On the Doctrine of the Direct Effect of European Provisions Regarding the Requirement of Enforceability

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The concept of direct effect, interpreted on the basis of a questionably adequate understanding of the concept of monism taken from international law, should have the purpose of disabling national agents to interfere or to perform the "handover" of rights from the EU level to citizens. Consequently, direct effect should annul the need for a dualistic approach presumed to be an obstacle to the enforceability of supranational provisions. Practice has shown that this understanding leads to its simplified, plain and bureaucratic usage, instead of the usage of the underutilised and at the same time very demanding "shield and sword" approach.

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This approach should defend individual rights from both national and supranational unfavourable influences, while taking into account fundamental rights and general principles, encouraged and taken care of by the Court of Justice of the European Union (CJEU), which are and should be the cornerstone of the EU legal system, and which are ultimately a vindication of the willingness for the Member States to embrace the principle of supremacy of European law.

Keywords: direct effect, principle of supremacy, European law, international law, enforceability, direct applicability

1. Introduction

In the framework of European law, direct effect was envisaged as a mechanism enabling participation in the law-making process (since it implies activities of national agents in the enforcement process of the European Union (EU) law, which will be shown below), and the efficient exercise of the rights of individuals through the possibility of relying on provisions containing them before courts and other implementing national institutions. The idea of direct effect was to achieve efficiency, which can be achieved through enforceability. To be enforceable, provisions must be obligatory, but also sufficiently clear, precise, and unconditional. To this end, it will be shown that the provisions of the most important documents of secondary legislation, regulations and directives, must be diligently handled in order to be enforceable, especially in view of the fact that many provisions of regulations for which the characteristic of direct applicability is recognised do not have direct effect, and some directives which should have neither of those attributes – due to the requirement of efficiency and enforceability – may still have them under defined circumstances. This can be understood as a problem of legal certainty, but the idea of direct effect is more complex than that. This paper aims to accentuate this problem, because direct effect should be applied for the benefit of individuals preserving their rights from national but also from supranational elements. This, as an additional task of national agents engaged in the process of the application of European law, is very demanding and unappealing in comparison to the plain and simplified application, using no interpretative methods whatsoever, which has been present as a legal practice for many years. This is why this paper aims to draw attention to the concept of

direct effect, interpreted on the basis of a questionably adequate understanding of the concept of monism taken over from international law, and also to emphasise the role of direct effect in enhancing enforceability. The idea of this paper is to highlight and rethink the historical comprehension and interpretation of direct effect, supported by the monistic influences aiming at the annulment of the activities and interferences of national "governments and bureaucrats"[1] in the handover of supranationally recognised rights of individuals. Today's changed situation, especially regarding the drafting of an increased number of precise and detailed provisions so that they can be directly applicable and effective, leads, using such historical interpretation of direct effect, to the exclusion of national actors, and consequently, to a simplified application causing not only the failure to properly comprehend and implement European provisions at the national level, but also questionable end results that can be contrary to the fundamental rights and general principles which are the cornerstone and precondition of integration and international cooperation.

Some of the CJEU case-law will be presented in this paper, with the remark that its practice is generally studied insufficiently at the national level. Regarding direct effect, the CJEU shows that it is not always possible to follow rules literally and formalistically and achieve just and adequate implementation at the national level without any further effort. It will be underlined that the CJEU, maintaining its case-by-case method and not adhering to a formalistic approach and textual interpretation,[2] shows in its work how direct effect and the related principle of supremacy should be understood. The paper states that, in doing so, the monist or dualist

[1] The expression used by Mancini and Keelling (1994, p. 183), authors who will be analysed and cited below.

[2] The terms "textual" or "grammatical" interpretation stem from the theory of interpretation and the theory of legal translation. Formalism, especially deeply rooted in the former socialist countries and their legal systems but also characteristic of all European countries to a certain degree, which is reflected in actions of courts in the implementation of the law, is characterised by grammatical interpretation of laws, and by the influence of the deeply rooted procedures resistant to changes. Furthermore, formalism is also evident in the use of legal sources, which are exclusively written laws, predominantly only national ones, and, consequently, in the limited role of judges compared to the role granted to them by European law. This role is insufficiently appropriately supported by national constitutional, procedural, and other authorisations. Such legal thinking creates an obstacle to the implementation of European law at the national level. The implementation inherent to European law implies a teleological interpretation of national regulations in accordance with European law, as well as of European law itself taking into account the general principles and fundamental rights thus ensuring a more humane, more just, more responsible, and even more effective achievement of the purposes of laws.

approaches understood in the way they were conceived and developed in international law, also cannot be plainly attributed to the concepts of European law. It aims to emphasise the features and aspirations of European law not to adhere to a strictly formalistic interpretative approach, and to highlight that all inconsistencies the CJEU makes or allows are, as a matter of fact, only exceptions to the rules in order to achieve ethical and proper application of European law at the national level. Those exceptions are not a denial or annulment of the basic rules, but rather an answer to the social dynamic to which law must respond and be adjusted. The intention of this paper is to stress the necessity of such methods, because only in doing so can one speak of real enforceability.

2. The Demand for Effectiveness of EU Law and the Mechanisms of Its Functioning

The demand for effectiveness, also a principle of European law on its own (Craig, 2009), resulted in the shaping and development of four basic mechanisms of EU law: interpretative effect, direct effect, supremacy of European law, and the principle of conferral (Sansović, 2013). For the purposes of this paper, direct effect means horizontal direct effect, applicable between private parties, characterising provisions of European law the citizens of the EU can refer to, invoke, or rely on (de Witte, 2021, p. 194), while vertical means that the addressees are Member States (MSs) and their bodies (de Witte, 2021, p. 198). In this paper the concept of efficiency will be tackled with reference to its relationship to enforceability. Effectiveness can also be seen as an aim inherent both to national and international systems. For the purposes of this paper, the concept of enforceability is understood as bestowing an applicable and mandatory/obligatory character on certain provisions. It does not presuppose effectiveness, but is a precondition of it. The key mechanisms of EU law: interpretative effect, direct effect, supremacy of law, and the principle of conferral are not (nor were they in previous decades) unknown to international law, as a matter of fact they derive from it (Nollkaemper, 2014). In the last 50 years, international law itself has been subjected to significant changes, but in a way, was lacking the notable transfer of national sovereignty to international bodies, and consequently featured rather nonaggressive usage of the rest of the mechanisms previously mentioned. The EU tried to use those mechanisms to make its provisions enforceable on a larger scale, and therefore more efficient. Mutual impact and inter-

dependence of those mechanisms had the task of enabling the effectiveness of EU law. Since the time when international law did not have many mechanisms enabling stronger duties for national governments to obey, both international and European law, influencing each other, have developed the said mechanisms, trying efficiently to fulfil their goals (Betlern & Nollkaemper, 2003). This is how European law happened to form "a *sui generis* legal system ... unique, new, exceptional, hybrid, differing from both federal states and international organisations" (Phelan, 2012, p. 367). Considering the high level of similarities of not only national legal systems of European countries, but also their cultural, historical and religious foundations, those similarities were the starting point of the idea to make it more integrated and more effective. After many years, those mechanisms were supposed to be used in this manner, and in accordance with the primary goals created by the Fathers of the EU (Ratzinger, 2013). These goals are and should still be relevant and are one of the issues this paper would like to address, especially since the consequences of the application of the said mechanisms without taking them into account can submit different results (Sansović, 2015). In this paper, direct effect will be analysed in connection with the principle of supremacy, and the others will be only cursorily addressed. The principle of supremacy, connected with the transfer of a part of sovereign powers from MSs to the EU, will be analysed briefly since it is crucial for the effective takeover of the *acquis communautaire* as a whole, without territorial, temporal, or any other limitations, except those encountered during the accession negotiations between the EU and its MSs on the one side, and the candidate/accession country on the other, or some particular exemptions obtained during the membership. Some differences between international and European law regarding the issue of the level of enforceability will be briefly indicated in the next chapter.

3. Enforceability of International and European Law

The problem of the full efficiency of international law, and its enforceability as the precondition of efficiency, has been ambiguous from the beginning. Morgenthau, as a realist, describes that the Hobbesian utilitarian and rationalistic view believed that nations obey international law only sometimes, when it serves their interests; that the liberal Kantian view

assumed that nations in principle obey international law, because they are guided by a moral sense and an ethical obligation originating from natural law and justice, and that positivists say that the ethical tradition "blurred" the issues of whether nations should and would obey international law (Morgentau, 1948). Austin stated that international law is not really law, because unlike domestic norms, its norms are not enforced by the same sovereign coercion: "The duties which (international law) imposes … are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected" (Austin, 2012, p. 201).

In addition, regarding the content of international law Austin claimed that it is a "positive international morality." According to this, the positivists were dealing with the causal question of why nations do or should obey international law at all. Therefore, this paper would like to tackle the standpoint that prevails covertly, so to speak, regarding the concept of international law, especially in its early beginnings, that national states/their governments are the key factor capable of disrespecting and jeopardising citizens' rights, while having full sovereignty even over their citizens. This statement was the starting point and also the motive for the establishment of transnational, international and supranational provisions the purpose of which was to protect individuals from arbitrariness of national systems and their governments and bureaucrats. Obviously, the tendency was to institute a higher system, which should have been just and fair by default.

In 1789, Bentham coined the phrase international law using it for the first time in his book "An Introduction to the Principles of Morals and Legislation" (Bentham, 2000). Nevertheless, he rejected the monistic view of a single, integrated transnational legal system. He claimed that the public law of nations operates on a separate horizontal plane for states only. However, Bentham provoked the era and the topics of dualistic theory, highlighting the differences between "domestic" law and international law (Bentham, 2000). According to the dualistic approach, the demand for a double judicial and legal system, a double mechanism which is both national and international, is a necessity. Perhaps this was regarded as a more efficient approach, although every international instrument requires an intervention on the part of the state, its implementation into national legislation, regardless of the monistic or dualistic system (Winter, 1972).

Regarding the EU, the situation is slightly different because of its different nature. For instance, Chalmers and Barosso (2014) have voiced the

opinion that as for the EU, there should be a dualistic understanding and dualistic mechanisms. They claimed that even the CJEU is not a monistic court, and that coordination of different legal systems in the case of EU law is too complex to be implemented in a monistic way. Moreover, regarding EU law they also expressed the opinion that it is progressively more visible that EU law is a special kind of law and cannot be integrated into the old monism-dualism dichotomy. Some authors, while discussing monism-dualism and analysing direct effect in relation to the monistic approach, claim that individuals can also have international rights and obligations, but in a limited scope (Konstandinides, 2009), and that the CJEU at the time of *Van Gend en Loos* case (26/62) thought that international law does not have direct effect, and therefore there is no obligation or right that could derive from it. Rights and obligations derive from state obligations undertaken according to international treaties (Konstandinides, 2009). In addition, it should be mentioned that beside the existence of European bodies and institutions that implement, create, and enforce European provisions, there are national courts and all other national bodies which are at the same time European courts and bodies (Ćapeta, 2002). Those basic elements suggest that this topic can hardly be strictly concluded by saying there is an exclusively monist or dualistic approach within EU law, especially seen the way it is in international law, but also that it is not recommendable to pour "new wine into old wineskins".

4. Some Notions Regarding the Principle of Supremacy Enabling Direct Effect

It would be useful to tackle the issue of the principle of supremacy by putting forth a thesis according to which the effectiveness of transnational, international, or supranational legal provisions can only be achieved if this principle exists due to the conferral of powers. The conferral of powers from national to international bodies facilitates direct effect and direct applicability of international, supranational, or transnational norms. As the principle of supremacy is linked with the ambiguous, politically and legally sensitive topic of sovereignty, there were always concerns and disputes regarding it. Looking back to the times when the concept of EU law supremacy and the concept of competence were still in the early stages of being shaped, Mancini and Keeling said that although from the beginning the Union contained supranational elements and provided for some

pooling of sovereignty, MSs were anxious to circumscribe the surrender of national sovereignty within clearly defined limits (Mancini & Keeling, 1994). Another author, Savaşan, says that the European integration process and the development of EU law have facilitated the restrictions directed towards the powers of sovereign states: "The process, just at the beginning of its establishment, through both the ECSC, including a High Authority and the EEC, including a supranational Commission, presented a challenge to traditional view of sovereignty. Then, in the period of its development as the EU, as common policies advanced further, it has produced further fundamental shifts in the traditional sovereignty" (Savaşan, 2009, p. 90).

Despite those obvious practical facts, the Treaty Establishing a Constitution for Europe from 2004 was the first document defining, comprising, and imposing the principle of supremacy of EU law, but it never came into force (Craig & de Burca, 2020). All the EU Treaties enacted before had neither tried to mention, nor defined this very delicate topic. Some authors think this was a "diplomatic" way of avoiding the problem (Steiner & Woods, 2006). Regarding this principle one can raise some objections to the Lisbon Treaty if compared to the Constitutional Treaty, that it does not regulate the issue of the supremacy of European law (Rodin, 2009), although it is rightly noted that the concept and the doctrine of supremacy are well established in the practice of the European Court of Justice (Rodin & Ćapeta, 2008).

The principle of supremacy of EU law and the direct effect principle are interconnected, all the more so because the principle of supremacy could not even exist without the support of the provisions having direct effect and *vice versa* (de Witte, 2020). Beside the fact that individuals have rights deriving from the law of the Union, and they can be referred to before national courts, they are valid not only when they are directly acknowledged by the Treaties but also when they are based on obligations deriving from the Treaties. As such, they are imposed on individuals, their MSs, and even on the institutions of the Union. The principle of direct effect concerns not only the rights of individuals recognised under the Treaty, but also legal relations among those individuals. The effect of the principle of supremacy of Union law therefore suggests the question of absolute or relative supremacy, meaning that it can be seen from the national point of view as well as from the European. However, those two dimensions can be subsumed in the case of European law, leading to restrictions of national sovereign powers, but also to different standpoints of MSs. Below is a reminder of some cases of the CJEU saying that the European

provisions have predominant effect in relation to national constitutional provisions which are contrary (see also Schütze, 2006).

On the other hand, the question of supremacy in the case of international law is in principle a matter of national law, and it is regulated in accordance with constitutional rules (coming back to the question of monism and dualism). If it were also the case in relation to European law, it could not be applicable in the case of conflict with the basic principles of national constitutions. The fact is that accession to the European Union which requires constitutional changes, or at least special constitutional powers for the conclusion of Treaties having international law characteristics, gives rise to the need for certain changes at the national level (Claes, 2007). The supremacy of European law from the perspective of the CJEU is in line with the development of fundamental rights,[3] playing a protective role in the national and European legislation. However, this has already been analysed and discussed in court cases such as *Stauder v. City of Ulm* (29/69), where the CJEU has declared the concept of human rights and announced that it will annul every European provision contrary to human rights,[4] or *Internationale Handelsgesellschaft* (11/70), where the CJEU proclaimed that validity of measures cannot be estimated in accordance with national rules or concepts. It has also pointed out that validity of a Community measure or its effect within a MS cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State, or the principles of its

[3] The confirmation in support of the thesis about the increasing role and recognition of fundamental rights within the European Union that are already recognised and defined within other international organisations, can be found in the case-law, e.g. in *Internationale Handelsgesellschaft*, where the Court takes into account the European Convention on the Protection of Human Rights, the European Social Charter, and the Convention of the International Labour Organization, and in secondary legislation: e.g. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law: "(14) This Framework Decision respects the fundamental rights and observes the principles recognised by Art. 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Art. 10 and 11 thereof, and reflected in the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof."

[4] Germany has expressed doubt regarding this principle, and asked if the European legal provisions should have supremacy over provisions from the German Constitution, especially those referring to human rights. This question was not asked regarding other provisions the Parliament had enacted. The thing is that all German provisions, including federal ones, are subordinated to the Constitution. German lawyers held that European law could not be applicable in Germany if it breaches fundamental human rights deriving from the Constitution. Therefore, a request was made in terms of how to interpret European law with the provisions of the German Constitution regarding fundamental human rights.

constitutional structure. The judgment is notable because it comprises the declaration that the fundamental rights are an integral part of the general legal principles protected by the CJEU.[5] Therefore, values have become the criteria for the assessment of law in force, and the basis for treating those regulations violating fundamental rights based on those values. The protection of those rights "inspired", among other sources, by the constitutional traditions common to the MSs, should be preserved in the framework of the Union and its goals.[6] In *Nold v. Commission* (4/73), this issue was further clarified and defined in need of the correct interpretation and recognition of fundamental rights, as well as of questioning the possibilities of their limitations.[7] In *Hauer v. Land Rheinland-Pfalz* (44/79), it is stated that international documents, accepted by the MSs are also a source of fundamental rights and general principles.[8] In the *Defrenne* case (43/75), the CJEU has acknowledged horizontal direct effect of Art. 147 of the Treaty on the Functioning of the European Union (ex Art. 141 of the Treaty establishing the European Community - TEC), equally as of general principles and fundamental rights of the Union. Through its own case-law, but also taking into consideration the practice of the European Court of Human Rights, the CJEU has also defined the scope and modes of the application of general principles and fundamental rights (Craig & de Burca, 2020; Shaw, 2000; Hartley, 2014, etc.)[9].

[5] In *Handelsgesellschaft,* paragraph 4 of the Judgment, the CJEU declares that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."

[6] The applicants stated that the whole system of common agricultural policy was contrary to human rights. The question of the principle of proportionality was raised, which was at the same time a doctrine of German constitutional law, and according to which public bodies can impose those obligations upon citizens necessary for the achievement of particular public interests.

[7] The applicant refers to the violation of the fundamental human right partly because he was deprived of his property, and partly because his right to economic activity was violated. The CJEU recognised those two rights as the principles of the Union, but considered that they should not be understood as absolute and unlimited ones. They may be limited only by justified general goals of the Union. The CJEU concluded that no violation has occurred in this case. Regarding this application, the CJEU stated that international treaties on the protection of human rights, in respect of which MSs cooperate and to which they are signatories, may represent guidelines that must be followed within the framework of Union law.

[8] The CJEU also refers to the constitutional regulations of three MSs (Germany, Italy, and Ireland) in order to establish the right to property, and in doing so takes into account the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[9] *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique* (C-282/10), *Inter-Environnement Wallonie* (C-129/96), *Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)* (C-212/04), Kücükdeveci v. *Swedex GmbH & Co. KG*, (C- 555/07).

Some of the recent cases, for example the so called *Taricco saga*, were interpreted as the CJEU rulings against the EU principles and giving supremacy to the national constitutional rules containing a higher level of protection of fundamental rights. It must be noted that those cases have repeated what was primarily already stated in *Arcaro* case (C-68/95) in paragraph 42 of the Judgment, saying that non-implemented directives cannot determine "obligation … when it leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive." In the *Taricco* case (C-105/14), the ECJ confirms not only the rule from *Arcaro*, but also acknowledges the values of European law already contained in national constitutions and international treaties accepted by its MSs.

The above cases show that the principles can be interpreted differently, and in that way, their application can be jeopardised. This is why the CJEU, owing to the principle of supremacy, can define the scope of fundamental rights and general principles and set them as obligatory standards. Those standards are not only obligatory in terms of their interpretation, but also in terms of the obligation to refer to them: "Although the supremacy of Community law *vis-ã-vis* national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather that referring for a Community ruling on these matters from the ECJ. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have similar effect" (Steiner, 2020, p. 120).

Maduro mentions that different legal systems and institutions can differ from each other but have to adjust their jurisdiction to the conditions of the European system. So-called differences and misunderstandings could be just a matter of their (different, unharmonized) interpretation because there is the presumption of compatibility of national constitutions of the MSs, which implies the same fundamental values (Maduro, 2003). Another important issue to be emphasised is that direct applicability regarding provisions containing fundamental rights can relate to direct application of EU provisions or by exclusion of applicable national rules that are incompatible, which is often considered as indirect horizontal effect (Prechal, 2020).

5. Do We Maintain the Course from Van Gend en Loos?

The idea of direct effect had already been mentioned and developed by the International Court of Justice in The Hague (ICJ) in the Advisory Opinion No 192 of 3 March 1928.[10] Regarding this concept deriving from the version of the ICJ until today, certain changes have been made. In the environment of EU law, direct effect was used and transformed in the framework of the *Van Gend en Loos* case. In this case, the CJEU recognised the two aspects of democratic legitimacy: the right of citizens to participate in the law-making function through representative bodies, and the ability of individuals to vindicate their rights in judicial proceedings. Mancini and Keeling (1994, p. 182) explain how direct effect was used to achieve that: "The involvement of Europe's citizens in the enforcement of Community law, as a result of the doctrine of direct effect, is, … a dramatically important democratising factor; but it could not have borne full fruit if the reference procedure under Art. 177 [of the then EEC Treaty, now 267 TFEU, author's comment] had not been transformed in the course of the years into a quasi-federal instrument for reviewing the compatibility of national laws with Community law". ,

According to this opinion, the CJEU demonstrated in *Van Gend en Loos* that the intention of the provisions of the then EEC Treaty and other provisions of European law is to confer primarily rights on individuals. Mancini and Keeling deem that it would be pointless for Art. 267 to empower or require national courts to seek rulings on the interpretation of provisions of European law if those provisions could not be invoked in national proceedings**.** The growing power of direct effect, according to them, distinguishes European law from other provisions by international law bodies: "Without direct effect, we would have a very different Community today – a more obscure, more remote Community barely distinguishable from so many other international organisations whose existence passes unnoticed by ordinary citizens" (Mancini & Keeling, 1994, p. 183). The idea of *Van Gend en Loos* was to affect directly the lives of individuals, as they were seen as subjects of the new legal order.[11] Their opinion and interpretation of direct effect in the case were as follows: "The effect of

[10] https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_B/B_15/01_Competence_des_tribunaux_de_Danzig_Avis_consultatif.pdf

[11] Paragraph 12 Section B of the Judgment

Van Gend en Loos was to take Community law out of the hands of politicians and bureaucrats and to give it to the people. Of all the Court's democratising achievements, none can rank so highly in practical terms" (Mancini & Keeling, 1994, p. 183) Although in *Van Gend en Loos* the CJEU also mentions that the then EEC Treaty imposes obligations on individuals, the idea of that case was probably the task of the national court to protect individual rights, not just to make sure that obligations deriving from the then EEC Treaty were enforced against individuals (as it is also stated in the third paragraph of the preamble of the judgment).[12]

If we uphold the position that the intention of *Van Gend en Loos* was to take European law out of the hands of politicians and bureaucrats and to give it over to people, direct effect should be implemented as a shield and a sword at the same time. This metaphor – "a shield and a sword" – has been used by many authors, e.g. sometimes by saying that directives would have been used not only as a shield against national provisions contravening it, but also as a sword against another individual (Lenaerts et al., 1999, p. 82); or by saying that EU norms can be used as a sword, meaning as a source of new rights, and as a shield, meaning as protection against a conflicting national norm, having in this way a "substitution effect" of taking the place of national provisions, or an "exclusionary effect" of excluding a conflicting national norm (de Witte, 2021, p. 194). Apart from that, there is another interpretation of this metaphor, namely that individuals should be protected from international/European provisions, as well as from the national ones when they breach their rights: "Direct effect is a useful technique that allows domestic courts to fulfil a role as a safety valve, or "gatekeeper": that states may find it acceptable that international law as such is part of the domestic legal order, but the effects of international law have to be controlled" (Nollkaemper, 2014, p. 116).

In this way, it should be understood as a shield, containing "a threshold requirement before international law can be applied" (Nollkaemper, 2014, p. 115). The sword function should be seen in action in the situations "that courts can use to pierce the boundary of national legal order and protect individual rights where national law falls short, so national courts play political function at the intersection of legal orders" (Nollkaemper, 2014, p. 105).

[12] "At the time, the obligations binding on individuals were indeed quite limited. Competition law was an important source of such obligations, as antitrust rules and the prohibition of abuse of a dominant position were explicitly targeting the behaviour of private companies" (Robin-Olivier, 2014, p.176).

When considering the application of direct effect shown this way, one can get the impression that direct effect demands a certain kind of engagement by judges, almost as demanding as it is in the case of indirect effect, the application of which is also underestimated and problematic in the implementation at the national level (Kühn, 2011). This is an extended task for courts, and not only for them, but for all the other actors applying European provisions at the national level, giving them greater responsibilities than the national constitutions are willing to admit. Truly, this should transform direct effect from a "seemingly technical principle" given to courts as it is designed in *Van Gend en Loos*, to a "fundamentally political one".

6. The Direct Effect of Directives – a Rule or an Exception?

Indirect effect was originally reserved for directives, but over time has become increasingly strong (Prechal, 2005; Rodin & Ćapeta, 2008). Some authors dealing with indirect effect have even put forth the thesis that indirect effect is becoming even stronger and its limits can be very broadly interpreted (Shaw, 2000; Arnull, 2006). The purpose of the development and strengthening of this concept was efficiency of European law at the national level. Indirect effect in the case of directives provides judges with a very wide margin of appreciation/discretion, presupposing a very demanding interpretative task of all agents in the process of implementation at the national level (Kühn, 2011; Ćapeta, 2006; Robin Olivier, 2014, etc.).

The *Von Colson* case set forth the functionality request, since direct effect of the relevant provision was not possible, and the CJEU considered directives should be entirely efficient. Namely, *Von Colson* concerned a directive that had been implemented inadequately. The CJEU demanded interpretative obligation, i.e. indirect effect, to be applied, which meant that the national court was required to interpret national law in the light of the inadequately implemented or unimplemented directive, even in a case against an individual (Craig & de Burca, 2020). In paragraph 28 of the Judgment, the CJEU concluded that it is the duty of a national court 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".

The *Marshall* (C-271/91) case referred to the differentiation between vertical and horizontal effect. The issue of directives was also considered and

they were taken into account when the definition of horizontal direct effect was developed. The CJEU held that direct effect cannot exist against an individual, but only against a state. Following this logic, directives only have vertical but not horizontal effect. This opinion has its basis in the third paragraph of Art. 288 of the TFEU, where it is stated that "a directive shall be binding, as to the result to be achieved, upon each MS to which it is addressed", meaning that directives are only obligatory for MSs. This opinion from *Marshall* is the result of a textual and very narrow interpretation. In *Van Gend en Loos*, the CJEU takes a softer position and provides the first and real definition of (horizontal) direct effect as a "possibility, in actions between individuals before a national court, of pleading infringements of these obligations."

Furthermore, the CJEU has expressed its position regarding the internal market Directive 88/361/EEC, demanding it should be unconditionally applicable. In two cases from 1995, the CJEU made the statement regarding principles "conferring rights on individuals which they may rely on before the courts and which the national courts must uphold" (cases C-358, 416/93 *Bordesa* (1995) C-163/94, *Sanz de Lera* (1995)). In the *Ratti* case (148/78), the issue was that MSs had the duty to implement directives but failed to do so. In this case the MSs are precluded from applying their national law and are therefore also precluded from the right to acknowledge the binding effect of particular directives against individuals. The idea is that MSs must implement directives, and if this is the case, it should be possible for an individual to refer to the national implementing legislation. Unlike the situation when an already implemented directive produces its regular indirect effect, this is a situation where directives have direct effect even though they are not implemented. If a MS has failed to implement a directive into its national legal system, there is no possibility for that MS either to plead its own omission or to deny its binding effect after the expiration of the date of implementation. In many other cases, the CJEU also holds that directives can have a "similar effect" as regulations, after the expiration of the date for their implementation.[13]

Furthermore, in the *Kortas* case (C-319/97) the CJEU decided that there is no possibility for the MSs to be exempted from the obligation of harmonisation with directives according to Art. 114(4) TFEU (ex Art. 95(4) TEC). It neither prevents a directive from having direct effect, nor does it

[13] *Ursula Becker v. Finanzamt Münster-Innenstadt* (8/81), *Ambulanter Pflegedienst Kügler GmbH v. Finanzamt für Körperschaften I in Berlin* (C-141/00).

preclude an individual from his/her right to directly rely on provisions of a directive, even in the situation where it is provided for a MS to have an exemption. Paragraph 12 of the Judgment reads: "Mr Kortas argued that the proceedings brought against him were based on national legislation which was contrary to Community law and that they should therefore be discontinued. The Public Prosecutor contended, on the other hand, that the Kingdom of Sweden should be deemed to have obtained a derogation from the Directive in so far as the Commission has neglected, over a period of years, to respond to Sweden's notification".

This produces a situation where a MS has no obligation to implement the directive, and an individual is still in a position to refer to it. The CJEU says in its response (operative part): "The direct effect of a directive, where the deadline for its transposition into national law has expired, is not affected by the notification made by a Member State pursuant to Art. 100a(4) of the Treaty [now, after amendment, Art. 95(4)–(9) TEC] seeking confirmation of provisions of national law derogating from the directive, even where the Commission fails to respond to that notification".

It follows that horizontal direct effect regarding provisions primarily not having this characteristic, is acknowledged to them to a certain degree by Art. 267 of the TFEU (ex Art. 234 TEC). On the basis of that Article, it is possible for national courts to refer their preliminary questions regarding EU measures to the CJEU, and as a consequence of it, a situation arises where individuals have the possibility to refer to CJEU's respective answers.

The fact that the provisions of directives have direct effect, if the conditions are fulfilled, is also stated in the *Van Duyn* case (41/74). In *Van Duyn*, the CJEU holds the position that directives are legally binding, and that they will be more efficient if individuals can rely on them (functional reason). Regarding the Van Duyn case, Rodin says: "At the time when the case was discussed before the Court, the position of the Court according to which former Art. 189 TEU does not renounce the possibility that directives could have effects similar to regulations was known from before. Quoting the Court: "If, however, by virtue of the provisions of Art. 189, regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow that other categories of acts mentioned in that Article can never have similar effects." (*l'effet utile*). In other words, every legal norm is designed to have legal effects. The situation, where a party to a proceeding would not be in the position to rely on them before national courts, would consequently pose the question of what their purpose is after all." (Rodin & Ćapeta, 2008, p. 25, own translation)

The fact that directives are by their nature obligatory European acts is another reason to recognise their direct affect. Craig interprets CJEU case-law saying that according to the CJEU, all obligatory acts can have direct effect, while non-obligatory do not, but can produce effects in other ways, especially through indirect effect (Craig & de Burca, 2020). Besides that, there is another reason to acknowledge the horizontal direct effect of directives. If directives only had vertical, but not horizontal direct effect, that would lead to unharmonized application both within a MS and between MSs, and would signify discrimination among individuals, especially discrimination between the public and the private sector (Mastroianni, 1999).

However, direct effect of directives could be considered as a rule, since how and when it happens is now predefined. The question formulated by Winter (Winter, 1972) years ago is still pending: how can a provision be sufficiently clear, detailed, and unconditional and still be found in a directive or, as it will be presented in the next chapter, how would provisions of regulations not need to be sufficiently clear, detailed, and unconditional, or even be optional, and still find their place in directly applicable obligatory documents?

7. On the Distinctions between Direct Effect and Direct Application and the Matter of Enforceability

There is another topic that should also be taken into consideration when speaking of direct effect. Besides the concept of direct effect, the concept of direct applicability or at least its terminological designation has been used in theory and practice throughout the years mostly as synonymous at the beginning, with differentiation coming slowly over the years. For instance, the Court of Justice considers the general formula of "produces direct effects and creates individual rights which municipal courts must recognize" to be synonymous with "directly applicable" (Koller 1971, p. 163).[14] Even nowadays, some distinguished theoreticians (Craig & de

[14] Regarding the Treaty establishing the European Economic Community from 1957 (11957E/TXT), there were four authentic texts - French, German, Dutch, and Italian. Its provisions contained the formulation regarding regulations as follows: German version – *gelten unmittelbar*; French version – *applicabilité directe*; Italian version – *direttamente applicabile*; Dutch version – *rechtstreeks toepasselijk*). In the English versions from the year 1962

Burca, 2015) use those two terms as synonyms by using the term direct application as an attributive, linguistic variation for a provision having direct effect. The reason for this situation is the absence of their written and precise definition in the legislation and in the case-law. The real question is, are they synonyms after all? Considering that the concepts are often used as interchangeable due to the lack of their definitions, a few cases where the CJEU responds regarding this will be introduced. In the judgment of the case 39/72 *Commission v. Italy*, paragraph 17, the CJEU has, purposely or not, set those two terms apart: "… Consequently, 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 jeopardizing their simultaneous and uniform application in the whole of the Community." Through the development of European law: documents of primary and secondary legislation, case-law, theory of European law, situations occurred where both terms were used side by side, although it was questionable if they were used as different concepts or as synonyms for the same concept.

The impression is that in the early beginnings those two concepts (if at all it is possible to see them as different concepts during this era), and consequently their related terms, were used regarding certain types of EU documents, mainly directives and regulations. Historically speaking, the formulation from the already mentioned Art. 288 of the Treaty on the Functioning of the European Union regarding directives and regulations had considerable influence, which has been retained to this day. On the other hand, arguments in terms of the differentiation between direct effect and direct application were made very early by Winter, as already mentioned (Winter, 1972), and later also by contemporary practitioners: "Direct applicability talks about whether an EU law needs a national parliament to enact legislation to make it law in a member state … Direct effect refers to whether individuals can rely on the EU law in domestic courts."[15] In the practice of the CJEU, direct effect was mentioned mainly in the case of the interpretation of directives, while direct application was associated with regulations according to the mentioned Article. The

and 1967, provisions of the Treaty contain the following formulations: "take direct effect", and "A regulation shall apply generally. It shall be binding in its entirety and be directly applicable in each Member State." The version from 1972 seems to distinguish between direct application and direct effect (Winter, 1972, p. 438.)

[15] Citation retreived from https://hum.port.ac.uk/europeanstudieshub/learning/module-3-governance-in-a-multi-level-europe/direct-effect-and-direct-applicability/

CJEU has stated in paragraph 23 of the Judgment in *Muòoz and Superior Fruiticola* (C-253/00*)* that regulations have direct effect which can be vertical and horizontal. This statement was set out with reference to Art. 288 of the Treaty (Hartley, 2014, p. 293). In the *Muòoz* case, the CJEU also reminds that due to their legal nature and their place among other legal sources of European law, regulations establish rights of individuals that the domestic, national courts have to protect (paragraph 27).

The greatest concern of this paper is that there is a contradiction between the statement that a regulation can be directly applicable and the acknowledgement that in practice, a considerable number of its provisions are not directly applicable (Mathijsen, 1975). As we can see, this is an old issue which has for some reason remained unresolved to this day. In solving this problem, we could claim that the provisions of regulations not fulfilling the criteria of being "complete and legally perfect" should not be found in regulations, but in directives and decisions addressed to the MSs (Winter, 1972, p. 434). One should primarily take into consideration the fact that the term "directly applicable" contained in Art. 288 of the Treaty designates another concept, different from the concept of "direct effect". There are some opinions saying that direct applicability does not require direct effect (Schütze, 2021).[16] Although such an opinion would not be in line with the statement from paragraph 12 of the Judgment in *Van Duyn*: "By virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects ... "According to this statement and due to the experiences from many ECJ cases, it happens automatically, because when it comes to regulations, direct effect was the goal and the intention. It should also be taken into consideration that they are binding and obligatory by their legal nature. That would imply that the whole regulation, all of its provisions should be and are "complete and legally perfect" or, in other words, using the older terminology, self-executing (Pascatore, 1974, p. 28). Such conclusion is not supported by CJEU case-law. It is possible for a particular provision having direct effect according to its legal nature, not to contain "self-executing" provisions which are sufficiently clear, detailed, and unconditional to enable individuals to benefit from direct and immediate application of their rights and obligations. Equally, it is possible for directives, which are

[16] 'The concept of direct applicability is thus wider than the concept of direct effect. Whereas the former refers to the internal effect of a European norm within national legal orders, the latter refers to the individual effect of a norm in specific cases. Direct effect requires direct applicability, but not the other way around. However, the direct applicability of a norm only makes its direct effect possible (Schütze, 2021).

according to Art. 288 and the wording from Marshall not directly applicable, to have a self-executing character being both directly applicable and having direct effect.

There are many examples where the application of regulations is explicitly conditioned by the obligation of transposition into national legislation,[17] which makes their direct applicability, and consequently their direct effect questionable. This was clearly confirmed in *Azienda Agricola Monte Arcosu* case (C-403/98), stating that regulations have neither direct effect nor direct applicability and that "it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States." Some of them contain the provision saying that the MSs shall lay down competent authorities, or the rules on penalties applicable to infringements and shall take all measures necessary to ensure that they are implemented in accordance with national law.[18],[19] Moreover, the MSs are obliged to establish procedures providing information on the transposition of EU provisions, harmonisation, and there are mostly EU norms on sanctions regarding failure to comply with obligations. Regulations were previously considered as a "federalising device", and it was also considered that "incorporation devices in respect of provisions of regulations are superfluous and forbidden" (Winter, 1972, p. 436). In regulations one can also find optional and selective content,[20]

[17] Art. 19 of the Council Regulation 3821/85 of 20 December 1985 on recording equipment in road transport stipulates: "Member States shall, in good time and after consulting the Commission, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this Regulation." Preamble of the Regulation No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management: "Member States should adopt adequate measures to guarantee the proper functioning of the management and control system and the quality of implementation of their national programmes … each Member State should submit to the Commission a national programme describing how it aims to achieve the objectives of the relevant Specific Regulation."

[18] For example, Art. 19 of the Regulation (EU) 2019/1021 states that each Member State shall designate a competent authority or authorities responsible for the administrative tasks and enforcement required by this Regulation. Also, Regulation (EU) 2019/1020.

[19] "The Member States shall lay down the rules on penalties applicable to infringements of this Regulation and of Union harmonisation legislation listed in Annex II that impose obligations on economic operators and shall take all measures necessary to ensure that they are implemented in accordance with national law."

[20] Regulation (EU) 2021/1059. More on this topic can also be found in Sansović (2020).

hardly inherent to textually interpreted direct applicability and direct effect, but due to the limited space and the wish to remain focused on the main thesis, it will not be elaborated here, but should be mentioned only as exceptions to the main rules on regulations. Furthermore, even though a significant number of regulations have horizontal direct effect, it is also possible for regulations to contain provisions predesignated to have only vertical direct effect. This way there is the possibility of the existence of the provisions of regulations which are not intended to have horizontal effect, but still have certain limited effect in relations between the MSs and individuals under their jurisdiction (Everling, 1967).

8. Conclusion

The view that MSs are the key factor capable of disrespecting and jeopardising individual rights, was maybe somewhat concealed but present since the beginnings of the conception of international law, and was also a motive for establishing transnational, international, and supranational provisions the purpose of which was to protect individuals from arbitrariness of national systems, and their governments and bureaucrats. Deducing from the standpoints of many authors, both positivists and naturalists, there is a rather strong belief that international law is a moral category containing universal fundamental rights common to all nations, or to quote Austin regarding the content of international law, it is a "positive international morality" that should be protected. It was in such an environment that European law was conceived, though aiming at more coherence, more effectiveness. This is the reason why European law gave rise to the reshaping and development of four basic mechanisms of EU law: interpretative effect, direct effect, supremacy of Union law, and conferral of powers.

All EU provisions should have the characteristic of effectiveness, regardless of their capability of being directly applicable and enforceable. However, there is a difference between the two statements usually pointed out. One says that all norms should be effective, otherwise it is worthless to adopt them, while the other says that there is a need for direct effect to exist in achieving goals more intensively, although, according to *Van Gend en Loos* not all norms should be directly effective (Schütze, 2021, p. 154). Directives and regulations are both of obligatory nature. Directives are not envisaged to be directly applicable but due to interpretative obligation, they are very demanding for transposition and many times produce

direct effect. Regulations are, on the other hand, envisaged to be directly applicable and consequently assumed to have direct effect. The problem arises when there are exemptions from this rule: where directives gain direct effect and regulations do not. For directives, direct application is a consequence of acknowledged direct effect in certain and defined cases (if the preconditions are fulfilled). Conversely, in the case of regulations, although having an acknowledged attribute of direct applicability, the realisation of rights guaranteed by them is not always possible if their stipulations are not sufficiently clear, detailed, and unconditional. Therefore, it is not surprising that a seemingly dual concept of direct applicability has arisen in practice. If it is the intention of a particular provision to be efficient, it should previously be equipped with features enabling its applicability and enforceability. This is why direct effect must be supported by direct applicability – to be enforceable, and to fulfil its purpose. Only when it is applicable does a provision become active, alive, and enforceable. This is the moment when we can say that there is a possibility for legal goals and purposes to be achieved, and for efficiency to be reached. We can say that direct effect is a mandate, and applicability is an ability, a qualification to accomplish a task, a mission. That thesis gives rise to another question: if direct effect is just a premise to refer to a particular right, is it an element of the monistic approach after all, taking into account that it needs the support of direct applicability? Is applicability a concept that was created to directly effectuate the rights of individuals?

Perhaps it is more likely that regarding direct effect the CJEU has demonstrated in *Van Gend en Loos* that the intention of the provisions of the Treaties and other provisions of European law was, first of all, to confer primarily rights (duties not so much) on individuals. This idea was not new, since it was taken over from international law, as mentioned at the beginning of this paper. The idea from *Van Gend en Loos* was to directly affect the lives of individuals, as they were seen as subjects of the new legal order, and the aspiration "to take Community law out of the hands of politicians and bureaucrats and to give it to the people" also bears resemblance to that of international law.

Furthermore, a certain number of the abovementioned authors, from Winter onwards, have analysed direct effect and direct applicability as separate, different terms and notions in the course of the development of European law, a thesis to which this paper has been inclined. One of the authors who separate those terms also states that in *Van Gend en Loos*, the CJEU claims that direct effect is possible without direct applicability (Schütze, 2021, p. 171), which statement was taken into consideration

in the writing of this paper. On the other hand, Prechal as well as Craig, as highly distinguished authors, seemingly do not differentiate between those concepts, but Prechal claims another very intriguing and appealing thesis for possible further analysis – on the differentiation between horizontal direct effect and horizontal indirect effect (Prechal, 2020, p. 410).

However, for this paper the most inspiring and influential was Nollkaemper's proposal regarding the present day problem of the comprehension of direct effect seeing it not as a totalitarian or federal tool, but as a democratic and responsible way that helps in the case of the "intersection of legal orders" (Nollkaemper, 2014, p. 105). In this context, the idea of direct effect comes into focus in its usage as a shield and as a sword. This notion has been developed primarily as protection of an individual from harmful application or non-application of their rights guaranteed by supranational norms from national legal orders. The current development of international relations requires its transformation and a different, more intense engagement of national implementing bodies.

Without a doubt, this idea creates a demanding task for judges and other agents applying the law: judges have consequently gained (quasi)legislative powers. In the framework of harmonisation of national law, administrative national bodies must draft and adopt transpositional provisions, which they must later enact by themselves, or they "merely" draft implementing national acts, which will be adopted by parliaments. If this way of dealing with direct effect were accepted for the benefit of individuals, the courts and other bodies applying EU law would have a very demanding task, as complicated as the task they have in the case of indirect effect. However, it is logical that those two mechanisms (direct and indirect effect) should not be very different, because all national implementing provisions have to be read along with international, transnational, and supranational provisions. Such situations leave room for a very engaged intervention. The intriguing question is, can we consider those activities as a result of dualism or of monistic pressure on national bodies to deal with European and national provisions at the same time? Such an engagement at the national level comprises many difficult and demanding activities. Nevertheless, we should be reminded that this task is just a part of the bigger picture regarding the functioning of EU law.

The first precondition of that is a harmonised legal system achieved not only during the membership of a particular MS, but during years and years before accession to the EU, in the process of harmonisation of not only legal documents, but also of the complete national legal system. If interpreted from the viewpoint of international law, this is an indisputa-

ble fact of the existence of a monistic structure. Considering this, direct effect comprehended as a shield and a sword would be a democratising factor by giving national bodies powers to adjust the application of supranational provisions, not only of national provisions as it was previously assumed. Would it be breaking the rule of supranational law? I would say no, because national courts and other implementing actors are at the same time supranational, preforming both activities. In some cases, such an approach is noticeable in CJEU case-law, showing the wide margin of discretion. Creating its case-law, the CJEU has proven again that narrow comprehension of European provisions and rules, as well as their application using a formalistic approach and textual interpretation, and wrongly consistent application leading to its paradox, was never coherent with the essence of European law. Therefore, the claim that monism is inherent to European law is only partially true. Maybe the idea of European law is in its essence inherent to monism, as it is defined in international law environment, but due to the need to respect the democratising factor protecting the diversities of the Union and the liberty of all peoples, this thesis cannot be taken so simply. More precisely, in the case of European law it would be rather incorrect to use terms like monism and dualism ontologically, because one-track interpretation and application was never the CJEU's style. If it must, it could rather be said that it is about the combination of both approaches. Just as an example and as indisputable proof, there is a huge bureaucratic mechanism behind European law controlling the implementation, which shows elements of dualism.

On the other hand, national courts and administrative bodies acting at the same time as European bodies and applying European law could be understood as proof of a monistic approach. As a matter of fact, the very conception of the coexistence of EU bodies and national implementing bodies (the concept also stemming from international law) being at the same time national and European, is in contradiction with both monism and dualism. Elements of monism or dualism should be interpreted in a dialectical way, since there is no black and white approach in EU interpretation in general. This is just one of the examples proving why EU law is attributed as *sui generis*. Every concept taken over from the national or international environment can be misinterpreted in the case of European law, if the purpose and goals of the EU are not taken into consideration. Accordingly, monism, dualism, direct effect, and direct applicability can also have a questionable tone if not considered properly. If systems are previously harmonised in a democratic and opened way, then direct effect and the idea of integration should not be taken and applied as a totalitari-

an regime element. To this end, the CJEU uses the case-to-case approach, accompanied by another "pillar" of European law: fundamental rights and general principles common to all nations, stemming from international treaties and the constitutions of the MSs. Taking fundamental rights and general principles into account when applying European provisions at the national level, a practice acknowledged as an interpretative discourse in many of its decisions, shows how the doctrine of the supremacy of EU law has to be understood. If direct effect were to be understood as a monistic tool completely deprived of any national intervention, as it is often the case at the national level, that would be inconsistent with the task given to national bodies applying both direct and indirect effect, the application of which includes a very demanding level of legal knowledge and activities. It should be noted that the purpose of direct effect is enforceability and efficiency, not direct and simplified application. Unfortunately, giving a very wide margin of discretion to national bodies in the case of indirect effect, and the simplified interpretation of direct effect without any discretion whatsoever, result in a flat and poorly engaged application of direct effect and lack of proper application of indirect effect. The impression is that the bodies, especially those creating EU secondary legislation, encourage this, but the working methodology of the CJEU shows how to mitigate it, presenting the interpretative methods and ways to apply written legislation.

In conclusion, the present day situation in comparison with the historical environment in which direct effect was comprehended differently has changed, as there have been more and more provisions aiming to be applied directly. According to the traditional comprehension of direct effect, national "governments and bureaucrats" should have been kept as distant as possible from interference in the exercise of supranationally and internationally acquired rights. The changed circumstances should be taken as a motive and reason for a redefinition of the comprehension of direct effect according to the current development of EU law and its needs by using those same "national bureaucrats" as supranational entities in securing and preserving the quality level of individual rights.

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ON THE DOCTRINE OF THE DIRECT EFFECT OF EUROPEAN PROVISIONS REGARDING THE REQUIREMENT OF ENFORCEABILITY

Summary

This paper analyses the interpretation of direct effect in terms of its contribution to the development of an efficient European legal system. A precondition for efficiency is the enforceability of provisions. The concept of direct effect, interpreted on the basis of a questionably adequate understanding of the concept of monism taken over from international law, should enhance enforceability by disabling national agents to interfere or to perform the "handover" of rights from the EU level to citizens. Such understanding leads to the national practice applying direct effect in a simplified, plain, and bureaucratic way, and distancing from the substance of provisions. In the cases where, intentionally or not, direct effect/direct applicability are sometimes denied and sometimes recognised to directives and regulations, the CJEU shows how to deal with such situations occurring in the activities of the European regulatory institutions. To fulfil its purpose, national agents applying European law should deploy the underutilised but demanding "shield and sword" approach regarding direct effect. Such an approach, which requires almost equally intense engagement as in the case of indirect effect (also insufficiently exercised at the national level), should defend individual rights from both national and supranational unfavourable influences. In doing so, fundamental rights and general principles encouraged and taken care of by the CJEU, which are and should be the cornerstone of the EU legal system, and which are ultimately a vindication of the willingness for the Member States to embrace the principle of supremacy of European law, should be taken into account.

Keywords: *direct effect, principle of supremacy, European law, international law, enforceability, direct applicability*

O DOKTRINI IZRAVNOG UČINKA EUROPSKIH ODREDABA VEZANO UZ UVJET NJIHOVA VAŽENJA I PROVEDIVOSTI

Sažetak

U ovom se radu analizira izravni učinak u odnosu na njegov doprinos u stvaranju učinkovitog europskog pravnog sustava. Pretpostavka učinkovitosti svojstvo je važenja i provedivosti (enforceability) odredaba. Koncept izravnog učinka, kako je interpretiran u okviru upitno primjerenog koncepta monizma preuzetog iz međunarodnog prava, trebao bi doprinijeti važenju odredaba na način da se nacionalnim primjenjivačima prava oduzme mogućnost upletanja, odnosno da im se onemogući da oni obavljaju „primopredaju" prava s europske razine prema građanima. U stvarnosti takvo shvaćanje doprinosi tomu da se u nacionalnoj praksi izravni učinak primjenjuje na pojednostavnjen i birokratski način te distanciranjem od biti i sadržaja propisa. U slučajevima kada se, namjerno ili ne, direktivama i uredbama katkad odriče, a katkad priznaje izravni učinak odnosno izravna primjena, Europski sud pokazuje kako rješavati takve situacije nastale u radu regulativnih europskih tijela. Kako bi europske odredbe postigle učinkovitost, ipak je potrebna nacionalna intervencija. Da bi ostvarili svrhu izravnog učinka, nacionalni primjenjivači prava trebali bi upotrijebiti slabo iskorišten i zahtjevan pristup mača i štita. Takav pristup, koji zahtijeva gotovo jednako intenzivnu uključenost, kao i u slučaju posrednog učinka (također nedovoljno primjenjivanog na nacionalnoj razini), trebao bi zaštititi prava pojedinaca od negativnih utjecaja, i nacionalnih i nadnacionalnih. Pritom bi se trebala uzimati u obzir temeljna prava i opća načela, poticana i štićena od Europskog suda, koja jesu i trebaju biti zaglavni kamen europskog pravnog sustava, i koja su, u konačnici, i opravdanje državama članicama da prihvate načelo nadređenosti europskog prava.

Ključne riječi: *izravni učinak, načelo nadređenosti, europsko pravo, međunarodno pravo, važenje/provedivost, izravna primjena*