine is a principle of some resilience, although the bounds of elasticity have been reached in the case of directives where the doctrine remains applicable only in the legal relationship between Member State and individual. On reflection, the doctrine of direct effect has in no small measure contributed to the maximisation of Community law by extending the number of individuals who can rely in proceedings before national courts on some of the key legal provisions of the Treaty and of secondary Community legislation. The approach of the Court in nurturing and developing the direct effect doctrine must be regarded as a significant development in achieving the united Europe that the founding fathers of the Community and the framers of the Treaty would only but aspire to. The direct effect principle, then, has implemented in a modest way the visions of the Community founders. The aphorism quoted from the writings of Heraclites which prefaced this paper has, in a sense, endured in the direct effect doctrine as it exemplifies the struggle waged by the European Court of Justice on behalf of Community individuals, and of course by individuals on their own behalf.

177 This concept is more fully articulated and developed in Lord Mackenzie Stuart *supra* n.10.