3

From Van Duyn *to* Mangold *via* Marshall: *Reducing Direct Effect to Absurdity?*

ALAN DASHWOOD

I. INTRODUCTION

IN AN ARTICLE published in 1983,[1] Pierre Pescatore who, as a Member of the Court of Justice, exercised a powerful intellectual influence over the development of European Community law during what might be deemed the Court's Golden Age, once described direct effect as 'an infant disease'. What he meant was that, in the early years of the Community, it may have seemed remarkable, even dangerous, that provisions of the EC Treaty or of acts adopted under it could give rise to rights and correlative duties which national courts were called upon to recognise and enforce. But now that Community law had reached maturity, direct effect should be taken for granted, as a normal incident of an advanced constitutional order.

Pescatore's vivid analogy brings home a truth now universally acknowledged so far as concerns provisions contained in the EC Treaty itself or in regulations. Such provisions, so long as they are apt to be applied by a court using ordinary judicial techniques, without needing to have their content further articulated by the legislator, have quite simply become part of the stock-in-trade of Member States' judicatures. However, the case of Directives is different, as Pescatore himself was aware;[2] though he could not have foreseen how interesting (in the sense of the probably apocryphal Chinese curse, 'May you live in interesting times') the issue of their direct effect would remain, nearly a quarter of a century later.

The argument of this paper is as follows. An Editorial in *Common Market Law Review*[3] has noted that the case law of the Court of Justice on the direct

[1] Pescatore, P 'The Doctrine of Direct Effect—An Infant Disease' (1983) 8 *EL Rev* 155.
[2] *Ibid*, 167–71.
[3] (2006) 43 *CML Rev* 1.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

effect of Directives discloses a tension between two objectives: on the one hand, the general objective of ensuring that, so far as possible, Community law is given full effect and applied in a uniform way by the courts of all the Member States; and, on the other hand, the objective of preserving the specific identity of Directives as a form of indirect legislation, intended by Article 249 EC to be differentiated from directly applicable Regulations. The 'effectiveness objective' and the 'specific identity objective', as they will be referred to, are ultimately irreconcilable, in the sense that to press one of them beyond a certain point is necessarily to compromise the other: the wider the range of circumstances in which it is recognised that provisions contained in a Directive can be applied as such in proceedings before national courts, the harder it becomes to maintain the position that a Directive creates an obligation of result for the Member States, and nothing more. There was a moment, in *Marshall (No. 1),*[4] when the Court of Justice might have made a clear choice between the objectives, opting either to maximise the effectiveness of Directives at the price of significantly eroding their particularity, or to accept that they are capable of having only a very limited measure of direct effect. Instead, the Court has sought to maintain a rather uncomfortable balance between the two objectives (though one that leans towards effectiveness), which is hard to justify in an intellectually coherent way. It is also an unstable balance, because there has been an occasional further lurch in the direction of the effectiveness objective. Thus, just when it seemed that reasonable clarity, if not perfect rationality, may have been achieved by the decision of the Grand Chamber in *Pfeiffer*, the judgment in the *Mangold* case[5] has brought fresh uncertainty.

II. THE PARTICULARITY OF DIRECTIVES AND OF DIRECT EFFECT IN RELATION TO THEM

It is trite law that Directives, if unconditional and sufficiently precise, may be invoked by an individual against any Member State in default of its obligation to ensure the attainment, within the national legal order, of the result they prescribe ('vertical direct effect'); whereas they may not be invoked in proceedings between individuals as the direct source of an obligation imposed on one party and an enforceable right conferred on the other ('the no horizontal direct effect rule'). The Court of Justice has explained that the vertical/horizontal distinction is based upon the express

[4] Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority(Teaching) (Marshall No. 1)* [1986] ECR 723.

[5] Case C–144/04, *Werner Mangold v Rudiger Helm* [2005] ECR I–9981.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

wording of Article 249. In *Marshall (No. 1)* the Court noted that 'the binding nature of a directive exists only in relation to "each Member State to which it is addressed"'.[6] It followed that 'a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against an individual'. In *Faccini Dori* the Court said that the consequence of extending the case law on the effect of Directives in vertical situations 'to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has power to do so only where it is empowered to adopt regulations'.[7]

The Court's analysis has attracted sustained academic criticism[8] and the dissenting opinions of some Advocates General.[9] One argument against the distinction is that certain Treaty provisions, such as Article 141(1) on the principle of equal pay for equal work, have been acknowledged as capable of imposing obligations on individuals, although they only refer explicitly to a requirement falling upon the Member States. Another argument is that the phrase 'each Member State to which it is addressed' in Article 249, third paragraph, should be understood as making the point, which is confirmed by the rule on publication in Article 254(2) EC, that Directives need not necessarily create obligations for all the Member States. It has also been observed that, whereas prior to the TEU there was no legal requirement for Directives to be published in the Official Journal (though in practice this often happened),[10] such a requirement is now imposed by Article 254(2) EC. However, it is submitted, those arguments for scrapping the no horizontal direct effect rule are unconvincing, because they ignore the evident intention of Article 249 to equip the Community's institutions with two entirely different kinds of legislative instrument.

As defined by the second paragraph of Article 249 EC, a Regulation has 'general application' and is 'binding in its entirety and directly

[6] [1986] ECR 723, para 48.

[7] Case C–91/92, *Faccini Dori v Recreb* [1994] ECR I–3325, para 24.

[8] See, among others, Prechal, S *Directives in European Community Law* 2nd end (Oxford, OUP, 2005); Tridimas, T 'Horizontal Direct Effect of Directives; A Missed Opportunity?' (1994) *19 EL Rev* 621; Tridimas, T 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2002) 21 *YEL* 327; Coppel, J 'Rights, Duties and the End of *Marshall*' (1994) *57 MLR* 859; Craig, P 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation' (1997) 22 *EL Rev* 519; Mastroianni, R 'On the Distinction between Vertical and Horizontal Direct Effects of Community Directives: What Role for the Principle of Equality?' (1999) *5 EPL* 417; Dougan, M 'The Disguised Vertical Direct Effect of Directives?' [2000] *CLJ* 586.

[9] Notably, AG Van Gerven in Case C–271/91, *Marshall (No. 2)* [1993] ECR I–4367; AG Jacobs in Case C–316/93, *Vaneetveld* [1994] ECR I–763.

[10] The lack of such a requirement was mentioned by AG Slynn in his Opinion in *Marshall (No. 1)* as a factor militating against reliance on Directives in a horizontal dispute: [1986] ECR 723, 734.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

applicable in all Member States'. It is a legally complete and perfect act, designed to apply throughout the Community; hence the incorporation of Regulations into national law is neither necessary nor permissible.[11] The Court of Justice has said that, because of 'its nature and purpose within the system of sources of Community law [a Regulation] has direct effect and is as such capable of creating individual rights which courts must protect'.[12]

In contrast, Directives are instruments of indirect law-making. As defined by the third paragraph of Article 249 EC, a Directive represents only the first stage in a legislative operation; it does not create Community norms applicable as such but imposes an obligation of result to be attained by the Member States, through amending or supplementing the relevant national provisions, in the manner appropriate to their respective legal orders.

Where a Member State does its job properly, so that the result prescribed by a Directive is fully achieved, any rights individuals may be intended to enjoy pursuant to the Directive will be guaranteed under national law. The issue of direct effect arises with respect to a Directive only if one or more of the Member States has failed to implement the Directive within the time limit specified for doing so, or where implementation is in some way defective.[13] In such a case, individuals may wish directly to invoke the provisions of the Directive itself, in order to assert the rights that should be theirs, as a matter of national law, if the steps necessary to complete the legislative operation had been taken by the Member State concerned.

Direct effect, therefore, has a very specific function with respect to Directives, as Pescatore noted in the article to which reference has already been made.[14] It is not an innate quality of the form of instrument, as in the case of Regulations, but a remedy the Court of Justice has prescribed to cure a pathological condition of the legal order.

Also connected with the peculiar character of Directives is the issue of legal certainty. Individuals who have received proper legal advice will be aware that, unlike Regulations, Directives are incomplete legislative instruments, and that the result they prescribe is required, in principle, to be achieved at the level of the domestic order. Legal certainty would be impaired if it were necessary for individuals to consider, before ordering their private affairs on the basis of the applicable national rules, whether

[11] Case 39/72, *Commission v Italy* [1973] ECR 101; Case 34/73, *Fratelli Variola v Italian Finance Ministry* [1973] ECR 981.

[12] Case 93/71, *Leonesio* [1972] ECR 287, para 5.

[13] Including where it is contended that a Directive which has been correctly *implemented* is not being correctly *applied*, so as to ensure that the prescribed result is actually achieved: see Case C–62/00, *Marks & Spencer* [2002] ECR I–6325.

[14] Above n 1, at 171.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

the rules would perhaps be different if the Member State concerned had complied fully with its obligations under a given Directive.

III. THE RATIONALE OF VERTICAL DIRECT EFFECT

The famous *Van Duyn* case[15] is the earliest authority on the direct effect of Directives. Ms Van Duyn, a Dutch national, had been refused entry to the United Kingdom in order to take up a secretarial post with the Church of Scientology, whose activities the British authorities wished at the time to discourage. The refusal was based on the public policy proviso in what is now Article 39(3) EC. In contesting her exclusion, Ms Van Duyn sought to rely upon a provision of the then Directive 64/221, limiting the scope of national authorities' power to restrict the free movement of workers from another Member State on public policy grounds.[16] The Court of Justice held that the relevant provision conferred on Ms Van Duyn an enforceable right, which, however, had not been infringed in the circumstances. The following reasons were given by the Court for recognising that Directive 64/221 was capable of having direct effect:

> If ... by virtue of the provisions of [Article 249] regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 249 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.[17]

The effectiveness objective is clearly uppermost in that reasoning. There is no attempt to give an explanation of direct effect that acknowledges the specific identity of Directives as legal instruments that are incomplete in principle, because they merely prescribe obligations of result for the Member States.

The missing element was supplied by the judgment in *Ratti*.[18] Mr Ratti, a manufacturer of solvents, was able to resist a criminal prosecution for not labelling his products in accordance with the applicable national standards,

[15] Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337.
[16] See now Directive 2004/38/EC, OJ 2004 L 158/77.
[17] *Van Duyn*, above n 15, para 12.
[18] Case 148/78, *Pubblico Ministero v Ratti* [1979] ECR 1629.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

because he had complied with the requirements of a Community Directive which Italy had failed to implement.[19] After repeating its reasoning in *Van Duyn*,[20] the Court of Justice went on:

> Consequently a Member State which has not adopted the necessary implementing measures required by the directive in the prescribed period may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.[21]

This is an adaptation in the public law sphere of the principle that a person should not be allowed to profit from their own wrong. English lawyers are tempted to regard it as a form of estoppel. To adopt the elegant rendering of the principle by Advocate General Slynn (as he then was) in *Marshall (No. 1)*:

> [A] litigant was held entitled to say that a Member State could not rely on national provisions kept alive by its own failure to adopt a Community directive which would have conferred rights on the litigant. As against the State in default, the litigant could assert those rights.[22]

Another way of making the same point would be to say that it would be contrary to the public policy (*ordre public*) of the Community for Member States to be able to exercise their powers against individuals in a way that is incompatible with an obligation imposed on them by a Directive.

The Court's reasoning in *Ratti* was reiterated in its *Becker* judgment of 1982. Mrs Becker was a trader carrying on an economic activity that fell into a tax-exempt category under the Sixth VAT Directive. Germany having failed to meet the deadline for implementing the Directive, it was held that the German tax authorities could not deny Mrs Becker the exemption to which she was entitled under Community law.

The judgments in *Ratti* and *Becker* offer a dual rationale of the direct effect of Directives: enabling the Directive to produce a useful effect, while also preventing the Member State concerned from gaining a legal advantage through its own default. There was no apparent tension in those cases between the effectiveness objective and the specific identity objective, because the Directives in question were ones relating to the exercise of Member Sates' public powers (labelling requirements for a

[19] Mr Ratti was also being prosecuted for the infringement of national legislation on the labelling of paints. In that instance, he was unable to rely upon the relevant Community Directive because the deadline for its implementation by the Italian authorities had not been reached.

[20] *Ratti,* above n 18, paras 19–21.

[21] *Ibid*, para 22.

[22] [1986] ECR 723, 734, referring to the application of the principle in the subsequent case of *Becker* (see below).

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

dangerous substance/indirect taxation). Thus ensuring the effectiveness of the Directive would, at the same time, prevent the Member State concerned from behaving oppressively.

IV. *MARSHALL (NO 1)*—DIRECT EFFECT AT A CROSSROADS

The Directive in issue in *Marshall (No. 1)*[23] was the well-known Directive 76/207 on equal treatment of men and women in employment.[24] Ms Marshall invoked the Directive against her employer, an Area Health Authority (AHA), in order to contest her compulsory retirement, which was linked to a pensionable age lower for women than for men. Her claim to have been the victim of sex discrimination was upheld by the Court of Justice. On the question whether the Directive could be directly relied upon against an employer, the Court of Justice first enunciated the no horizontal direct effect rule for Directives in the passage that is cited above.[25] However, it continued:

> [W]here a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.[26]

In so holding, the Court followed the opinion of Advocate General Slynn that 'where the question of an individual relying upon the provisions of a directive as against the State arises … the "State" must be taken broadly, as including all the organs of the State'.[27] On that analysis, since the AHA was a public body, Ms Marshall's reliance on Directive 76/207 against it could be regarded as an instance of vertical direct effect. Subsequently, in *Foster v British Gas*,[28] the Court provided loosely formulated criteria for judging whether a body should be considered an organ of the State.[29]

Ingenious as the wide conception of the State may be, in the respectful view of the writer it deprives the second limb of the rationale in *Ratti* of much of its explanatory power. Bodies like the AHA in *Marshall (No. 1)*

[23] See above n 4.
[24] Directive 76/207/EC of 9 Feb 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40 ('the Equal Treatment Directive'). The Directive has been amended by Directive 2002/73/EC, OJ 2002 L 269/15 and is due to be repealed by Directive 2006/54, OJ 2006 L 204/23.
[25] See above n 5.
[26] [1986] ECR 723, para 49.
[27] *Ibid*, at 735.
[28] Case 188/89, [1990] ECR I–3313.
[29] *Ibid*, paras 18–20.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

or like British Gas in *Foster* bore no vestige of responsibility for the failure of the United Kingdom government to implement the Equal Treatment Directive fully. They were in exactly the same position as any private employer attempting to understand and apply complex legislation. The artificial character of the employing body's 'default' undermines the public policy justification for the direct effect of the Directive.

Another criticism is that the extension of vertical direct effect through a wide notion of the state is liable to result in arbitrary discrimination between public and private sector employees. The Court of Justice summarily dismissed that objection, which the United Kingdom had raised in *Marshall (No. 1)*, on the ground that such an outcome could easily be avoided if Member States would only implement Directives properly.[30] That is, with respect, a poor answer, because it assumes that the incorrect implementation of Directives is always a matter of bad faith. In reality, as the Court itself has acknowledged,[31] Directives may sometimes be imperfectly transposed through an honest misunderstanding.

The point may be illustrated by the case of *P v S and Cornwall County Council*,[32] where the Court of Justice found that the protection against discrimination that is afforded by the Equal Treatment Directive extended to a trans-sexual, who had been dismissed from her employment at an educational establishment run by the County, because of undergoing an operation for gender reassignment. P was fortunate to be employed by a body falling within the Court's notion of an organ of the state: she would not have been able to invoke the Directive against a private sector employer. Given that the Directive refers in its Article 1, and repeatedly thereafter, to equal treatment for 'men and women', no Member State could be blamed for having failed to grasp that the result prescribed by the Directive included the outlawing of discrimination on the ground that a person's gender had changed. So the discriminatory consequences of the broad conception of the state for employees in the private sector are not as easily avoidable as the Court seems to have imagined.

To the writer it appears that *Marshall (No. 1)* really was a crossroads, when the Court of Justice might have taken the route of clarity by opting firmly either for the effectiveness objective or for the specific identity objective of the direct effect of Directives.

To have gone for the former objective would have meant recognising that Directives can be relied upon even in disputes between individuals, provided only that the provisions of the Directive satisfy the criteria of being unconditional and sufficiently precise. Private sector employees wishing to

[30] [1986] ECR 723, para 51.
[31] Case C–392/93, *R v HM Treasury, ex parte British Telecommunications plc* [1996] ECR I–1631.
[32] Case C–13/94, [1996] ECR I–2143.

https://doi.org/10.5235/15288712802746858 Published online by Cambridge University Press

enforce rights derived from the Equal Treatment Directive would thus have found themselves in the same position as Ms Marshall. The effectiveness of Directives would have been strengthened at the expense of their specific identity. It would have been a bold move for the Court of Justice thus to ignore the clear intention of the EC Treaty, but not the first or only time it has done so: the *Foto-Frost* principle,[33] that national courts have no jurisdiction to rule on the invalidity of Community acts, exemplifies the Court's willingness to set aside a literal interpretation of Treaty provisions (*in casu* Article 234 EC) in favour of one based on its understanding of the system of the Treaty.

Choosing the specific identity objective would have meant recognising the direct effect of Directives as a remedy of an exceptional nature, provided in the interests of the Community's public policy, in order to prevent Member States from abusing their powers. Such a remedy would only be available in situations like those of *Ratti* or *Becker*, where it would have seemed outrageous for the coercive force of the state to be deployed against individuals, in breach of obligations imposed by Community law. A claimant in the position of Ms Marshall would have to fall back on the state liability doctrine.[34]

In the event, the Court of Justice opted for the compromise solution that the vertical/horizontal distinction represents, maintaining the specific identity objective in parallel with the effectiveness objective, while in practice favouring the latter. The no horizontal direct effect rule for Directives was confirmed by the Court in *Faccini Dori*,[35] and it has often been reiterated,[36] recently in these strong terms: 'even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties'.[37] Nevertheless, the Court seems strangely unwilling to countenance the outcome, which might be thought to follow naturally from its (correct) understanding of the nature of Directives, that there are bound to be times when a national court finds it simply has no option but to resolve a horizontal dispute by giving effect to incompatible national provisions that remain in force through the default of the Member State concerned.

[33] Case 314/85, *Foto-Frost v HZA Lubeck-Ost* [1987] ECR 4199.

[34] See below.

[35] See above n 7.

[36] See, among others, Case C–472/93, *Spano v Fiat* [1995] ECR I–4321; Case C–192/94, *El Corte Ingles* [1996] ECR I–1281; Case C–97/96, *Daihatsu Deutschland* [1997] ECR I–6843; Case C–185/97, *Coote v Granada Hospitality* [1998] ECR I–5199; Case C–456/98, *Centrosteel Srl v Adipol GmbH* [2000] ECR I–6007.

[37] Joined Cases C–397 to 403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I–8835, para 109.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

That unwillingness has not been affected by the development of the state liability doctrine.[38] The Court of Justice evidently does not regard an action for damages against the defaulting Member State as an eligible alternative to the direct effect (or consistent interpretation) of the Directive in question; state liability is treated, rather, as a remedy to fall back on when all else has failed.

The broad notion of the state was the first of the expedients developed in the Court's case law, which seem calculated to neutralise the no horizontal direct effect rule as far as possible, while preserving some kind of balance between the effectiveness and the specific identity if Directives. Other expedients are the subject of the discussion that follows.

V. THE DUTY OF CONSISTENT INTERPRETATION

The duty was formulated in the *Marleasing* judgment, in these terms:

> [I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article [249] of the Treaty.[39]

That requirement has been explained by the Court of Justice as an application of the general duty of loyal cooperation laid upon the Member States by Article 10 EC, which is binding, the Court says, 'on all the authorities of Member States including, for matters within their jurisdiction, the courts'.[40] The latter are, accordingly, required, pursuant to the Article, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of any relevant Directive. More recent judgments explain the requirement as being 'inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it'.[41]

The earliest authority on the duty of consistent interpretation is *Von Colson*,[42] which illustrates its use in a vertical situation, where a provision

[38] It was not until the *Francovich* case in 1991 (Joined Cases C–6 and 9/90, [1991] ECR I–5357) that the ECJ first formulated its state liability doctrine. In the *Faccini Dori* judgment, the Court referred to state liability as a possible remedy in a horizontal situation, where it had been found that a private law Directive could not be directly invoked: [1994] ECR I–3325, para 27.

[39] Case C–106/89, [1990] ECR I–4135, para 8.

[40] *Ibid*.

[41] Case C–160/01, *Mau* [2003] ECR I–4791, para 34; Joined Cases C–397 to 403/01, *Pfeiffer* [2004] ECR I–8835, para 114.

[42] Case 14/83, *Von Colson and Kaman v Land Nordrhein-Westfalen* [1984] ECR1891.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

contained in a Directive is held not to be sufficiently precise to found the claim for which it is invoked. The Court ruled that Article 6 of the Equal Treatment Directive did not specifically guarantee the form of remedy being sought by employees against their public sector employer; however, the national court was instructed 'to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law'.[43]

Marleasing was the first in a long line of cases involving disputes between private parties, where the national court's duty of consistent interpretation has been emphasised by the Court of Justice. In fulfilling this duty, the national court avoids invoking the provisions of a Directive in order to displace otherwise applicable national provisions; rather, it decides the case before it by applying the national provisions themselves, while interpreting them in a sense that achieves the result prescribed by the Directive.[44] This has proved an effective means of limiting the scope of the no horizontal direct effect rule in practice.

Unlike in *Von Colson*, the Spanish legislation that fell to be interpreted in *Marleasing* had not been enacted in order to implement the relevant EC Directive;[45] indeed, it was in existence long before the Directive came into force in Spain, on that country's accession to the Community. Those facts were held by the Court of Justice to be irrelevant for the purposes of the duty of consistent interpretation. As indicated in the passage from the judgment that is cited above, the duty applies 'whether the provisions in question were adopted before or after the directive'.

A further indication given by the cited passage is that the national court is required only to interpret the applicable national provisions 'as far as possible' in the light of the Directive's wording and purpose. However, that qualifying phrase was omitted from the operative part (*dispositif*) of the judgment, suggesting that the duty might perhaps be an absolute one. If that had really been what the Court of Justice meant, it would have been tantamount to abolishing the no horizontal direct effect rule. In subsequent re-statements of the duty of consistent interpretation, the Court has been careful to include the qualifying phrase,[46] which suggests that its absence

[43] *Ibid*, at para 28.

[44] Some commentators refer to the duty of consistent interpretation as 'indirect effect'. This implies that the Directive is being given effect, at least indirectly, whereas the whole point is that the relevant *national* provisions are being used to resolve the dispute between the parties.

[45] The First Company Law Directive, Council Directive 68/151/EEC of 9 Mar 1968, [1968] I OJ Spec Ed 41.

[46] See, eg, *Faccini Dori*, above n 7, para 26; Joined Cases C–240 to 244/98, *Océano Grupo Editorial* [2000] ECR I–4951, para 32; Joined Cases C–397 to 303/01, *Pfeiffer* [2004] ECR I–8835, para 119.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

from the *dispositif* of the *Marleasing* judgment was due to an oversight. The duty imposed on national courts does not, therefore, oblige them to violate the general principles governing the interpretation of legislation under their respective legal systems or to adopt a construction *contra legem*.[47] It should be added that the duty arises only once the period for the implementation of the Directive in question has elapsed.[48]

Consistent interpretation is a 'secondary' method of ensuring that the result prescribed by a Directive is achieved, in the sense that it is only needed if there is no way of giving direct effect to the instrument itself. So, as against a party that can be regarded as an emanation of the state, the national court discharges its duty of loyal cooperation by applying the Directive directly, without having to fall back on interpretation of the applicable national provisions.

An important restriction on the duty of consistent interpretation is that, in vertical situations, it applies only 'upwards' (for the benefit of an individual against the authorities of the Member State in default), never 'downwards' (for the benefit of the authorities against an individual). In other words, the duty cannot be used to compensate for the absence of reverse vertical direct effect by requiring national provisions to be read in a way that places individuals at an added disadvantage in their relations with the state, more especially by rendering them liable under criminal law, or aggravating such liability.[49] This restriction chimes well with the specific identity objective.

In horizontal disputes, on the other hand, the language used by the Court of Justice when expounding the duty of consistent interpretation has become increasingly insistent. In *Océano Grupo Editorial*, a case in which the Unfair Contract Terms Directive was in issue, the Court said that the national court was required 'to *favour* the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term'.[50] In *Pfeiffer*, a case concerning the Working Time Directive,[51] which is further considered below, the judgment devotes no fewer than 10 paragraphs to an exposition of the duty.[52] The following points are stressed:

— When applying domestic provisions which have been specifically enacted for the purpose of implementing a Directive intended to confer rights on individuals, '[t]he national court must, in the light of the

[47] Case C–105/03, *Pupino* [2005] ECR I–5285, para 47.

[48] Case C–212/04, *Adeneler and Others v ELOG* [2006] ECR I–6057.

[49] Case 80/86, *Kolpinghuis Nijmegen* [1987] ECR 3969; Case C–168/95, *Arcaro* [1996] ECR I–4705.

[50] [2000] ECR I–4951, para 32 (emphasis added).

[51] Council Directive 93/104/EC of 23 Nov 1993 concerning certain aspects of the organisation of working time, OJ 1993 L 307/18 ('the WTD').

[52] [2004] ECR I–8835, para 109–119.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling *entirely* the obligations arising from the directive concerned'.[53]

— The duty of consistent interpretation 'requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive'.[54]

— '[I]f the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, *the national court is bound to use those methods in order to achieve the result sought by the directive*'.[55]

— The national court was required 'to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that [the WTD] is fully effective'.[56]

Such lengthy exhortation by the Court of Justice, culminating in the peremptory statement cited in the final bullet point, puts the Member State court at which it is directed under very strong pressure indeed to reach an interpretation of existing national law consistent with the Directive in question. An element emphasised for the first time in the *Pfeiffer* judgment was the requirement for the national court 'to consider national law as a whole', in order to see whether there is recognition of any 'interpretative method' allowing apparent conflicts between rules of the domestic legal order to be resolved; and, should such a method be available, the language of paragraph 116, cited above, would suggest that the court is 'bound' to employ it in order to ensure that the result intended by the directive prevails. The paragraph has been described as 'somewhat cryptic'.[57] The essential point appears to be that, in complying with the duty of consistent interpretation, the national court should not confine its attention to the incompatible provision itself, and the immediate legal context in which this is found; the court must consider whether the canons of interpretation of the domestic order allow some other provision of national law to be applied instead of the incompatible provision, so as to produce the result prescribed by the Directive.

[53] *Ibid*, para 112 (emphasis added).
[54] *Ibid*, para 115.
[55] *Ibid*, para 116 (emphasis added).
[56] *Ibid*, para 118.
[57] Extra-judicially, by Judge Koen Lenaerts, together with Tim Corthaut, in their article, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 13 *EL Rev* 287, 294.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

The duty of consistent interpretation is well designed to reconcile the effectiveness objective with the specific identity objective, while enabling the principle of legal certainty to be given due weight, in situations where competing individual interests are liable to be affected by a Member State's failure properly to implement a Directive; but that can only be so if Member State courts do not feel compelled to adopt a strained construction of the relevant national provisions. In the writer's submission, the test should be whether, in the circumstances in which they fall to be applied, those provisions could reasonably be understood in a sense corresponding with the wording and purpose of the Directive, by the individuals whose conduct they are designed to govern.

VI. 'INCIDENTAL' OR 'TRIANGULAR' DIRECT EFFECT

'Incidental' or 'triangular' direct effect are the descriptions given by commentators to the Court's analysis of certain cases that appear problematic, because a private party, A, has been allowed to invoke provisions contained in a Directive in circumstances where this will have an immediately adverse impact on the legal situation of another private party, B.[58] The analysis establishes a limitation in principle on the scope of the no horizontal direct effect rule, complementing the limitation in practice imposed by the duty of consistent interpretation.

A first group of cases concerns disputes which, from a formal point of view, are vertical in character, because A is challenging the validity of a national measure on the ground that it conflicts with an obligation imposed on the Member State concerned by a Directive; however, the inevitable consequence of a successful challenge will be to deprive B of a right he/she enjoys under national law. The situation can be illustrated by *Wells*.[59] The owners of a quarry in Wales, which had been dormant for many years, were granted permission to recommence mining operations. A neighbouring householder sought to have the permission revoked or modified on the ground that it had been given without due consideration as to whether an

[58] The cases have been the subject of intense academic debate. Some writers have attempted to develop an all-encompassing rationale; others have acknowledged that the task is impossible. See the discussion of the exclusion/substitution theory, below, and the authors cited in n 75. See also Hilson, C and Downes, T 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 *EL Rev* 121; Dougan, M, above n 6. For a recent contribution to the debate, adopting a fresh approach, see Ward, A 'From Direct Effect to Review of Discretion: the Impact of Directives in National Law and the End of Individual Rights?', forthcoming in (2007) 2 *Swedish Studies in European Law*.

[59] Case C–201/02, [2004] ECR I–723. See also Case 103/88, *Fratelli Costanzo* [1989] ECR 1839; Case C–201/94, *Primecrown Ltd v Medicines Control Agency* [1996] ECR I–5819; Case C–435/97, *World Wildlife Fund v Autonome Provinz Bozen* [1999] ECR I–5613.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

environmental impact assessment, as provided for by Directive 85/337,[60] should be carried out. Evidently, if Ms Wells were successful, the quarry owners would have to suspend operations, pending the outcome of an assessment exercise. The argument, which had been raised by the United Kingdom, that for a Directive to be used by an individual in order to compel a Member State to deprive other individuals of their rights would amount to 'inverse direct effect', was rejected by the Court of Justice. Ms Wells was held to be entitled to rely upon the Environmental Impact Assessment Directive, in spite of the 'adverse repercussions' that would be suffered by the quarry owners.

In a second group of cases, A has been allowed to invoke the provisions of a Directive in order to secure the disapplication of incompatible national measures, thereby obtaining a legal advantage in a horizontal dispute with B. The leading cases concern the effects in horizontal situations of failure by a Member State to comply with the procedural requirements governing the introduction of new technical standards legislation.

Under the system of preventive control, which was originally laid down by Directive 83/189,[61] Member States are required, pursuant to Article 8, to notify new technical regulations in draft form to the Commission; and they are further obliged, pursuant to Article 9 of the Directive, to refrain from introducing the proposed standards during a standstill period. The aim is to give the Commission an opportunity of vetting the draft legislation in order to ensure its compatibility with the free movement of goods, and of considering whether it might be appropriate to harmonise the relevant standards at Community level.

CIA Security v Signalson arose out of proceedings brought under the Belgian law on unfair trading practices between competing manufacturers of security equipment.[62] It was claimed by B that A's products had not been officially approved under the relevant technical standards legislation in Belgium. A contended that the legislation had been introduced by the Belgian authorities without prior notification to the Commission under the procedure of the Technical Standards Directive, and was thus inapplicable. A's contention was upheld by the Court of Justice on the ground that it would enhance the effectiveness of the Directive as a mechanism to protect the free movement of goods if a Member State's failure to notify new

[60] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/80 ('the Environmental Impact Assessment Directive').

[61] Council Directive 83/189/EEC, OJ 1983 L 109/8, repealed and replaced by European Parliament and Council Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204/37 ('the Technical Standards Directive').

[62] Case C–194/94, *CIA Security SA v Signalson SA and Securitel SPRL* [1996] ECR I–2201.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

technical rules constituted a 'substantial procedural defect', rendering them inapplicable to individuals. No attempt was made by the Court to justify that outcome in the face of the no horizontal direct effect rule.[63]

The Technical Standards Directive was again invoked successfully in *Unilever Italia*.[64] A had entered into a contract for the sale of a quantity of olive oil to B. Having refused to take delivery, B sought to resist A's action for breach of contract on the ground that the goods that were tendered did not meet the labelling requirements for olive oil laid down by recent Italian legislation. The legislation fell within the scope of the Directive, and it had been notified to the Commission; however, it had been brought into force prematurely by the Italian authorities, without waiting for the requisite standstill period to expire. The Court of Justice held, accordingly, that the legislation could not be applied to the dispute between A and B, though on this occasion it did specifically address the issue of compatibility with the case law on the direct effect of Directives which had been referred to in argument by the Italian and Danish governments. Citing *Faccini Dori* as authority for the no horizontal direct effect rule, the Court went on:

> 50. [T]hat case law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.
>
> 51. In such circumstances, and unlike the case of non-transposition of directives with which the case law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

It follows from what is said in paragraph 51 that the operation of the no horizontal direct effect rule is to be understood in terms of the nature of the substantive obligation imposed by the Directive in question. The Doorstep Sales Directive,[65] in issue in *Faccini Dori*, was intended to result in the creation of new rights for individual buyers and new obligations for individual sellers. If Ms Faccini Dori had been able to rely on the 'cooling-off period' there provided for, in the absence of transposition by the Italian authorities, that would have meant enforcing a right, and a correlative duty for her seller, derived directly from the Directive. The situation in *Faccini Dori* could be distinguished from that in *Unilever Italia*, because the Technical Standards

[63] See, however, *ibid*, the Opinion of AG Elmer, paras 71–73.

[64] Case C–443/98, *Unilever Italia v Central Food* [2000] ECR I–7535.

[65] Council Directive 85/557/EEC of 20 Dec 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

Directive imposes on the Member States duties they alone are called upon to perform. Reliance on the Directive could be seen as the (indirect) enforcement of an obligation on which the Belgian authorities had defaulted.[66] Unlike in *Faccini Dori*, it would not involve enforcing a modification of private law relations, which was specifically envisaged by the Directive.

That analysis was confirmed in *Wells* (though, as explained above, in the context of vertical proceedings), where the Court of Justice said:

> 56. [T]he principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights ... Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.
> 57. On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned …
> 58. In the main proceedings, the obligation on the Member State concerned to ensure that the competent authorities carry out an assessment of the environmental effects of working the quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, be described … as inverse direct effect of the provisions of that directive in relation to the quarry owners.[67]

Once again, the nature of the substantive obligation imposed by the Directive relied upon is treated as crucial. The Court's understanding of the no horizontal direct effect rule is that 'an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party'. The Court of Justice acknowledges that it would be contrary to the principle of legal certainty for a Member State's obligation to implement such a Directive to be enforceable at the instance of the party whose rights it was intended to enhance, if this would amount to the enforcement, against another private individual, of obligations derived from the Directive itself.

[66] This interpretation of the earlier cases on incidental direct effect was suggested by Dougan, M, above n 6.
[67] *Ibid*, paras 56–58.

https://doi.org/10.5235/15288712802746858 Published online by Cambridge University Press

That situation is distinguished from one where the Directive relied upon is designed purely and simply to influence the behaviour of Member States. The Environmental Impact Assessment Directive is such a measure. It provides for the attainment of a result that involves the performance by the competent national authorities of certain new duties when carrying out their public functions with respect to the granting of planning permission. Ms Wells' reliance on Directive 85/337 did not entail the enforcement of provisions designed to bring about the imposition of obligations on the quarry owners, since the Directive contained no such provisions. The adverse repercussions the quarry owners would suffer, through having to suspend mining operations while awaiting the outcome of the assessment, were the purely incidental consequence of holding the United Kingdom to its obligations under the Directive.

It is convenient to express the distinction that was drawn by the Court of Justice in *Unilever Italia* and *Wells* as identifying two categories of Directives: 'private law Directives', designed to result in the modification of legal relationships that subsist typically, though not necessarily, between private individuals, and which are subject to the no horizontal direct effect rule; and 'public law Directives', exclusively governing Member States' exercise of public powers in their relations with individuals or the Community, and which are not subject to the rule. However, a double *caveat* is necessary. In the first place, where the party on whom an obligation should have fallen, if a private law Directive had been properly implemented, is a public body like the AHA in *Marshall (No. 1)*, the dispute will be treated as a vertical one, on the basis of the Court's broad conception of the state. Secondly, the same Directive may contain certain provisions aimed at individuals, and others aimed at national authorities. The Equal Treatment Directive can be taken as an example. The substantive provisions of the Directive require action by the Member States in order to impose non-discrimination obligations on individual employers. However, Article 6 of the Directive is about ensuring the availability of adequate remedies, an obligation that can be discharged only by the national authorities. In the writer's view, that explains why the Court of Justice has been willing to allow reliance on Article 6 in disputes between individuals.[68]

There is no reason why the incidental direct effect analysis should be confined to the particular cases in which it has been articulated by the Court of Justice.[69] It is available to explain any instance in which the invocation of

[68] See Case C–180/95, *Draehmpaehl* [1997] ECR I–2195. Judgment was given in *Palacios de la Villa* on 16 October 2007. Other commentators take a different view of the case. The Court of Justice found on the facts that no discrimination had occurred; so there was no need for the issue as to the possible existence of a general principle of law prohibiting age discrimination, and the possible horizontal effect of such a principle, to be addressed. The hearing in Bartsch took place on 10 October 2007. See Ward, A 'New Frontiers in Private Enforcement of EC Directives' (1998) 23 *EL Rev* 65 and above n 58; Dougan, M, above n 6.

[69] For another case on the effect of failure to notify technical regulations see Case C–159/00, *Sapod Audic v EcoEmballages SA* [2002] ECR I–5031.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

a public law Directive in a dispute between private parties has been treated as acceptable. An example that pre-dates both the *Unilever Italia* and *Wells* cases is *Unilever v Smithkline Beecham*.[70] B was seeking an injunction to prevent the marketing in Austria of toothpaste manufactured by A on the ground that advertising material on the packaging was misleading. It was held that, in resisting that claim, A was entitled to rely on the argument that the applicable Austrian legislation was incompatible with Directive 76/768 on cosmetic products.[71] The provisions of the Directive limiting the possibility of imposing restrictions, supposedly in the interests of consumer protection, on the free movement of products such as toothpaste were clearly designed to govern an aspect of the exercise of Member States' public powers. On the other hand, the analysis is not available to explain other much-discussed cases, where the Court of Justice seems not to have baulked at the invocation, in a horizontal situation, of provisions contained in a Directive of a private law character.[72] A detailed re-examination of those cases would be out of place in the present paper. Suffice it to say that, in the opinion of the writer, the cases can be explained either on the basis of the duty of consistent interpretation[73] or as an instance of vertical direct effect;[74] or perhaps, indeed, because the referring court failed to put a question on horizontal direct effect and the Court of Justice saw no reason to raise the issue of its own motion.[75]

The incidental direct effect analysis is an instance of a lurch in the case law away from the specific identity objective and towards the effectiveness objective, of the kind referred to in the introduction to this paper. While it continues to be recognised that, in view of the definition of Directives in Article 249 EC, these are instruments incapable of directly imposing obligations on individuals, they have nevertheless been found to produce legal consequences that significantly affect the legal situation on the ground in the Member States. Through invocation of the Technical Standards Directive, Signalson was deprived of a defence to the claim that it had libelled CIA, and Central Food was deprived of a defence to Unilever Italia's action for breach of contract. Manifestly, those were situations where, in the words of the *Marshall (No.1)* judgment, provisions of Directive 83/189 were 'relied upon as such against an individual'. The Directive was accepted as capable of closing a particular avenue of escape from liability under national provisions on, respectively, unfair trading practices (*CIA*

[70] Case C–77/97, [1999] ECR I–431.

[71] Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member states relating to cosmetic products, OJ 1976 L 262/169, as amended and consolidated.

[72] Case C-441/93 *Pafitis* [1996] ECR I-1347; Case C-129/94 *Ruiz Bernaldez* [1996] ECR I-1829, Case C-215/97 *Bellone* [1998] ECR I-2191.

[73] *Ruiz Bernaldez* and *Bellone*.

[74] *Pafitis*.

[75] As suggested by M Dougan, n 6, above.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

v Signalson) and national contract law (*Unilever*). In Hohfeldian terms,[76] it has been suggested, the exclusion of the otherwise applicable national legislation created a 'disability' for one of the parties to the dispute and an 'immunity' for the other.[77] Similarly in *Wells*, the Environmental Impact Assessment Directive was invoked, not only to determine that the United Kingdom authorities had failed to attain the result prescribed by the Directive, but also to reverse the legal consequences of the action they had taken, thereby depriving the quarry owners of a right which was theirs under national law. In all those cases, the Directive in question was given a kind of direct effect. It is legitimate to ask whether an instrument, which is incomplete in principle because it only establishes an obligation of result for the subordinate law-maker, should be regarded as capable of giving rise to a 'higher norm' the application of which may impact upon individuals' rights and duties.

There is, moreover, an issue of legal certainty, of which the cases relating to the Technical Standards Directive provide a clear illustration. Should it really be the business of individual traders, before arranging their affairs on the basis of a set of technical regulations, to check up whether the Member State concerned has duly notified the regulations to the Commission and waited for the prescribed time before bringing them into force?[78]

VII. THE EXCLUSION/SUBSTITUTION THEORY

In pressing the duty of consistent interpretation upon national courts, and in developing its incidental direct effect analysis, the Court of Justice has shown a strong tendency to favour the effectiveness of Directives over the preservation of their specific identity. Nevertheless, the resistance the Court has shown to the theory discussed in this section, which if accepted would limit the scope of the no horizontal direct effect rule still more drastically, is evidence of its continuing will to maintain a precarious balance between the two objectives.

The theory is based on a distinction between the 'substitution effect' and the 'exclusionary effect' of Community provisions. According to proponents of this distinction, the only significance of the no horizontal direct effect rule is to prevent the provisions of a Directive from being directly substituted, in a dispute between private parties, for the provisions

[76] Hohfeld, WN *Fundamental Legal Conceptions as Applied in Legal Reasoning* (Princeton, NJ, Yale University Press, 1919).

[77] See above n 3.

[78] A similar point is made powerfully by AG Jacobs in *Unilever Italia*, above n 46, at para 100 of his Opinion.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

of national law on which a Member State court would otherwise rely in determining the outcome of the proceedings before it. However, it is argued, the rule does not prevent a Directive from causing the disapplication of incompatible national provisions, even in horizontal situations, where this would open the way for the case to be decided on the basis of some other provision of national law that is compatible with the Directive.

The theory has distinguished supporters in the academic literature[79] and it has won the backing of some Advocates General. The underlying rationale, found in the principle of the primacy of Community law, was explained by Advocate General Saggio in *Océano Grupo Editorial* in these powerful terms:

> Ultimately, the national court's function as a Community court of ordinary law entails entrusting it with the delicate task of guaranteeing the primacy of Community law over national law. The need to prevent the harmonising action of the Community directives from being compromised by Member States' unilateral behaviour, whether through omission (failure to implement a directive within the prescribed period) or action (adoption of incompatible national rules), implies that the application of incompatible legal provisions is in any event excluded. In order to be able to achieve its results, this 'exclusionary effect' must occur whenever the national rule comes into consideration for the purpose of resolving a dispute, irrespective of the public or private status of the parties concerned.[80]

The case concerned the legislation in Spain implementing Directive 93/13 on unfair terms in consumer contracts.[81] The defendants in the main proceedings were being sued for failing to make payments on encyclopaedias they had purchased from the claimant. A clause in their contracts with the claimant conferred jurisdiction on the courts in Barcelona, which was the latter's place of business. It was said not to be clear in Spanish law whether, in consumer protection proceedings, the issue as to the fairness of a contractual term could be raised by a court of its own motion. Mr Saggio thought that the intended result of the Directive—to protect consumers against oppressive terms such as the jurisdiction clause in question—could not be attained by way of consistent interpretation of the relevant national provisions.[82] He, therefore, fell back on the exclusionary effect analysis. The Directive could be invoked, as a higher-ranking norm, to prevent the

[79] See Lenz, M, Sif Tynes, D and Young, L 'Horizontal What? Back to Basics' (2000) 25 *EL Rev* 509; Tridimas, T 'Black, White and Shades of Grey; Horizontality of Directives Revisited' (2002) 21 *YEL* 327; Lenaerts, K and Corthaut, T, above n 57.

[80] Joined Cases C–240 to 244/98, [2000] ECR I–4951, at para 37 of the Opinion.

[81] Council Directive 93/13/EEC of 5 Apr 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

[82] Above n 80, Opinion, para 28.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

application of the national rule which allowed a choice of forum in the circumstances of the case. This would not leave a legal void, since the normal rule, that proceedings should be brought in the courts of the district where the debtor resides, would then fall to be applied.[83] Similar reasoning can be found in the Opinion of Advocate General Alber in *Collino and Chiappero*[84] and that of Advocate General Ruiz Jarabo Colomer in the first of his two Opinions in the more recent *Pfeiffer* case.[85]

The Court of Justice appears, however, to be unpersuaded by the theory. In *Océano Grupo Editorial*, the referring court was advised that it must give effect to the relevant provisions of national law in conformity with the duty of consistent interpretation. In *Collino and Chiappero*, the judgment refers both to the duty of consistent interpretation and to the possibility that the party against whom the Directive in question was being invoked might be assimilable to the state, so that the case could be seen as one involving vertical direct effect. In *Pfeiffer*, after recalling the no horizontal direct effect rule, the Court went on to restate the duty of consistent interpretation in the strong formulation that is discussed above.

The outcome in *Pfeiffer*[86] appears especially significant, because the case provided a textbook example of a dispute between workers and their private sector employer, where the exclusionary effect/substitution effect distinction might have been seen as an escape route from the no horizontal direct effect rule (confined, as it now is, to private law Directives), had the Court been inclined to look for one. The case related to a provision of German employment law establishing, with respect to the category of on-call workers, a derogation from a general rule compliant with the 48-hour time limit on average weekly working time set by Article 6 of the WTD.[87] The exclusion of the disputed provision would thus have made it possible for the German court to decide the case on the basis of a rule of national law compatible with the Directive—though not the rule which the national legislature intended should apply. In response to a series of questions, on which it had invited the parties, the Member States, the Council and the Commission to make submissions, the Court heard detailed argument specifically addressing the issue whether Article 6 of the Directive might have an exclusionary effect in the circumstances of

[83] *Ibid,* Opinion, para 39.

[84] Case C–343/98, [2000] ECR I–6659.

[85] Joined Cases C–397 to 403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I–8835. The AG's initial Opinion identified the horizontal direct effect issue in the dispute, which had not been raised in the Order for Reference. This led to the re-opening of the written procedure. In his second Opinion, the learned AG put forward the strong version of the duty of consistent interpretation, which is also found in the judgment of the Court.

[86] See above n 47.

[87] See above n 46.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

the dispute; but in the end it chose to dispose of the case in the manner described above.[88]

In the writer's submission, the exclusion/substitution theory is based on a false dichotomy. As has been pointed out,[89] whether the applicable national provision were substituted by a provision of the Directive in question, or merely excluded so as to allow the application of another national provision, it would still be the case that the dispute was being resolved on the basis of a rule different from the one prescribed by the national legislator. To take the facts of *Pfeiffer*, if Article 6 of the WTD were recognised as having an exclusionary effect with respect to the disputed provision, this would prevent the application of the rule which the German legislator intended should govern the position of on-call workers; and a different rule, which the legislator intended should not apply, would be used to decide the case. It would not be correct to describe such an outcome as one determined through the application of national law. It would be an outcome resulting from the modification of national law by the WTD. The effect of disapplying the derogation would be to deny employers a right which they enjoy under national law, and to impose on them an obligation to which national law does not subject them.

Another objection is that the theory is inherently arbitrary, because its operation depends on the way in which the applicable national law is structured. The same Article 6, which might be capable of having an exclusionary effect in respect of national legislation structured in the German manner, would be of no avail to workers in a Member State where the general rule on the maximum working week was itself in breach of the WTD.

Acceptance of the exclusion/substitution theory by the Court of Justice would have further eroded the specific identity of Directives, for which indeed the proponents of the theory, with the strong emphasis they place on the primacy of Community law, show scant regard. The judgment in *Pfeiffer*, therefore, seemed a welcome re-affirmation of the new orthodoxy, established in the light of the cases on incidental direct effect: that there can be no horizontal direct effect for provisions contained in a private law Directive, which confer rights and impose correlative obligations on individuals; but the national court is under a strict duty to interpret the applicable national legislation, so far as possible, in conformity with such provisions.

[88] See comments on the case by Dougan, M 'Legal Developments' in Miles, L (ed) *Journal of Common Market Studies Annual Review 2004–2005* (Oxford, Blackwell 2006); Prechal S (2005) 42 *CML Rev* 1445. See also Arnull, A *et al, Wyatt & Dashwood's European Union Law* 5th edn (London, Sweet & Maxwell, 2006) (hereinafter, '*Wyatt and Dashwood*') 183–5; and the analysis of *Pfeiffer* and *Mangold* in Ross, M 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?' (2006) 31 *EL Rev* 476.

[89] See above n 3.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

However, it was not long before the judgment of the Court in *Mangold* brought a further twist to this meandering story.

VIII. THE DIRECT EFFECT OF GENERAL PRINCIPLES OF LAW

The *Mangold* case[90] arose out of a claim of discrimination on grounds of age, contrary to Directive 2000/78, which establishes a general framework for equal treatment in employment.[91]

The alleged discrimination resulted from an amendment to legislation in Germany implementing the Community provisions designed to protect workers on fixed-term contracts. These are laid down in a Framework Agreement of 1999 between the social partners, which was put into effect by Directive 1999/70.[92] The German implementing legislation included a provision establishing an exception to the conditions that must normally be fulfilled to enable a person to be employed under a fixed-term contract, which would apply if the worker concerned were aged 58 or over when the employment relationship began. By an amendment adopted in 2002, the age limit was reduced to 52 during the period 1 January 2003 to 31 December 2006.

Mr Mangold was given a part-time job by a lawyer, Mr Helm, for a fixed term beginning in July 2003 and running through to February 2004. He was 56 years old at the time. His contract explicitly made clear that he was being employed under the conditions applicable to older workers. Shortly after starting work, Mr Mangold brought proceedings against his employer, contesting the legality of the fixed term clause.

Article 6 (1) of Directive 2000/78 allows differential treatment of workers on grounds of age, so long as the treatment is objectively and reasonably justified by a legitimate policy aim and the means of achieving that aim are appropriate and necessary (i.e. proportional). The Court of Justice found that the German legislation in question pursued the legitimate aim of facilitating access to employment for older workers; however, the legislation failed the proportionality test, because it applied to all persons who had reached the specified age, regardless of whether they happened at the time to be employed or unemployed.

[90] See above n 4. For comments on the case see Dougan, M, above n 88; *Wyatt and Dashwood*, above n 88, 185; Waddington, L 'Recent Developments and the Non-discrimination Directives: *Mangold* and More' (2006) 13 *Maastricht Journal of European and Comparative Law* 365. Not surprisingly, there has also been intense discussion of the case in the German academic literature.

[91] Council Directive 2000/78/EC of 27 Nov 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

[92] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/4.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

There seemed to be fatal objections to Mr Mangold's direct reliance on Directive 2000/78. In the first place, the dispute was a horizontal one between an employee and his private sector employer. The second objection concerned the deadline for implementation of the Directive. The normal date for this was 2 December 2003; however, Member States could have the deadline extended by a further three years, and Germany was one of those that had chosen to do so. The date for the implementation of Directive 2000/78 in Germany was, therefore, more than three years away, when Mr Mangold entered into his contract with Mr Helm. Surely it followed that, at the material time, the Directive could not be invoked even vertically—let alone horizontally—in proceedings before a German court?

Two lines of reasoning are pursued in the judgment, in order to circumvent those objections.

The first line of reasoning was based on the principle established in *Inter-Environnement Wallonie*[93] that Member States must refrain, during the period fixed for the implementation of a Directive, from taking any measures liable seriously to compromise the attainment of the prescribed result.

The measure being attacked by Mr Mangold (the reduction, from 58 to 52 of the age at which the derogation from the general rules on short-term employment contracts would apply) was destined to expire on 31 December 2006. Since this would be less than a month after the final date for the implementation of Directive 2000/78, it could hardly be said that the prescribed result was likely to be compromised *seriously*. To meet this point, the Court recalled the obligation, imposed by Article 18 of the Directive on Member States benefiting from the extended implementation period, to report annually to the Commission on the steps they had taken to tackle age discrimination; the expectation that such Member States would progressively approximate their legislation to the Directive must mean that they were not free to take measures tending in the opposite direction. The Court noted further that, by the time the measure in question expired at the end of 2006, this would be too late to be of help to Mr Mangold and other individuals in a similar position, because they would have reached the age of 58 and therefore still be caught by the derogation applicable to older workers.

There is some merit in the first of those arguments. The provisions of Article 18 can plausibly be interpreted as imposing an interim obligation, which is stricter than usual, on those Member States that took advantage of the extended deadline for implementation of the Directive. The second argument is hard to follow: it seems to imply that reliance on a Directive should be allowed, even prior to the implementation date, where it would

[93] Case C–129/96, [1997] ECR I–7411.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

be impossible otherwise for the individuals concerned to benefit from the result the Directive is designed to attain. However, the essential point which the judgment failed to address was whether the obligation falling on Germany under the principle recognised in *Inter-Environnement Wallonie* could be invoked in legal proceedings between private parties. Advocate General Tizzano was positive that it could not,[94] and that must surely be right. If the definitive obligation of result prescribed by a Directive is incapable of producing horizontal direct effect, the interim obligation not to impede the attainment of that result must be so, a fortiori. It may be recalled that *Inter-Environnement Wallonie* related to a vertical situation.

The Court's second (and seemingly preferred) line of reasoning was the novel one that it was unnecessary for claimants like Mr Mangold to rely on the provisions of Directive 2000/78 as such, since the Directive 'does not itself lay down the principle of equal treatment in the field of employment and occupation'.[95] The actual prohibition against the forms of discrimination to which the Directive relates was to be found in general principles of law derived from international instruments and the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age was thus applicable independently of the entry into force of Directive 2000/78, in respect of national rules falling within the scope of Community law, as was the case with the German legislation on short-term contracts of employment. 'In those circumstances', the Court concluded, 'it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law'.[96]

In the light of that analysis, the question has been asked whether there is any real sense in which the no horizontal direct effect rule for Directives can be said to survive.[97] It has been pointed out that the private law Directives to which the rule applies are typically designed to provide a measure of protection for the weaker party to a private law relationship—workers against employers, consumers against the suppliers of goods and services; ingenious counsel would not find it difficult to make the case that Directives of that kind embody some general principle or other which might be considered enforceable in horizontal situations, even if the provisions of the Directive itself were not. For instance, the approach adopted by the Court of Justice in *Mangold* could equally well have been taken in *Marshall No. 1* and the other cases on the equal treatment of men and women in employment.

[94] *Ibid,* Opinion, para 10.
[95] *Ibid,* Judgment, para 74.
[96] *Ibid,* Judgment, para 77.
[97] See above n 3.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

Whether that proves to be an exaggerated reaction will depend on how the Court of Justice resolves two issues, as it may have an opportunity to do in cases that are currently pending before it.[98]

The first is the issue, which was passed over in silence in the *Mangold* judgment, whether general principles of law should be considered capable of conferring substantive rights and imposing substantive obligations in legal relations between individuals. Is the apparent assumption in the judgment that they are so capable compatible with the very nature of such principles, and does it find any support in the case law?

That issue was addressed by Advocate General Mazak in a passage of his Opinion in the subsequent case of *Palacios de la Villa*,[99] which is critical of the approach adopted by the Court in *Mangold*. The learned Advocate General describes the Court as having:

> [S]et foot on a very slippery slope, not only with regard to the question whether such a general principle of law on the non-discrimination on grounds of age exists but also with regard to the way it applied that principle.

For such a principle to be given direct effect would not only raise serious concerns in relation to legal certainty; 'it would also call in question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general'. In this connection, Mr Mazak recalls that Article 13 EC is purely and simply a power-conferring provision and that the Council had chosen in this instance to act by way of a directive. He concludes:

> In my view, the limitations which this specific Community act entails, notably with regard to horizontal direct effect, should not therefore be undermined by recourse to a general principle.

The second issue needing clarification concerns the requirement that, for general principles to apply as a matter of Community law, the situation must fall within the scope of application of the EC Treaty. That requirement was fulfilled in *Mangold*, because the provision that was found to be discriminatory had been inserted into national legislation implementing the Community rules on fixed-term contracts of employment; so there was a connection with the EC Treaty quite independently of Directive 2000/78.

[98] Case C–411/05, *Palacios de la Villa v Cortefiel Servios SA;* Case C–427/06, *Bartsch v BSH Bosch und Siemens Hausgerate Alterfursorge GmbH,* both pending. On 15 Feb 2007, AG Mazak delivered an Opinion in *Palacios*, in which he criticises aspects of the *Mangold* judgment. See also the remark by AG Geelhoed, at para 56 of his Opinion in *Navas*, advocating 'a more restrained interpretation and application of Directive 2000/78 than adopted by the Court in the *Mangold* case': Case C–13/05, *Sonia Chacon v Eurest Colectividades SA,* not yet reported.

[99] Above n 98, Opinion, paras 132–139.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

But suppose discrimination on grounds of age (or any other ground within the scope of the Directive) were established with respect to a measure which a Member State had adopted autonomously. Would the existence of Directive 2000/78 be sufficient in itself, at least after the implementation date had been reached, to constitute a link with the Community order, such as to bring into play any underlying general principle that might (unlike the provisions of the Directive) be enforceable against a private party?

If those issues were to receive an affirmative answer from the Court, *Mangold* would be seen to have blown a very large hole in what remains of the no horizontal direct effect rule for Directives. For the time being, all that can be said with certainty is that the judgment has brought fresh uncertainty to the already convoluted case law.

IX. CONCLUSION

It has been suggested that the Court of Justice missed the chance, at the time of *Marshall (No 1)*, of opting clearly and firmly for either the specific identity objective or the effectiveness objective of the direct effect of Directives. The former choice would have meant accepting that Directives could have only very limited direct effect, to prevent Member States from behaving oppressively; this would have been more consistent with the division of powers between the national and Community levels, as contemplated by the Treaty. The latter choice would have meant accepting that Directives were fully invocable against individuals; this would have enhanced the ability of the judicial arm, at both levels, to meet the challenge the defective implementation of Directives undoubtedly poses to the well functioning of the Community order.

The compromise solution of the Court of Justice has involved recognition of the no horizontal direct effect rule for Directives, while restricting the scope of the rule by various stratagems, resulting in a case law of which it is hard to give an account that is intellectually satisfying. Those stratagems comprise:

— the broad conception of the state, which artificially extends the range of situations classed as vertical;
— the duty of consistent interpretation, formulated in terms that put strong pressure on national courts to interpret the applicable national provisions in the light of the wording and purpose of any relevant Directive; and
— incidental direct effect, which means that Directives are recognised as capable of having legal effects on individuals, other than the direct conferral of rights and the correlative imposition of obligations; the no horizontal direct effect rule is thus confined to private law Directives.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press

The development of the state liability doctrine failed to deflect the Court of Justice from this approach. The remedy by way of damages against the defaulting Member State is treated in the case law as a last resort, where there is no possibility of direct effect or consistent interpretation.

In *Pfeiffer*, the Court of Justice and Advocate General Colomer, after hearing argument on the exclusion/substitution theory, chose not to apply it. Instead, the case was decided on the basis of the no horizontal direct effect rule, in combination with a powerfully stated duty of consistent interpretation. That seemed to reaffirm the orthodox position, as it had evolved in the case law summarised under the three bullet points above.

But then came the *Mangold* decision—so much out of the blue that no Member State other than Germany had seen the need to make written or oral submissions. After *Pfeiffer*, to have described the case law on the direct effect of Directives as a reduction to absurdity would have seemed excessively harsh. After *Mangold*, the wise course is to reserve judgment until the implications become clearer.

https://doi.org/10.5235/152888712802746858 Published online by Cambridge University Press