
Editorial

EC Directives: do they need more than 'direct' and 'indirect' effects to have full efficacy?

Yann Kergall and Philippe Juilhard, Bureau Francis Lefebvre, Neuilly-sur-Seine

The European Court of Justice has played a most significant role in the evolution of the European Community and of the common legal framework within which it operates.

One of its major achievements is the so-called '*direct effect*' that the Court of Justice attaches to directives, in order to step up their effectiveness and increase their efficiency. The '*direct effect*', however, has two major drawbacks:

- first, the directive must create a right but also be clear, complete and unconditional, and second,
- the direct effect only operates against the defaulting State ('*vertical*' effect) but not between two individuals ('*horizontal*' effect). If the directive creates rights for individuals, against the State, it does not create obligations on the side of the individuals in the absence of any implementation.

Recently, the Court of Justice went a step further by holding in the Francovich case¹ that individuals have a right to indemnification against the State where the latter has failed to implement a directive, and that such right is based on the EC Treaty itself.

The Court indeed has held that, under Article 5 of the Treaty, Member States must compensate individuals for damages suffered by reason of violation of Community law. This '*indirect*' effect thus given to directives that Member States have failed to implement operates as a powerful balancing mechanism where a directive cannot be given any '*direct effect*'. Interestingly enough, in the Francovich case the Court of Justice held that the directive could not have '*direct effect*' because the proposed methods were not unconditional, i.e. because the States were left with a discretion.

In most Member States, the Francovich case will not substantially change the position of individuals who suffered a damage caused by improper implementation of a directive, since the indemnification principle has been recognized by most States. It however clearly establishes that the right to indemnification arises from EC law rather than national laws. An individual may therefore claim either the '*direct effect*' of the directive, or the '*indirect indemnification effect*'.

In a time where the parent-subsidiary and the merger directives are being slowly phased into Member States' legislations, sometimes improperly, sometimes not to their full extent, sometimes even not at all, one may wonder whether those pieces of EC law gave rise in defaulting Member States to a '*direct*' or an '*indirect*' effect, which leads to the next question of whether an individual may only claim the refund of taxes levied in contravention of the provisions of the directive, or whether he may also claim indemnification against the defaulting State, arguing, for example, that a whole transaction has failed to be carried out because of a misimplementation of EC law.

What clearly emerges from the foregoing observations is that, propelled by the European Court of Justice's strong impetus, Community law is moving fast, sometimes going beyond the strict framework of the Treaty.

One may however wonder whether to be fully operative directives should not need to be recognized a '*horizontal effect*' (i.e. as between two individuals). Such development, which has perhaps been initiated in the Marleasing case,² would certainly allow to strengthen the Community as a distinct legal body. This would nevertheless amount to the negation of the specificity of Directives as opposed to Regulations, something the Court of Justice has traditionally resisted. Will the Court take this narrow path in future?

¹ CJCE 19 November 1991 Francovich & Bonifaci – 6/90 and 9/90.

² CJCE 13 November 1990 – 106/89.