Common Market Law Review **43:** 1–8, 2006.

EDITORIAL COMMENTS

Horizontal direct effect – A law of diminishing coherence?

The convoluted case law on the direct effect of directives has received a further twist from the recent decision of the Court of Justice in *Mangold*.[1]

In the Court's handling of the issue whether provisions contained in directives may be directly relied upon by individuals in proceedings before national courts, there has long been a tension between two objectives. The Court has seen it as its primary task, here as elsewhere, to ensure that, so far as possible, Community law is applied effectively and uniformly by the courts of all the Member States. At the same time, the Court has been alert – more so than some of its advocates general and the bulk of academic opinion – to the manifest intention of Article 249 EC that the political institutions of the Community should have at their disposal two entirely different kinds of instrument, one for direct and the other for indirect law-making: *regulations* laying down general rules that apply as binding law, immediately upon their entry into force, in all the Member States; and *directives* specifying a legislative outcome, which the Member States are required to achieve by the means appropriate to their respective legal orders.

The distinction between "vertical" and "horizontal" direct effect has been the Court's traditional way of resolving that tension. The rationale of the distinction was first fully articulated by the Court in *Ratti*:[2] it is that a Member State must not be allowed to gain a legal advantage, in its relations with individuals, because of its own failure to achieve the result prescribed by a Community directive. Underlying that rationale there is an important insight: that direct effect is not a natural incident of directives, as it is of regulations, but a remedy for a pathological situation, which the Court has been compelled to recognize for reasons of the Community's public policy. Reconciliation of the vertical/horizontal distinction with the text of Article 249 EC has been achieved by emphasizing that directives are there defined as instruments imposing obligations exclusively on Member States. As the Court said in *Marshall No. 1*:

> "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189

1. Case C-144/04, *Werner Mangold* v. *Rudiger Helm*. judgment of 22 Nov. 2005, nyr.
2. Case 148/78, *Ratti*, [1979] ECR 1629.

> of the EEC Treaty [now Article 249 EC], the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows 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".[3]

It is in the logic of the vertical / horizontal distinction that there will be situations where the courts of a Member State that has failed to make the necessary adaptations to bring its law into line with a Community directive, have no option but to continue giving effect to the incompatible national provisions. However, the Court of Justice has appeared unwilling to countenance this outcome, and has made strenuous efforts to avoid it, at increasing cost to the coherence of its case law.

It emerged only gradually that the Court understood the "no horizontal direct effect" rule to be confined to a certain category of directives, namely those that specifically require Member States to modify the nexus of rights and duties arising under private law relationships, like the Directive on doorstep selling at issue in *Faccini Dori*.[4] These are to be distinguished from directives that organize relations either between Member States and the Community or between Member States and individuals. The distinction was already present in the reasoning of the *Faccini Dori* judgment, where the Court explained that the consequence of extending the case law on the effect of directives of the last-mentioned kind "to the sphere of relations between individuals would be to recognize 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".[5] However the narrowly technical sense in which the Court uses the term "obligation" in this context only became fully apparent in the series of cases, beginning with *Signalson*,[6] on the legal consequences of a Member State's failure to notify new technical standards legislation to the Commission, in accordance with the procedure originally laid down by Directive 83/189, since replaced by Directive 98/34 ("the Technical Standards Directive").[7]

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

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

5. Ibid., para 24.

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

7. 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, O.J. 1998, L 204/37 .

The *Unilever Italia* case will serve as an example.[8] In resisting an action for breach of a contract for the supply of a quantity of olive oil, the purchasing company contended that the refusal to take delivery of the goods had been justified, on account of their being incorrectly labelled. However, the Court upheld the contention of the seller that the national legislation in question was inapplicable, because it had been brought into force prematurely by the Italian authorities, during the standstill period intended to give the Commission an opportunity to examine notified legislation. It is true, of course, that the Technical Standards Directive imposes a purely public duty on the Member States; it does not purport to alter private law relations, and the rights and duties to be enforced in *Unilever Italia* were those arising under the Italian law of contract. Nevertheless, the Court's ruling cannot easily be reconciled with the final sentence of the passage cited above from the judgment in *Marshall No. 1*. By invoking the Technical Standards Directive, the seller was able to secure the disapplication of the new Italian legislation on labelling, so depriving the buyer of the argument that he was not contractually bound to accept wrongly labelled goods. Manifestly, that was an instance of provisions in a Directive being "relied upon as such against an individual". The Directive was recognized as capable of producing a certain kind of *direct effect*, namely that of foreclosing for the buyer a possible avenue of escape from contractual liability. In Hohfeldian terms, the disapplication of the Italian legislation created a "disability" for the purchaser and a correlative "immunity" for the seller.[9]

Thus, it seems, a directive may produce adverse legal effects for a private party to litigation, so long as these do not take the form of conferring an enforceable claim on the other party. The distinction, and consequential restriction in principle of the no horizontal direct effect rule, is intelligible. But does it make substantive sense?

Even where the directive relied upon is one designed to bring about changes in private law relations, the Court has found ways of ensuring that the result intended by the Community legislator is attained in practice. One such device, resorted to in *Marshall No. 1* simultaneously with the first articulation of the no horizontal direct effect rule, is the recognition of a wide conception of the State, extending to bodies such as the Area Health Authority, which was the defendant in that case, and British Gas (then a public utility company) in the *Foster* case.[10] The price of thus enlarging the scope of

8. Case C-443/98, *Unilever Italia SpA* v. *Central Food SpA*, [2000] ECR I-7535.

9. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (Yale University Press 1919).

10. Case C-188/89, *Foster* v. *British Gas plc*, [1990] ECR I-3313.

vertical direct effect was to weaken the rationale based on the principle that Member States must not be allowed to benefit from their own default, as explained in *Ratti*, since the bodies in question had not a vestige of responsibility for the United Kingdom's failure properly to implement the Directive that was invoked against them. Another device, available in horizontal situations where it is acknowledged that a directive cannot be directly relied upon, is the duty of the national court to interpret any relevant provisions of national law, so far as possible, consistently with the directive's wording and purpose, which the Court of Justice explains as a corollary of the duty of loyal cooperation in Article 10 EC. The Court is employing ever more insistent language in emphasizing this duty,[11] to a point where it is legitimate to wonder whether national courts are being put under pressure to adopt strained interpretations, with the risk of compromising legal certainty.

An analysis that would have limited the scope of the no horizontal direct effect rule still further, and has exercised an appeal for certain advocates general, is based on a suggested distinction between "substitution effect" and "exclusionary effect".[12] According to that analysis, the case law shows that directives are incapable of having a "substitution effect" in national proceedings between private parties; in other words, the provisions of a directive cannot directly replace the normally applicable national provisions in determining the outcome of the dispute. On the other hand, a directive may have an "exclusionary effect" in such cases: it may, and indeed must, cause any incompatible national provision to be disapplied, where this opens up the possibility of deciding the case on the basis of a rule of national law which is compatible with the directive.

The analysis is based on a false dichotomy. Whether the applicable national provision were substituted by a provision of the directive itself, or merely excluded so as to allow the application of another national provision, it would still be the case that the dispute was being decided on the basis of a rule different from the one prescribed by the national legislator. Assuming the directive to be one designed to modify private law relations, the recognition of an exclusionary effect, no less than of a substitution effect, would be tantamount to recognizing "a power in the Community to enact obligations for individuals with immediate effect".[13]

11. Cf. the language of earlier judgments, such as *Faccini Dori*, para 26, with that in Joined Cases C-240–244/98, *Oceano Grupo Editorial* v. *Rocio Murciano Quintero*, [2000] ECR I-449, para 32, and most recently in Joined Cases C-397–403/01, *Bernhard Pfeiffer and others* v. *Deutsches Rotes Kreuz*, *Kreisverband Waldshut eV*, judgment of 5 Oct. 2004, nyr, where the reasoning on this point occupies no less than 10 paras. (110–119).

12. The most authoritative exposition of the substitution/exclusion analysis is found in the Opinion of A.G. Saggio in *Oceano Grupo Editorial*, *supra* note 11, paras. 37 to 39.

13. Para 24 of the *Faccini Dori* judgment. See note 4, *supra*.

The *Pfeiffer* case[14] provided a textbook example of a dispute to which the distinction between substitution and exclusionary effects might have been thought to provide a solution; and that was evidently the view taken by Advocate General Ruiz Jarabo Colomer. German employment law lays down a general rule that respects the 48-hour limit on average weekly working time fixed by Article 6 of Directive 93/104;[15] however, there was a derogation from that rule allowing the extension of the working week beyond 48 hours for on-call workers. The claimants in the case were employed by the German Red Cross as emergency rescue workers; they were contesting the validity of a clause in their contracts of employment providing for an extended working week, as permitted by the derogation.

Happily, the Court of Justice did not fall for the insidious charm of the substitution / exclusion analysis. The judgment in *Pfeiffer* states that "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";[16] though the Court went on to issue a reminder, in the strongest terms yet seen, of the national court's duty to find a way of interpreting the applicable German legislation in conformity with the Directive. After *Pfeiffer*, the position with respect to directives designed to modify legal relations between private parties appeared reasonably clear, if not wholly satisfactory. The no horizontal direct effect rule (including no exclusionary effect) had been reaffirmed, as well as the standard escape route via consistent interpretation.

But then came the *Mangold* case. Community provisions designed to protect workers employed under fixed term contracts are found in a Framework Agreement of 1999 between the social partners, put into effect by Directive 1999/70.[17] The legislation of December 2000 implementing the Framework Agreement in Germany included a provision requiring objective justification for concluding fixed term contracts of employment, as provided for in the Framework Agreement; however, that requirement was expressed not to apply if the worker concerned was aged 58 at the time when the fixed term employment relationship began; and the age limit was reduced to 52, during the period from 2003 to the end of 2006, by an amending measure of December 2002. 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

14. Note 11, *supra*.

15. Council Directive 93/104/EC of 23 Nov. 1993 concerning certain aspects of the organization of working time, O.J. 1993, L 307/18.

16. *Pfeiffer*, para 109.

17. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999, L 175/43.

was 56 years old at the time, and the imposition of the fixed term was stated in the contract to have no justification other than the exception allowed by the applicable German legislation in the case of older workers. Shortly after starting work, Mr Mangold brought proceedings against his employer, contesting the compatibility of the fixed term clause with Directive 1999/70, and also with Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[18] The reference that was made to the Court of Justice by the *Arbeitsgericht* of Munich raised a variety of interesting issues. The one that concerns us for present purposes was what the consequences should be if a fixed term clause like that in Mr Mangold's contract were held to infringe the provisions of Article 6(1) of Directive 2000/78 relating to age discrimination (as, in the result, the Court of Justice confirmed that it would do).

There seemed to be a knock-down answer to that question. Settled case law establishes that a directive only begins to produce vertical, let alone horizontal, direct effect, once the deadline for implementation has passed.[19] The normal date for the implementation of Directive 2000/78 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 the Directive in Germany was, therefore, more than three years away, when Mr Mangold entered into his contract with Mr Heim. Surely it followed that the Directive could not be relied upon in proceedings before a German court at the material time?

A first line of reasoning pursued by the Court of Justice, in order to refute that conclusion was based on the principle established in *Inter-Environnement Wallonie*[20] 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.

It might have been objected that the result prescribed by Directive 2000/78 was hardly likely to be compromised *seriously* by a national measure due to expire less than a month after the final date for the Directive's implementation. 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

18. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

19. See, to this effect, *Ratti*, *supra* note 2.

20. Case C-129/96, *Inter-Environnement Wallonie ASBL* v. *Region Wallonne*, [1997] ECR I-7411, para 45.

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.

Whatever may be the merits of those arguments, they relate to a side issue. The essential point, which the Court completely failed to address, was whether the obligation falling on Germany under the principle recognized in *Inter-Environnement Wallonie* could be invoked in legal proceedings between private parties. Advocate General Tizzano was positive that it could not,[21] and how could that not 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 is notable that both of the authorities cited by the Court of Justice, *Inter-Environnement Wallonie* and *ATRAL*,[22] related to vertical situations.

The Court's second (and seemingly preferred[23]) line of reasoning was the novel one that it was unnecessary for claimants like those in the main proceedings 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".[24] 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 in question, which had been adopted for the purpose of implementing Directive 1999/70. "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...".[25]

Among several objections that can be levelled against that reasoning, two are fundamental. In the first place, the issue of horizontal direct effect was,

21. See his Opinion, para 110.
22. Case C-14/02, *ATRAL SA* v. *Etat Belge*, [2003] ECR I-4431.
23. *Mangold*, para 74: "In the second place and above all..."
24. *Mangold*, para 74.
25. *Mangold*, para 77.

once again, ignored. The Court of Justice assumed, without a shred of supporting argumentation, that general principles of law are capable of conferring substantive rights and imposing substantive obligations in legal relations between individuals. What is the authority for that startling proposition? All the three cases cited in the relevant passage of the judgment – *Rodriguez Caballero*,[26] *Simmenthal*[27] and *Solred*[28] – were concerned with vertical situations. Indeed, the last two cases had nothing at all to do with general principles of law. Such inapt citation in a student essay would provoke thick red underlining. Secondly, the wording of Article 13 EC, interpreted in its context (namely the juxtaposition with Art. 12), strongly suggests that a conscious choice was made by the authors of the Treaty of Amsterdam not to impose a directly effective prohibition against discrimination on grounds of age and the other matters there referred to, but to leave this for the Community legislator to determine. There may be a counter-argument that can be made, but it is not to be found in the judgment. Vague references to international conventions and to the constitutional traditions of the Member States are no basis for an interpretation of Article 13 EC *contra legem*. Indeed, it seems highly implausible that any kind of constitutional tradition could have developed in regard to a concern so relatively modern as age discrimination.

In the light of the judgment in *Mangold*, is there any real sense in which the no horizontal direct effect rule for directives can be said to survive? The 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 will not find it hard to make the case that directives of that kind embody some general principle or other: Title IV of the Charter of Fundamental Rights, grouping a wide range of social aspirations under the heading "Solidarity", would provide a fertile source of such speculative claims. Certainly, the approach adopted by the Court of Justice in *Mangold* could as well have been taken in *Marshall* and the other cases on the equal treatment of men and women in employment.

Mangold has thus brought the tension that was referred to at the outset of this discussion nearer to breaking-point. As the latest episode in the Court's heroic struggle to escape the consequences of its own (correct) analysis of Article 249 EC, the judgment renders the task of providing a coherent account of this area of Community law more daunting than ever.

26. Case C-442/00, *Angel Rodriguez Caballero* v. *Fondo de Garantia Salarial*, [2002] ECR I-11915.

27. Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmentha*l *SpA*, [1978] ECR 629.

28. Case C-347/96, *Solred SA* v. *Administracion General del Estado*, [1998] ECR I-937.