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The principle of direct effect in the EU legal system: the case of directives and international agreements

Prof. Robert Schütze	Eleonora Savoldi (ID 100962)
SUPERVISOR	CANDIDATE

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Introduction

Pierre Pescatore, while being a judge at the European Court of Justice (ECJ), in 1983 wrote that the doctrine of direct effect constituted a sort of '*infant disease*' of Community law. However, he also clarified that infant diseases are usually mild and have the big advantage that "*once one has gone through with them they leave immunity for a lifetime*"[1]. The principle of direct effect has become one of the two pillars of the European Union (EU) legal order, the other one being the principle of supremacy of EU law, nonetheless, it is not explicit in the Treaties and it has been mostly developed through the case law of the ECJ. The case law has defined the concept of direct effect as the ability of provisions to be *directly* invoked by private parties before national courts and *effectively* confer rights upon individuals. The national courts, on their side, have the opportunity and sometimes the obligation to directly apply the EU provision instead of a national one covering the same area, in this way they enforce a right arising from EU law by directly relying on the EU provision. By empowering individuals to directly invoke rights conferred to them by EU acts, legal certainty and homogeneity is fostered, the rights of individuals are safeguarded and the effectiveness of the EU integration process is enhanced.

The assessment of whether a provision is capable of direct effect is carried out by national courts taking into account its wording, scope and enforceability. While general criteria have been established by the case law of the ECJ on the topic, specifically by the *Van Gend en Loos* case[2], certain conditions for direct effect vary depending on the specific source of EU law in question. Notably, the ECJ judgements concerning direct effect in the areas of directives and international agreements signed by the EU have created a complex web of rules and exceptions for the former and left multiple unclarified issues for the latter. For both, the ECJ's case law remains inconclusive on a number of issues and recent judgements still show changing trends and new challenges. Consequently, if the Court has "*gone through"* the matter of direct effect for regulations and Treaty provisions, which are now undoubtedly capable of direct effect, there is still inconclusiveness regarding certain aspects of directives and EU international agreements. Given the relevance the principle of direct effect has in the Union legal order, there is abundant literature and scholarly publications on the topic, both regarding the more 'established' cases of regulations and Treaty provisions and the more complex and 'unresolved' cases of directives and EU agreements. However, there has been less research on recent trends and challenges, specifically regarding direct effect of directives and EU agreements.

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[1] Pescatore (1983: 155).

[2] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

This thesis aims at showing the on-going relevance and evolution of direct effect in these areas, since, citing Pescatore yet again, direct effect is not an *innate quality* of directives, as in the case of regulations, but a *remedy* the ECJ has prescribed to "*cure a pathological condition*" of the legal order. Meanwhile, importantly for the discussion of EU agreements, he said that direct effect constitutes "*the normal condition of any rule of law*"[3], however, it does not seem to be the case for international agreements signed by the Union. For these reasons, the case law regarding these areas is extremely interesting and complex and to this day it is still evolving. The following work consequently aims at highlighting, on the one hand, the established positions of the Court for direct effect, especially regarding regulations and Treaty provisions, while, on the other, making explicit and analyzing the more recent trends and challenges, specifically in the areas of directives and EU agreements, where the literature is more scattered.

The forthcoming chapters are organized in the following way. In the first chapter, the general concept, the evolution and the mechanism of interaction with national legal systems of direct effect will be presented, after having traced and analyzed the origins of the principle in the EEC Treaty for regulations and in the *Van Gend en Loos* judgement for Treaty provisions. The first chapter lays the groundwork for the second and third chapters to delve into the specific and complex cases of directives, on one side, and EU agreements in the other. The second chapter starts from the analysis of the established case law on direct effect of directives, specifically observing the foundation of the no horizontal direct effect rule and the complex web of limits that were later attached to it. Then, it delves into the contemporary application and challenges related to direct effect in this area, notably also the relationship between directives and the Charter of Fundamental Rights of the EU is analyzed. The third and last chapter, which analyzes the case of EU international agreements begins, in the same way, from the observation of the general framework regarding them, in particular distinguishing two main lines of case law that reflect the two main approaches of the ECJ. In the second part it investigates the recent attitude and practice of the Court and of the other EU institutions.

[3] Pescatore (1983: 155).

1. Direct effect

1.1 Introduction

This chapter seeks to provide a basic overview of the origins, evolution and implications for national legal systems of the principle of direct effect, laying the groundwork for the later chapters to delve into the specific cases of directives on one side and international agreements on the other. The first subchapter traces the origins of the principle in the foundational Treaties of Rome (1957), for regulations in particular, and in the landmark Case of *Van Gend en Loos* for Treaty provisions. In the second part of this first chapter, the concept and evolution of direct effect will be analyzed, furthermore, this section will touch upon the principle of indirect effect which is sometimes complementary, or an inviting alternative, to direct effect. In the third and last part of this chapter, the main focus will be the constitutional settlement mechanism for EU law in national legal systems and the implications, often unwanted and concerning, of direct effect for the Member States.

1.2 Origins of the principle of direct effect

The foundations of the European Union as we know it today are to be found in the Treaty of Paris (1951), which established the European Coal and Steel Community (ECSC), and in the Treaties of Rome, which created the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM)[4]. These treaties can be considered the bedrock of the *union* because they created a *community*. The European Union will formally be created only in 1992 with the Treaty of Maastricht which marked the transition from strictly economic communities to a political, other than economic, union. The EEC Treaty did not explicitly recognize the existence of direct effect but it laid the groundwork for further developments: the creation of supranational institutions, the powers conferred to the them, the creation of rights and obligations for Member States and the principle of supremacy produced the potential for certain provisions to have the power to confer rights that could be directly invoked by individuals before national courts.

1.2.1 Regulations

Even if the Treaty did not mention direct effect itself, it did recognize to regulations the capacity to be directly applied in Member States. It is Article 189 of the EEC Treaty which identified this potential for regulations, but *only* for the latter kind of secondary law. The article, currently Article 288 of the Treaty on the Functioning of the European Union (TFEU),

[4] the same six countries were involved in both the Treaty of Paris and the Treaties of Rome, namely Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany. However, the Treaty establishing EURATOM was signed by the same six countries plus two additional countries: Denmark and Norway.

stated: "*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. […]*" Regulations were thus the optimal candidate for direct effect, they are binding and have general application, meaning that they apply uniformly and without distinctions to all individuals, entities or situations falling within their scope. Furthermore, they are directly *applicable*. This latter characteristic was initially intended as equal to directly *effective* in early case law[5]. Later, this position was revisited, defining the difference between the two concepts[6], direct applicability means that these acts do not need a national implementing act to be applicable in the national legal systems, direct effect instead refers to the possibility for individuals to directly rely on the act to invoke their rights in front of national courts. It is important to note that direct applicability does not imply direct effect. While all regulations are directly applicable and thus do not depend on national implementing measures they also have to satisfy the other criteria established by *Van Gend en Loos* and be relevant to the situation of the individual litigant[7], to be directly effective. The landmark case and the criteria established by it will be now analyzed.

1.2.2 *Van Gend en Loos* and Treaty provisions

If the direct effect if regulations was already envisaged in the EEC Treaty, for Treaty provisions it was the landmark Case of *Van Gend en Loos*, in 1963, that established their ability to have direct effect. The questions on which the Court was asked to rule in this case were two, the first, of outmost importance for the establishment of direct effect of Treaty provisions, was *"whether article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the courts must protect"*. To ascertain whether a provision of an international treaty, in this case Article 12 of the EEC Treaty[8], can have direct effect, "*it is necessary to consider the spirit, the general scheme and the wording of those provisions*" states the ECJ in the judgement; the Court decided to use a

[5] Case 43/71 *Politi v Ministero delle finanze* [1971] ECR 1039, para 9.

[6] recently Case C-316/10 *Danske Svineproducenter* [2011] ECR I-000, paras 39-40; Case C-592/11 *Ketelä* [2012] ECR I-000, para 35.

[7] *ibid.*, para 5.

[8] Article 12 of the EEC Treaty stated: "*The Member States shall refrain from introducing between themselves new customs duties on imports and exports or charges having equivalent effect and from increasing those which they already apply in their mutual trade relations.*"

literal, systematic and teleological approach to interpret the provisions[9]. Following this approach, the Court exhibits in its judgement how:

> "*independently of the legislation of Member states, community law not only imposes obligations on individuals but it is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the community".*

The purpose of the Treaty is to, not only create obligations, but also rights; these are not only addressed and conferred upon Member States, rather, they both extend to individuals as well. By considering this spirit, alongside the general scheme in which the single provisions exist, it becomes clear that the Treaty paves the way for the potential for direct effect of certain provisions. For instance, considering the overall structure, it will be noticed that in the Treaty's preamble mention is made to *people*, not solely governments; furthermore, the institutions are endowed with their own rights and powers of which exercise affects also citizens, not only Member States. Thus, it is evident that the agreement does not only pertain to states and their governments, but also to individuals themselves. This is the first revolutionary point that the Court makes, recognizing that the EEC Treaty has created a new legal order, different from the classic international one. In the European legal order, the subjects of European law are not only the Member States, but also individuals. Thus, Treaty provisions are capable of direct effect and individuals can directly rely on them before national courts.

Regarding the wording of the provision itself, the Court makes the second important and revolutionary remark of the judgement: "*The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law.*". The judgement then goes on to say that "*the very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.*". With this ruling the Court set the criteria that a provision must satisfy to produce direct effect, namely clarity and unconditionality. The provision has to be clear and precise in the sense that it must have a definite meaning and rend the third criteria, unconditionality, meaningful. In other words, the provisions must be capable of immediate application without further clarification and without depending on implementation by Member States through a national legislative measure. The ECJ also clarified in the judgement that while the Member States are the subjects of the obligation imposed by Article 12 of the EEC Treaty, this does

[9] to give better context, this Case was ruled in 1963, thus before the Vienna Convention on the Law of Treaties which would be held in 1969.

not imply that their nationals cannot benefit from the rights arising from that obligation and in this sense it does not deprive the individuals of the right to invoke the same rights before a national court.

Subsequent ECJ judgements further expanded and refined the concept of direct effect, its conditions and scope[10]. For the purpose of this thesis and chapter however it is not fundamental, nor a good use of resources, to analyze all the case law touching upon the concept of direct effect, due to the fact that it is very extended and it has already been done elsewhere. It is however important to note here that, while initially applied only to rights enforceable against member state authorities (*vertical* direct effect), the concept of direct effect was later extended to rights enforceable against private parties (*horizontal* direct effect). The ECJ's jurisprudence in cases like *Defrenne v Sabena* and *Francovich*[11] established the possibility of individuals invoking EU law rights in disputes between private parties.

1.2.3 Behind the scenes of the judgement

A new field of historical studies of European law studies help us understand, among other things, how this judgement, constituting one of the core doctrines underpinning the new European constitutional legal order, was, in fact, revolutionary.[12] It has been the common position of doctrinal analysts and ECJ judges themselves that the judgement was drawn from the logical comprehension of the Treaties of Rome, but the latter cannot fully account for the leap taken by the ECJ with this case. The ECJ had been slowly building a line of interpretation of the treaties that was more constitutional, even if the overall shape of the EEC Treaty itself was clearly more intergovernmental[13], without however forgetting the relevance of the establishment of a common market and the transformative impact it had.

In the years leading to this important judgement there were some factors that helped pave the way to it, the most important, maybe, the fact that the balance inside the ECJ changed in a constitutional direction[14]. The direct effect and primacy of the Treaty within national legal systems were now the two primary objectives of the Court, the strive to achieve this was legitimized by the general objective of the Treaty and the supranational nature of the

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[10] e.g. Case 6-64 *Flaminio Costa v E.N.E.L* [1964] ECR 585; Case 106/77 *Simmenthal SpA v Italian Minister of Finance* [1978] ECR I-629; Case *R v Secretary of State for Transport, ex parte Factortame Ltd (Factortame I)* [1990] ECR I-2433.

[11] Case 43/75 *Defrenne v Sabena* (No 2) [1971] ECR 445; Joined cases C-6/90 and C-9/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357.

[12] Rasmussen (2014).

[13] i.e. the key role was still held by the Council; the prevalent legislative norm consisted in Council directives which offered autonomy to national administrations in the choice of means of implementation.

[14] *ibid.* [12].

institutions. The landmark judgement was a big step, took to address two major weaknesses of the system, namely the lack of homogeneous application of community law by national courts and the lack of primacy of community law in certain Member States. The daring position of the ECJ, supported by the Commission, was not well received by the Council and the Member States and in the aftermath of the judgement there was a general skeptical attitude towards European law by national administrations and Member States. The latter were well aware of the importance of the judgement and its potential beneficial consequences, however this does not mean that they received the judgement favorably, at least at the beginning. National courts gradually began to cooperate more and more with the ECJ during the 1970s and 1980s, while the Court continued to develop its constitutional practice and began to strike down national legislation that did not comply with European law[15].

1.3 The concept and evolution of direct effect

Case law has defined the concept of direct effect as the power of Treaty provisions to be *directly* invoked by private parties before national courts and *effectively* confer rights upon individuals. From the point of view of national courts, the existence of directly effective provisions gives them an opportunity and, at times, an obligation to directly apply the former instead of a national provision covering the same area[16], they can enforce a right arising from an EU legal provision by directly relying on that provision, without there being any need for 'translation' by national law. An EU legal act comprises multiple provisions, each may give rise to a right and have a different content and scope. It is important to reiterate that the existence of direct effect is to be determined for a specific legal provision, not at the level of the legal act as a whole. This is because direct effect regards the ability of a provision to confer a right that can be directly invoked by individuals in national courts. Assessing direct effect at the provisional level ensures clarity and precision in the application of EU law and ensures reliability and effectiveness for the enforcement of the rights arising from provisions. This ability can be assessed evaluating whether the provision has the necessary characteristics established by the case law, in particular the above discussed *Van Gend en Loos* Case. This assessment cannot be done for a whole act, national courts conduct it for each provision separately taking into account its wording, scope and enforceability.

1.3.1 The evolution of the principle

The evolution of the case law has made the assessment more clear for the national courts in certain cases, but also more complex in others. In the first subchapter the origins of the

[15] Rasmussen (2014: 160).

[16] Ginter & Schasmin (2023: 69-71).

principle have been addressed: its first appearance was in 1963 with the bold *Van Gend en Loos* judgement in which the Court established that for a provision to have direct effect it must be clear, precise and unconditional. However, from then on, the clear-cut definition of the criteria and instances for direct effect has been blurred. This has happened mainly in two ways: first, even provisions which were not unconditional, meaning that they were dependent on further national implementation measures, were deemed to be directly effective[17]; second, the potential for direct effect was later expanded to other sources of EU law, some of which did not always satisfy the criteria listed above, i.e. decisions and directives, but also international agreements to which the EU was a party. To analyze better the complexity and peculiarity of directives and international agreements, one chapter will be later dedicated to each.

There is a debate, which is still open, on the question of whether one or multiple 'direct effects' exist, since the conditions for there to be direct effect vary slightly in respect to the source[18]. In spite of the different specific criteria and conditions, the question at the basis of the 'objective test'[19] for direct effect has always been the same, that is, whether the EU provision contains an understandable and readily justiciable rule which can be applied by national courts. An important characteristic of this test is the fact that it is functional even when the rule contained by the provision is not explicitly present, it is sufficient that the rule is recognizable and extractable. If the rule is clear, it is not important whether the literal expression of the provision is[20].

1.3.2 Excursus: The interaction with the principle of indirect effect

The principle of direct effect is a pillar of the EU legal system and a fundamental part of the interaction between EU law and national law. It is however not be understood as the only way in which the Union ensures the uniform and efficient application of its acts in the Member States, there is in fact also the principle of *indirect effect*, otherwise known as conform or consistent interpretation. This means that all national bodies must interpret, as much as possible, all national law in conformity with EU law. This concept is fundamental to ensure consistency in the EU legal order and uniformity among Member States especially because the majority of national application of EU law happens under the principle of consistent

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[17] e.g. Article 5 of the EEC Treaty, currently Article 18 of the TFEU, in the *Factortame I* Case.

[18] Bobek (2014: 146).

[19] meaning either satisfaction or non-satisfaction of objective criteria.

[20] e.g. if it contains indeterminate legal notions like "quantitative restrictions" and "measures having equivalent effect" mentioned in Article 34 TFEU. This does not prevent the potential for direct effect.

interpretation[21]. The notion of indirect effect was first articulated in *Von Colson*[22], in this case the subject matter was a directive, but the principle can be extrapolated and generalized:

> "*The member states' obligation arising from a directive to achieve the result envisaged by the directive […] is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying national law and in particular the provisions of a national law specifically introduced in order to implement a directive, the national court is required to interpret its national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 189*[23]*."*

In a later case of 2004, *Pfeiffer*[24], the ECJ again highlighted this principle and obligation but also importantly emphasized that even if the principle of conform interpretation concerns mostly domestic provisions introduced to implement the act in question, the interpretation should not be limited to only those provisions but should entail a consideration of national law as a whole. The ECJ is essentially saying that all national law must be interpreted in accordance will all EU law by all national authorities[25]. The position of the Court is very ambitious, thus the scope of the principle is extremely broad, it includes national laws passed before the EU legislation in question and all the levels of legal force of national laws, including national constitutions.

It is true that directives are the legal source for which the principle of indirect effect may be used the most since there are cases in which direct effect cannot be feasible[26]; this is however not to say that conform interpretation is limited to EU sources which cannot be directly effective. Treaty provisions and regulations may produce indirect effect, and they may be just used for conform interpretation if deemed appropriate by the Court under the circumstances. Furthermore, also non-binding EU acts may produce indirect effect[27] because of the principle of sincere cooperation established by Article 4(3) of the Treaty on the European Union

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[21] Bobek (2014: 154-6).

[22] Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

[23] Article 189 of the EEC Treaty stated: *"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."*

[24] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 [110-115].

[25] *ibid.* [21].

[26] more on this issue in the next chapter, dedicated to directives.

[27] e.g. Case C-207/01 *Altair Chimica* [2003] ECR I-8875, para 41; Joined Cases C-317/08 to C-320/08 *Alassini* [2010] ECR I-2213, para 40.

(TEU)[28]. In practice, national authorities and courts may consider non-binding EU acts as relevant when interpreting and applying national law in areas related to EU law; particularly when such acts provide guidance on the interpretation of EU binding acts or reflect common standards or practices at the EU level.

Indirect effect can have different strength, depending on the argument drawn from EU law in the particular case. Strong conform interpretation may be borderline with instances of direct effect in practice, without openly acknowledging the direct application of EU law[29]. For this reason, reliance on indirect effect can be sometimes preferable, since it can be better reconciled with the integrity of the national legal system. It is important to say that the potential for conform interpretation is not, nonetheless, unbounded. The ECJ has recognized three limits to this principle[30]. The first is that a national authority can only use interpretative methods recognized by national law. The second limitation is put by general principles of law[31] which limit, in practice, individual far-reaching interpretative 'ventures'. Thirdly, an interpretative outcome *contra legem* cannot be reached[32]. Because of these limits and because of the, in fact, *indirect* functioning of the principle, direct effect remains objectively more powerful in ensuring homogeneous application of EU law in domestic legal systems and results in higher reliability for individuals who wish to rely on certain provisions to have their rights recognized.

1.4 Constitutional settlement in the Member States and implications of direct effect

To understand the method for constitutional settlement of EU law in the Member States, three planes need to be analysed: institutions, procedures and principles[33]. On the institutional plane, it is the job of existing national institutions to enforce EU law, be it the legislator, the executive or the judiciary. On the procedural plane, the Union again relies primarily on the

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[28] Article 4(3) of the TEU states: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[29] Bobek (2014: 156).

[30] Case C-212/04 *Adeneler* [2006] ECR I-6057, paras 110-111. See also Case C-268/06 *Impact* [2008] ECR 1-2483, paras 100-101; Joined Cases C-378/07 to C-380/07 *Angelidaki* [2009] ECR I-3071, para 199; Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paras 61-63.

[31] e.g. legal certainty and legitimate expectation

[32] This principle, coming from continental legal theory, provides that a provision cannot be interpreted as to amount to the denial of the original rule. In the Court's view, however, a provision's meaning can still be twisted and modified quite significantly without being considered *contra legem.*

[33] *ibid.* [29] (143-4).

existing national procedures, to which however the Union can attach further conditions. In practice the Member States put their national institutions and procedures at the disposal of the Union to enforce EU law, this can sometimes create confusion since national institutions are 'serving' two masters: the States and the EU. It is the subject matter of the case that decides which one the institution is serving at a given moment. However, even when the institutions are serving the national state, the principles of the Union permeate every aspect and decision; the states' autonomy is always somewhat pre-empted by Union's principles like direct effect and primacy, that determine the general rules of interplay between EU law and national law. In other words, they tell the national institutions how to act in cases of divergence or collisions[34]. Key judgements like *Van Gend en Loos* and *Costa v ENEL* have shaped these principles that in turn now pre-empt the potential for a national choice for the enforcement. From the point of view of the Member States obviously having their autonomy restricted has not been received gladly, but in this way the ECJ eliminated the potential for the diverse application and ensured an homogeneous overall status of EU law in the Member States. This pre-emption, combined with the choice of the ECJ of opting for an objective test for direct effect[35], resulted, as already mentioned, in the establishment of a new legal order, independent of both national constitutions and international law[36].

If an EU provision is deemed directly effective, it will effectively 'jump' directly into the national legal system of the Member States. In practice, this can function in a number of ways, usually however either the EU provision will create a new rule which did not exist before in the national legal system or it may exclude the application of an existing but contradictory national rule[37]. It is important to reiterate two characteristics of the principle: first, the presence of direct effect is to be assessed for individual provisions, not for whole acts, so even a single section or an indent of an article can be directly effective; second, even if the end result of the principle is granting individual rights, the presence of the latter in the provision is not necessary since direct effect is concerned with the objective justiciability of the provision, which can in turn result in the recognition of individual rights. Directly effective EU provisions do not affect the validity of national provisions, if there are any, in the same areas, but direct effect, operating in conjunction with the primacy principle, obliges the national courts to put conflicting national measures aside. It is important to clarify that the two legal system interact, but each remains 'responsible' of its own legal norms, thus laws can

[34] Bobek (2014: 143-4).

[35] See previous section 1.3.1 for the related discussion.

[36] Opting for an objective test for the principle of direct effect, the ECJ effectively cut the cord with international law, where the *intent* of the signatories is crucial for the interpretation of the treaty (in this case the EEC Treaty).

[37] In this case the principle of direct effect operates in conjunction with the principle of primacy.

be modified or annulled only by the institutions that created them, even the ECJ can declare a national rule incompatible with EU law but it cannot annul it. A national rule that was set aside in a case falling within the scope of EU law because incompatible with the latter, could be later applied in a case falling outside the scope of EU law.

1.4.1 Possible unwanted and concerning implications

There is an important implication of the principle of primacy and direct effect as formulated by the Court. They empower all national judges to set aside incompatible national laws and directly apply an EU provision, they can do so of their own motion without previously having to ask the ECJ for a preliminary ruling. Notably however, the Court has extended these powers to all the bodies of the Member States, thus also to national administrators, which means that they too can disregard national provisions to enforce directly effective EU ones[38]. The rise of 'omnipotent' administrators may cause concern[39]. The national executive, under the liberal rule of law tradition, can only operate in accordance with and within the bounds of the law, to which it is subject. The idea that, instead, every tax commissioner in every district town is entitled to disregard of their own motion an act of parliament or even the national constitution because they believe that they are incompatible with a provision of the EU Value Added Tax Directive, is deeply unsettling from the perspective of the requirement of strict legality of all administrative action[40].

On the other hand, it makes sense from the perspective of EU legislation to give administrators the same authority. The Court operates within the broad understanding of a state provided by international law, which mandates that all bodies of Member States effectively execute EU law within their particular arena. It is not supported by normative or empirical evidence to worry that giving national governments access to the principles of primacy and direct impact will lead to an uncontrollable administration. As a result of the expansion of the body of legal sources, *national* legality became *European* legality normatively upon joining the EU. Empirically and practically speaking, national administrative bodies would scarcely be doing anything different from what occurs on a daily basis with national law, even if they were interpreting EU law and occasionally made the wrong assessment[41]. Lastly, national administrations are still subject to full national judicial examination, which inevitably covers concerns of EU law.

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[38] e.g. Case 103/88 *Costanzo* [1989] ECR 1839, para 31 or Case C-198/01 *CIF* [2003] ECR I-8055, paras 49-58.

[39] Bobek (2014: 163).

[40] *ibid.*

[41] *ibid.*

The national views and responses to the Court's claims for *absolute* primacy and broad scope of direct effect vary, given the different constitutional traditions and concerns, but also converge on certain aspects[42]. Member States don't disagree with the Court on the assumption that the EU legal order is of special and different nature, but they highlight that this stems from the treaties that *they* have signed. The 'Masters of the Treaties' are and always will be the Member States. The sovereignty and the last word on controversial matters lies with them, even if they have decided to transfer some competences to a special international organization. The Member States accept, or better, have to accept the application of EU law in their territory, including its principles of direct effect and primacy, being them part of the Union. They may also silently acknowledge and admit the 'tramping' of their own constitutions by EU law in individual judicial cases, but not on a normative and conceptual level. The EU has been and always will be based on the principle of conferral. The national courts could in fact potentially assume the power to review whether the EU has acted *ultra vires*. This potential for assuming the role of national 'guardian' of constitutionality, does not mean that it will be effectively exercised in judicial cases, but it serves as precaution device and a deterrent from the point of view of the Member States to always draw attention to the fact that they are indeed the Masters of the Treaties[43].

1.5 Conclusion

The origins of direct effect are to be found in Article 189 of the EEC Treaty for regulations, which are thereby defined as directly applicable. Even if later case law defined differently this ability from the one of direct effect, it can be reasonably argued that direct effect of regulations was already envisaged in the EEC Treaty. Direct effect of Treaty provisions was instead brought fourth by the ECJ with the *Van Gend en Loos* judgement. The ECJ recognized the possibility for individuals of directly invoking Treaty provisions, having interpreted the EEC Treaty as creating a new legal order in which individuals are subjects of EU law. In the landmark judgement the Court also established the criteria for a provision of an EU act to be directly effective. By empowering individuals to directly invoke rights conferred to them by EU acts, legal certainty and homogeneity is fostered, the rights of individuals are safeguarded and the effectiveness of the EU integration process is enhanced. These criteria have remained fundamental in the assessment of direct effect, however an evolution was also observed through the recognition of direct effect of non-unconditional EU measures and through the expansion of the applicability of the principle to other measures, different from Treaty provisions. In the end a brief overview of the national settlement mechanism for EU law was

[42] Bobek (2014: 164-5).

[43] *ibid.*

given to illustrate how the EU and domestic legal systems interrelate. Furthermore possible unwanted implications were analysed, specifically the possible rise of ‘omnipotent’ administrators. In conclusion, by understanding direct effect's criteria, scope and implications we can better understand its role in the EU legal landscape as a ‘guardian’ of efficacy. It is still important to remember that, in this landscape, direct effect does not stand alone, it interplays with other principles such as primacy and indirect effect. However, while the principle of direct effect has faced challenges and resistance by the Member States, it has in the end contributed to the harmonization and uniform application of EU law across Member States. One of the main challenges, during its still-on-going evolution, has been represented by the case of directives. The next chapter will delve into the history and the past and present challenges regarding this peculiar type of secondary law.

2. Direct effect of EU directives

2.1 Introduction

In the early years of the Community, the principle of direct effect was received as remarkable and somewhat revolutionary. It was envisaged in the Treaties only for regulations; however, the case law brought forth the possibility for also treaty provisions to be directly effective. With time, the ability of treaty provisions, or acts adopted under the latter, of giving rise to rights and duties directly enforceable became part of the norm. The case of directives is peculiar since it was not envisaged in the Treaties and it was entirely developed through the case law of the Court of Justice of the EU with various revolutionary judgements, that were not always received positively by the Member States. The first section of this chapter will give an overview of the main judgements that shaped direct effect for directives, in particular, it will be observed how the Court decided to deal with the complex task of balancing the peculiarity of directives with the principle of effectiveness of EU law. Then, three contemporary cases and the interplay between provisions of the Charter of Fundamental Rights of the EU and directives will be analyzed, with the aim of describing contemporary trends and challenges in this delicate area of case law.

2.2 The peculiarity of directives

The case of directives is different from the one of regulations or Treaty provisions; the case law reflects this peculiarity in the tension between two objectives of the ECJ: on one side, the overarching objective of effectiveness and homogeneity in the application of Community law by the national courts, on the other, the aim of preserving the particularity of directives as a form of indirect legislation. The effectiveness objective and the specific identity one are ultimately irreconcilable, meaning that overly pushing one of them ends up compromising the other[44]. It can be argued that in *Marshall I*[45] the Court could have made a clear choice between the two objectives, either prioritizing the maximization of effectiveness of directives or holding on to their peculiarity rendering them capable of direct effect only in a very limited measure. Conversely, the Court decided to maintain an unstable balance between the two aims. In this subchapter, an overview of the established case law on direct effect of directives will be given, observing in each step how the Court tried to be more or less balanced in this delicate area.

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[44] Dashwood (2006-2007: 3).

[45] Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 7.

2.2.1 The established case law

Article 189 of the EEC Treaty, currently Article 288 TFEU, states that "*[…] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. […]* " Basing itself on the wording of the provision, the ECJ established that the binding nature of directives exists solely for the Member States to which it is addressed. Because of this, directives might be relied upon by any individual against a Member State in default of having ensured the attainment of the result prescribed. This direct effect is defined as 'vertical' because of the hierarchy entailed between a private party and the State. Conversely, directives cannot be invoked against an individual as the direct source of an obligation imposed upon them because, again, directives are only binding for their addressees, namely, the Member States. In *Marshall I* the ECJ established the distinction between vertical and horizontal direct effect, deciding that, in the case of directives, the former existed while the latter was prohibited.

In *Faccini Dori* the Court recognized that the consequence of extending the principle of direct effect "*to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has power to do so only where it is empowered to adopt regulations*."[46] Directives in fact, contrary to regulations, are *indirect* law-making instruments, since they do not create Community norms readily applicable, but they impose an obligation on the results to be attained by the States, through changing or supplementing the relevant national provisions. The issues arise when a Member State fails to do so, or does so defectively. In such cases, the individuals may need to rely directly upon the directive to assert the rights that would have already been theirs, if the necessary steps had been taken by the State. Pierre Pescatore, as a Member of the ECJ, rightfully noted that direct effect is not an innate quality of directives, as in the case of regulations, but a remedy the ECJ has prescribed to 'cure a pathological condition' of the legal order[47].

In the *Van Duyn* case, the ECJ notably first recognized that a directive was capable of direct effect. The reasoning behind the decision showed that the effectiveness objective was surely the priority for the Court, which stated that "*the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law*"[48]. In the reasoning the Court does not seem to acknowledge the 'specific identity' of

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[46] Case C-91/92 *Faccini Dori v Recreb* [1994] ECR 1-3325, para 24.

[47] Pescatore (1983: 155).

[48] Case 41-74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 12.

directives, which instead was referred to in *Ratti*: "*A Member State which has not adopted the necessary implementing measures required by the directive in the prescribed period may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.*"[49] As mentioned earlier, the ECJ tried to balance its decisions not to push one objective more than the other, in this way trying to ensure the effectiveness of directives without transforming them in something they are not. However, taking a stand could have ensured more clarity and legal certainty, especially at the national level. Conversely, it can be argued that even when the Court had the possibility to make a clear choice, it decided to compromise.

In *Marshall I* the Court opted for the enunciation of the 'no horizontal direct effect rule' for directives, while reaffirming the possibility of vertical direct effect and thus the ability of individuals to rely on a directives against the State. Although, already in the same case, the ECJ started to develop ingenious ways in which the rule can be bent, namely, that the concept of State must be taken broadly and "*regardless of the capacity in which the latter is acting, whether employer or public authority*". This is done to extend the situations that can be classified as vertical and thus in which direct effect is possible. It can be noted how this reasoning renders the rationale in *Ratti* rather strained, since to neither the Area Health Authority in *Marshall I* or British Gas in *Foster*[50] can be attributed the fault of not having correctly implemented the directive in question, rather the responsibility fell in both cases on the UK government. They were in exactly the same position as any other private employer attempting to understand and apply complex legislation was[51]. The incorrect implementation of directives is not, in fact, always due to bad faith. It can be noted that the broad conceptualization of the State was the first, but not the last, expedient developed by the Court's case law in order to neutralize the no horizontal direct effect rule as far as possible, while preserving some of the specific identity of directives.

2.2.2 Limits of the no horizontal direct effect rule

Other ways in which a strain on the no horizontal direct effect rule was put are the duty of consistent interpretation and incidental direct effect. Consistent interpretation is based on the general duty of loyal cooperation of Member States. In carrying out this duty, the national court applies the national provisions themselves, interpreting them in a way that accomplishes the directive's intended outcome, rather than using the provisions of a directive to supersede otherwise applicable national provisions. In this way again the ECJ strikes a balance between

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[49] Case 148/78, *Pubblico Ministero v Ratti* [1979] ECR 1629, para 22.

[50] Case C-188/89 *A. Foster and others v British Gas plc* [1990] ECR 1-3313.

[51] Dashwood (2006-2007: 8-9).

ensuring effectiveness of directives and maintaining their peculiarity. To further stress the latter point, it is important to mention here an important restriction to consistent interpretation which is its application to only 'upwards' vertical situations (for the benefit of an individual against a body of the Member State in default), never 'downwards' (for the benefit of the State against an individual). The practical limitation imposed by consistent interpretation is accompanied by a limitation in principle due to situations of 'incidental' or 'triangular' direct effect. These happen when a private party is allowed to directly rely on a provision in a vertical situation and this has an adverse legal impact on another private party, in practice representing an almost horizontal situation. As the Court explained in *Wells,* "*an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party*"[52]. This is important to state so that private parties do not abuse this possibility to effectively have horizontal direct effect scenarios. However, "*mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned*"[53]. Furthermore, in *Unilever Italia*[54] and *Wells*, the Court identified two categories of directives: 'private law directives', which are subject to the no horizontal direct effect rule, and 'public law directives', that can instead be directly invoked, even in borderline cases like *Marshall I* or for measures that include both provisions aimed at individuals and ones aimed at national authorities.

In the early 2000, certain scholars and advocates general started supporting a theory based on the distinction between the 'substitution effect' and the 'exclusionary effect' of Community provisions. Proponents of this distinction contend that the no horizontal direct effect rule has no significance other than preventing the direct *substitution* of national law provisions with the ones of a directive, in a dispute between private parties. It is contended, however, that even in horizontal situations, a directive may cause the *disapplication* of incompatible national provisions, and that in such cases, the case may be decided in accordance with some other provision of national law that is compatible with the directive. In Dashwood's submission it is pointed out how, whether it is a matter of substitution or merely exclusion, the dispute will be resolved by applying a different rule from the one prescribed by the national legislator. Notably, in *Pfeiffer*[55]*,* this theory could have represented an escape route

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[52] Case C-201/02 *D. Wells v Secretary of State for Transport, Local Government and the Regions* [2004], para 56.

[53] *ibid.* para 57.

[54] Case C-443/98, *Unilever Italia v Central Food* [2000] ECR 1-7535.

[55] Joined Cases C-397 to 403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR 1-8835.

from the no horizontal direct effect rule, but it was not accepted by the Court; this shows the continuing willingness of the latter to try to maintain a precarious balance between the effectiveness and specific identity objectives, since the acceptance of it would have represented a further erosion of the specific identity of directives.

Importantly, in *Mangold*[56], the ECJ used a novel line of reasoning, namely that the prohibition in question did not stem from a directive, but that it was to be found in general principles of law derived from international instruments and the constitutional tradition of the Member States, consequently, it could also be relied on in proceedings between two private parties. Even if some merit has to be given to this argument, it can be observed that ingenious counsel would not, then, find it difficult to make the case that directives designed to protect a weaker party in a private law relationship actually embody a general principle of law and thus be able to rely on the latter to 'solve' the case. In the judgement it was not explicit whether general principles of law should be considered as conferring rights to individuals and impose obligations in private legal relations, effectively being capable of direct effect, even if in practice this was the case. Another unclear issue is whether, for the application of a general principle of international law in a matter of Community law, the case must fall within the scope of application of the Community Treaties[57].

In conclusion, directives surely represent a peculiar type of legislation, rendered maybe even more peculiar by the case law that regards them. In 1986, in the *Marshall I* case, the ECJ had the opportunity of clearly prioritize either the effectiveness objective or the specific identity one, but it decided to compromise establishing the no horizontal direct effect rule. With successive case law, the Court restricted the scope of the rule by putting in place various stratagems, these comprise a broad conception of the state, a strongly formulated duty of consistent interpretation and instances of incidental direct effect. In *Pfeiffer* the ECJ chose not to apply a distinction that would have showed a preference for enhancing the effectiveness of directives at the expense of their specific identity, but later, in *Mangold*, the Court found a new way of making an exception in a case between two private parties, effectively establishing that the general principle at the basis of the directive in question was to be directly applied in the judicial case. In spite of the development of the state liability doctrine, the Court's approach did not change[58]. Remedy by way of damages is treated as a last resort by the Court in its case law, after all possibilities of direct and indirect effect have been

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[56] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR 1-998.

[57] At the time of the Mangold case it was the EEC Treaty, for current legal cases the TEU and TFEU would have to be considered.

[58] The state liability docrine was formulated by the ECJ in the *Francovich* case (Joined cases C-6/90 and C-9/90 *Francovich and others v Italian Republic* [1991] ECR 1-5357).

exhausted. In the next subchapter, the latter practice and other aspects of contemporary application and challenges of the direct effect in the case of directives will be tackled.

2.3 Contemporary application and challenges

This section of the paragraph is dedicated to three selected cases that serve three distinct purposes to observe part of the contemporary application and challenges related to direct effect for directives. The first chosen case is *Kücükdeveci*[59], used here to analyze how the approach taken in *Mangold* evolved and was confirmed by the Court. The second is *Portgás*[60] in which, it will be argued, the Court established an 'intermediate' horizontal direct effect for directives. Finally, the judgement *Gabel Industria Tessile and Canavesi v A2A Energia and Energit*[61], having been delivered in April 2024, has been chosen to show the relevance that direct effect of directives continues to have and how the case law on the latter issue is still unclear and inconclusive therefore pushing national courts to make reference to the ECJ for a preliminary ruling.

2.3.1 *Mangold* confirmed

At the start of 2010, the Court passed the judgement on the *Kücükdeveci* case, which confirmed the *Mangold* approach clarifying a number of issues, but also revealing further questions. Between the two cases, there were other judgements on age discrimination which, conversely, made the approach taken in *Mangold* appear as 'exceptional' since the Court did not refer to the most striking paragraphs of the case[62]. *Kücükdeveci*, instead, is very much aligned with *Mangold*, the central point of both is a double obligation, on one side the national judge must apply the general principle of EU law, on the other the former must not apply national legislation that conflicts with the latter. Both cases regard a dispute between private parties, thus they show how *general principles* can have horizontal direct effect, regardless of the fact that they are, in fact, general, usually unwritten and unpublished and that they have been historically means of protection for private individuals *vis-à-vis* public authorities. Furthermore, the approach taken in these cases assumes that *fundamental rights* can have horizontal direct effect, this is an important innovation since the only earlier cases

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[59] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR 1-365.

[60] Case C-425/12 *Portgás — Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território* [2013].

[61] Case C-316/22 *Gabel Industria Tessile SpA, Canavesi SpA v A2A Energia SpA, Energit SpA, Agenzia delle Dogane e dei Monopoli* [2024].

[62] Case C-35/96 *Bartscb v Middernacht* [1998] ECR I-0859; Case C-228/91 *Petersen* [1992] ECR I-03705; Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] ECR I-01365; Case C-334/08 *Huter v Landesamt für Soziales und Versorgung Sachsen-Anhalt* [2010] ECR I-04135; Case C-388/07 *Age Concern England* [2009] ECR I-04505; Case C-101/01 *Palacios de la Villa* [2003] ECR I-06239.

where a fundamental right such as the one of equal treatment had been given horizontal direct effect had their rationale linked to Treaty provisions, not derived from various international instruments and constitutional traditions of the Member States which normally do not have such ability.

It is important to note how in *Mangold* and, later, in *Kücükdeveci*, the approach of the Court impacts the invocability of EU legislation in the sense that when general principles are included in the latter, they can be invoked independently from that legislation. This is clearly very relevant for directives since, firstly, it effectively gives a private party the possibility of relying on provisions of a directive in a private dispute, secondly, it can do so even before the period of transposition of that directive is expired[63]. *Kücükdeveci* renders existing distinctions and ongoing political debates less relevant since general principles apply within the broad scope of EU law and thus national legislation related to matters falling within the scope of directives will probably have to comply with general principles of Union law, even before the expiration date for the transposition. An important issue is the principle of legal certainty which the Court as defined as requiring that the rules involving negative consequences for individuals should be clear, precise and predictable for those subject to them[64]. It is doubtful that general principles are apt to fulfill these requirements since both their existence and substance are not clearly defined but, in fact, general. Currently, the case law and the Charter of Fundamental Rights can aid with the clarity on the existence of a prohibition or a right, but the assessment of the practical consequences of the latter remain complex for private parties. The ECJ has not addressed these uncertainties which makes it difficult to define if there are limitations to the horizontal direct effect of 'Court-made' general principles and, in case, what these limitations are. What can be said is that non addressing these issues does not promote legal certainty, legitimacy and institutional balance in the Union.

2.3.2 The relationship between directives and the EU Charter of Fundamental Rights

The issue of whether fundamental rights produce effects in private relations has been at the center of extensive literature and case law. The possible horizontal direct effect of the Charter of Fundamental Rights of the EU (CFR) is part of this larger debate. On one side, the role of fundamental rights has evolved in the sense that they were initially created to protect the individual against an 'omnipotent' State, but in the recent years there has been an important shift of power to private entities, thus creating a need for protection of fundamental rights in this context too. On the other side, there has been intent by the Court to find ways to ensure the protection and effectiveness of fundamental rights and freedoms when forms of indirect

[63] Mirjam de Mol (2010: 303-304).

[64] Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland* [2010] ECR 1-131.

horizontal effect, such as consistent interpretation and reliance on the duty of protection by the State, are not effective. The issue with direct effect, as it has been exposed before, is that it causes a change in a legal relationship which modifies the rights and obligations of the parties, regardless of whether this happens through direct application of EU law or by exclusion of national laws. In 2018 the Court of Justice delivered a number of judgements in which it decided that some provisions of CFR may have horizontal direct effect[65]. A brief overview of these cases will be given, and then, the possible implications and interplay with directives will be analyzed.

Accepting horizontal direct effect of Charter provisions that embody a fundamental right fits into a line of cases that recognized horizontal direct effect of fundamental or quasi-fundamental rights that existed before the CFR[66]. These are the principle of equal pay for men and women, which developed from an economically inspired labor law standard to a fundamental right laid down in Article 157 TFEU, and the fundamental free movement freedoms, present in the Treaties, including the prohibition of discrimination on the basis of nationality. The cases, all of which were resolved in 2018, center on the horizontal direct effect of Article 21 CFR, namely the ban on religious discrimination, Article 47 CFR, which guarantees the right to effective judicial protection, and Article 31 (2) CFR, the right to paid yearly leave. At the time of the judicial proceedings, the substance of the cases was not only dealt with in the articles of the Charter just cited, but also in different directives[67]. However, since provisions of directives cannot have horizontal direct effect and consistent interpretation of national provisions was not possible, the Court turned to the relevant articles of the Charter.

As stated before, various provisions of the founding Treaties prohibiting discrimination have been recognized as having effect also in horizontal situations. Since the Charter is itself part of EU primary law[68], the prohibitions and rights included in it were mandatory as general principles of EU law. The Court used a compound rationale for the final judgements, other than the just stated fact that the CFR is part of EU primary law, the Court noted that these

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[65] Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] ECR I-257; Case C-68/17 *IR v JQ* [2018] ECR I-696; Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019] ECR I-43; Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] ECR I-87; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* [2018] ECR I-874.

[66] Prechal (2020).

[67] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303) for Article 21 and 47 CFR; Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299) for Article 31 (2) CFR.

[68] Since the Treaty of Lisbon (2007) the Charter of Fundamental Rights (2000) is part of EU primary law; together with the founding treaties, amending treaties, accession treaties, protocols annexed to those treaties, supplementary agreements amending specific sections of the founding treaties.

general principles are also present in various international instruments and the constitutional traditions of the Member States. Furthermore, the Court declared that the fact that the Charter is addressed to the EU institutions and bodies and to the Member States when they are implementing EU law as stated in Article 51 (1) of the CFR[69], does not preclude the scenario where certain individuals are directly required to comply with some of its provisions. As mentioned before in fact, it is paramount that fundamental rights are protected in private relationships too, since fundamental rights are now perceived as basic values that permeate the entire legal order, not only the public one.

It would seem, as the case law stands now, that for a provision of the Charter to be deemed horizontally directly effective it must be *sufficient in itself to confer a right* that creates a corresponding obligation for another private party. This is true when the provision is *mandatory*, in the sense that it is impossible to derogate from it, and *unconditional*, it does not need to be further elaborated to become applicable. The first requirement is different from standard case law, while the second coincides with the requirements for direct effect. Clearly, before the question of horizontal direct effect of provisions of the Charter arises and is answered following the said criteria, it has to be assessed whether the Charter is applicable in the case in question. Often, the implementation of directives, as in the mentioned cases, pulls the Member State action into the scope of EU law and thus into the scope of the Charter[70]. Directives can elaborate in fact fundamental rights already present in the Charter.

This can create the impression that accepting horizontal direct effect of the fundamental rights provisions of the Charter is yet another way of circumventing the no horizontal direct effect rule for directives[71]. This was argued by many after *Mangold*, and even more, after the *Kücükdeveci* judgement where the Court used a 'combination-approach' mentioning the general principle *as given expression* by the directive. This approach was criticized by many and even dismissed by the Danish Supreme Court in the *DI* case[72]. However, as the case law stands now, the following is confirmed. If a directive embodies a fundamental right but cannot be applied because the case regards a private dispute and consistent interpretation is not feasible, the former can trigger the application of the Charter; for a provision of the latter to have horizontal direct effect it has to be *sufficient in itself* to confer a right. This does not mean that if a directive were to give legislative guidance to a self-sufficient principle of the

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[69] Article 51 (1) CFR states: "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*"

[70] *ibid.*

[71] Prechal (2020: 422).

[72] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* [2016].

Charter, this would affect the capability of horizontal direct effect of the provision at issue. If the latter instead, needs elaboration by a directive to become applicable then it does lack horizontal direct effect. As of now, there seem to be only a few provisions of the Charter capable of horizontal direct effect and thus able to interplay with directives embodying fundamental rights and their practical application.

2.3.3 *'Intermediate'* horizontal direct effect

A few years after *Kücükdeveci*, specifically in 2013, the Court delivered a judgement on a case concerning a dispute between a private undertaking providing a public service as a sole concession holder, Portgás, and a ministry of the government[73]. For the purpose of this thesis, it is not important to list the whole factual and legal background of the case, it is only important to note here that the Portuguese national court had made reference to the ECJ on the interpretation of a directive, in particular because Portgás had concluded a contract with another private company that fell within the scope of the directive concerned and crucially, at the time of conclusion, the deadline for implementation had expired but Portugal had not implemented it. The main issue that led the national court to refer to the Court of Justice was not related to the substantive application of the directive in question, but whether the Portuguese authorities could actually rely on the provisions of the unimplemented directive against Portgás.

Advocate General Wahl recognized, in his opinion, the complexity of the case law on direct effect of directives and acknowledged that this case presented the Court a new opportunity to rule on the matter. The difference with previous cases was that here it was the State trying to rely on an unimplemented directive against a public service provider. The provisions themselves were capable of producing direct effect but the question was whether this potential could be 'unleashed'. On the suggestion of the Advocate General it was necessary to establish whether Portgás was an emanation of the State and then whether the State could rely on an unimplemented directive against an emanation of the State. On the first issue the Court concluded that the provision of a public service was not sufficient to satisfy the *Foster* test but that the other criteria had to be assessed too, namely, that Portgás was under the control of public authorities and that it had special powers. The Court however concluded that it did not have sufficient information to decide on this issue and thus left it to the national court to do so. Assuming that Portgás was actually an emanation of the State, the Court held that Member States were obliged under Article 288 TFEU to ensure the effective implementation of directives and this obligation extended to emanations of the State and public authorities, thus the State would be able to rely an unimplemented (if sufficiently clear and precise) directive

[73] Prechal (2020)

against an emanation of the State. The Court provided three justifications for its conclusion, the first was that it would be contradictory if the State or an emanation of the latter were not able to ensure compliance with a directive by another emanation of the State, when they are are both under the same obligation of compliance. Second, the Court used the estoppel rationale, stating that a State would be able to profit from its own wrongdoing if it could not ensure compliance by its own emanations. Finally, the Court observed how if the State was not able to rely on a directive against its own emanations, the enforceability of the obligation of compliance by the emanations of the State would depend on private parties seeking to rely on the directive.

The scholar Albors-Llorens has examined the decision and the reasoning of the Court in *Portgás* and the implications of the judgement[74]. These will be considered in turn. The Court held that if Portgás was indeed found to be an emanation of the State, it would then be possible for the State to rely on an unimplemented directive against it. The Court did not acknowledge that in practice this would constitute a new form of direct effect and consequently create new difficulties in an already complex area of case law. It is not clear whether the scenario examined in Portgás can be treated as one of the existing situations of direct effect[75]. The relationship between the State and one of its emanations could be characterized as quasi-vertical and descending, however, this would be easier to do in cases where the *Foster* test had been broadly applied, while it would be harder to sustain a 'verticality' in cases where the body in question was clearly a subdivision of the State. An approach that could be more convincing and sustainable would be considering this scenario as a new form of '*intermediate*' horizontal direct effect. Intermediate because it does not entail the classical horizontal scenario between two private parties, but there is still the element of horizontality since, following the *Foster* line case of law, the State and its emanations are legally on the same level. Consequently, in the *Portgás* case, the Court would have sent the message that this form of 'intermediate' horizontal direct effect is permitted, while the classical one remains prohibited[76]. In practice, while private parties are obliged to comply with the directive only when the latter has been properly transposed in national law, the price that emanations of the State have to pay for their 'special powers' is to be directly subject to the obligations in the directive once the time for transposition has passed, even in the case that the State has not implemented it.

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[74] Albors-Llorens (2013).

[75] ascendent vertical or descendent vertical or horizontal direct effect.

[76] *ibid.* [74] (13-14).

Another observation has to be made in discussing the implications of the judgement, the *Foster* test was designed to provide a wider umbrella for the bodies falling within 'the State' or that could anyway be equated to it in legal disputes in order to enhance the possibilities of private parties to rely on unimplemented directives against bodies or emanations of the State, not only the State itself. However, after *Portgás*, the same mechanism, created for scenarios of ascendant vertical direct effect, open these bodies and emanations to challenges from a second front, namely, the State itself. Moreover, the Court is not completely consistent of whether the criteria of the *Foster* test are cumulative or alternative[77]; still, in *Portgás*, the Court stressed that the test is made up of cumulative elements. It is paramount for these bodies 'enjoying' special powers that the interpretation of the test are clarified by the ECJ, so that also the use that different national courts make of it is not so diverse. Another possible implication for future cases could be new situations of 'halfway' ascendant vertical direct effect, specifically emanations of the State against the State itself, or other forms of 'intermediate' horizontal direct effect, namely one emanation of the State against another. This ramification flows from the duty of effective implementation falling on emanations of the State, which should then be able to secure the same behavior by the State or by other emanations of the State[78]. Ultimately, the decision in *Portgás* can be seen as introducing yet another qualification to the primary assertion of *Marshall I* that directives can only produce ascendant vertical direct effect.

2.3.4 Direct effect still creates issues

The third case that will be hereby analyzed regards the proceedings between two Italian companies signatories of separated contracts for the supply of electricity with two other Italian companies which fell within the scope of an unimplemented directive for which the period of transposition had expired. The *Gabel Industria Tessile and Canavesi v A2A Energia and Energit* case[79] has been chosen to show the relevance that direct effect of directives continues to have and how, to this day, the case law on the latter issue is unclear and inconclusive thus national courts still make reference to the ECJ for a preliminary ruling. In fact, in its reference, the Tribunale di Como (District Court, Como) states how it is 'confused' on which approach to take. According to one line of case law, a court is not permitted to disapply a national provision in contrast with an EU directive in a dispute between private parties since it would result in the precluded horizontal direct effect. According to a second

[77] See Case C-297/03 *Sozialhilfeverband Rohrbach v Arbeiterkammer Oberösterreich and Österreichischer Gewerkschaftsbund* [2005] ECR I-4305, at para 27, where the Court placed the main emphasis on the fact that the body or organisation in question should be under the supervision of the State but did not refer to the fact that it should also have special powers.

[78] Albors-Llorens (2013: 18).

[79] *ibid.* [61].

line of case law, instead, the court has an obligation to interpret domestic law in the light and purpose of the relevant directive in order to achieve the results expressed in it and thus "*the result of that obligation would be to recognise that the principle that European directives only have vertical direct effect does not preclude the determination of an undue payment in the horizontal 'passing on' relationship, by virtue of the link between that relationship and the tax relationship in respect of which the prohibition laid down by EU law operates directly.*"[80]

The District Court consequently decided to refer two questions to the Court of Justice, the first regarded whether the third paragraph of Article 288 TFEU precluded the disapplication of a provision of national law that is contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been transposed incorrectly, in a dispute between private parties, although it is necessary for the national legal system to be able to assert the rights conferred on the individual by the directive in question. The second question is indirectly related to the topic of this thesis in the sense that the District Court asks whether, in the case that the provision of the directive is confirmed not to have horizontal direct effect, the national legislation that precludes a final consumer to seek reimbursement directly from the State is to be considered excluded, following the principle of effectiveness, since, in scenarios like the one of the case in analysis, the individual is not able to rely on the directive in order to seek reimbursement from the person liable to pay. The Court answers the first question reiterating the no horizontal direct effect rule, that applies even in the case that the national provision is contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been transposed incorrectly, "*unless national law provides otherwise or unless the entity against which that inconsistency […] is relied upon is subject to the authority or control of the State or possesses special powers beyond those which result from the normal rules applicable to relations between private parties.*"[81] For the second question instead the Court held that the principle of effectiveness has to be interpreted as precluding national legislation that:

> "*does not allow a final consumer to seek directly from the Member State reimbursement of the additional economic burden which that consumer has borne as a result of the passing on by a supplier […] of a tax which the latter had itself unduly paid, but which allows such a consumer to bring only a civil action for recovery of sums paid but not due against such a supplier, where the undue nature of that payment is the consequence of that tax being contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed, and where, because it is impossible to rely on a directive as such in proceedings between private parties, that ground for unlawfulness cannot validly be relied on in the context of such an action.*"

[80] *ibid.*, paras 18-19.

[81] *ibid.*, para 27.

According to established case law of the Court, the Member States have to repay charges levied that turned out to be in breach of EU law, since individuals have the right to be refunded, which stems from the rights conferred upon them by the EU provision prohibiting such charges. The Member State cannot derive a benefit from its own wrongdoing in not having implemented a directive or having implemented it incorrectly, thus, the consumer that has in the end unduly borne the additional economic burden, must have the possibility of seeking reimbursement either directly from the State or from the supplier, in the case that the latter has passed on the tax to the consumer. In the case analyzed this is what had happened with an additional tax on electricity excise duties, but since the consumers are not able to rely on an unimplemented directive against a company, because that would amount to horizontal direct effect, the Court decided to opt for a solution of damages payed by the State to the wronged consumers. As mentioned before, the solution by damages is treated by the Court, in its case law, as a last resort, after the possibility of direct or indirect effect have been excluded. Still, it is important to offer somewhat of a protection to individuals who must have their rights enforced but have no way of relying on a directive's provision against another private party.

These selected cases are not representative of all the contemporary trends and challenges regarding the case law of direct effect of directives. However, they highlight a few characteristics. First, the possibility of general principles to be used in private disputes as a way of protecting individuals who cannot directly rely on directives, established in *Mangold* was upheld in *Kücükdeveci*, which clarified that the former was not a unique case but represented a new approach. Second, the possibility of a new kind of horizontal direct effect, that can be defined as intermediate, possible for directives in disputes between the State and its emanation or bodies. Third, the acknowledgment of the actuality of the case of directives that, to this day, remains partially unclarified and inconclusive. Fourth, the importance of the solution by damages when direct or indirect effect of the instruments are not feasible. To further analyze the role of general principles, and fundamental rights, in this part of the case law, the next section will delve into the ability of certain provisions of the Charter of Fundamental Rights of the EU to be directly effective and their interaction with directives, which is most relevant after the *Kücükdeveci* judgement.

2.4 Conclusion

Directives represent a peculiar case in the EU legal system. The case law that regards them has made them evolve from an indirect form a legislation to an instrument with broad capabilities. From *Van Duyn* to *Marshall I* and *Mangold* the Court has tried to maintain the specific identity of directives although enhancing their effectiveness making them able to be

directly effective in certain scenarios but not in others. Specifically, while no grand issues are encountered in cases of vertical ascendant direct effect, situations of descendant vertical and horizontal direct effect were initially clearly prohibited, for directives are binding only on their addressees, that is, the Member States. However, the broad conception of the State introduced by *Foster*, the possibility of general principles at the basis of a directive to be horizontally directly effective in private disputes, and other stratagems developed by the Court rendered the no horizontal direct effect rule for directives less absolute. The analysis of a few contemporary cases confirms this general approach, but also brings to light new developments such as the ability of directives to have an intermediate horizontal direct effect between the State and its emanations or the importance of remedy by compensation for the damages suffered when neither direct or indirect effect for the protection of the individual are possible. To further expand on the contemporary relevance of the horizontal direct effect of general principles, a few recent cases of 2018 were analyzed to show the importance of the interplay between the CFR and directives in this area. After having dealt with the case of directives, the next chapter will be dedicated to the case of international agreements.

3. Direct effect of international agreements signed by the EU

3.1 Introduction

In the last sixty years, the EU's external policy has evolved and changed deeply politically, economically and financially. The Union's recognition as an important actor in the international arena has also increasingly grown, starting from its accession to the World Trade Organization (WTO) in 1995 and continuing with a growing number of concluded international agreements of different kinds. The internal effects of such agreements have evolved too, mainly through the case law of the ECJ. Direct effect is an inherently political concept used, also, for political purposes, giving the Court a *de facto* political power. After the extension of the direct effect doctrine to a vast number of Treaty provisions in fact, a second major expansion to international agreements, alongside directives, took place. In the first section of this chapter the established case law on direct effect of EU agreements will be overviewed and the general framework of the interrelations between the two legal orders will be presented. In the second section instead, the new protective approach of the Court, not without inconsistencies, will be presented; together with the recent trend of the other EU institutions which seem to want to take some power back from the Court in deciding when to leave the possibility for direct effect.

3.2 General framework and the approaches of the ECJ

The aim of this first section is giving an overview of the general framework of interrelations between the international and the EU legal order. Starting from the GATT case law, arriving at the judgements delivered in the first decade of the new millennium, the Court's position on direct effect of international agreements has evolved, becoming clearer on certain issues but also not totally consistent on others. After having analyzed the principles and notions regulating EU international agreements, two main lines of case law will be presented. Furthermore, the role of 'gatekeeper' of the Court and the two main approaches followed by the latter in regulating the relations with international law will be illustrated.

Generally it can be argued that, whereas direct effect is the default rule for EU law, or at least the ECJ tries to render it that way, this is not true for rules originating in international agreements signed by the EU, regardless of their becoming integral part of EU law upon conclusion, as established in 1974 by the Court in its *Haegeman* judgement[82], and of Pescatore's well-known remark that direct effect is "*the normal condition of any rule of*

[82] Case 181-73 *R. & V. Haegeman v Belgian State* [1974] ECR 449.

law"[83]. Direct effect for international agreements' provisions remains to be verified case by case[84]. The issue faced by the Union is common to every legal order which must, on one hand, guarantee that the international obligation taken are complied with in the internal legal order and, on the other hand, ensure that it has a way of 'escaping' these rules if they risk endangering its values and core principles. There are some principles in place to ensure a functional and functioning relationship between the international and the EU legal orders. The first is the supremacy of international law over EU secondary law and national law, this is true when it is the Union to conclude the agreements, when the latter are concluded only by the Member States, the international law provisions do not assume primacy over EU secondary law. The second principle regards the technique of incorporation of international agreements chosen by the Union, specifically, the automatic adaptation to international law. This means that actually *during* the process of incorporation the incompatibility with primary law can in principle be corrected by implementing legislation. It has to be noted that there is no formal incorporation of EU international agreements in the Member States' legal orders, which become automatically binding on them and assume the 'role' of EU legislation. After the incorporation, the evaluation of the content of the rule takes place, in order to assess if further legislation is needed to give full power to the agreement[85]. This system puts incredible pressure on the ECJ which has to use its interpretative tools to determine if and to what extent EU and national legislation are conform to international law legislation. Direct effect here plays a crucial role; thus, an analysis of the case law can shed some light on this complex matrix of interrelations between legal orders.

In the *Van Gend en Loos* (herein after *VGL*) judgement, the Court recognized the possibility of Treaty provision to be directly invoked by private parties if they contain a clear, precise and unconditional rule, after having assessed that the spirit, general scheme and wording of the EEC Treaty constituted the creation of a new legal order which involves not only the States but also their nationals. As previously analyzed, the Treaties envisaged the direct effect of regulations, which was never called into question; conversely, they did not provide for such effect for other binding legal acts. Nevertheless, the ECJ recognized such effect to both decisions and, notably, directives. The provision dealing with agreements concluded by the EU is Article 216 of the TFEU[86], which states that they are binding on both the EU

[83] Pescatore (1983: 155).

[84] Martines (2014: 132).

[85] Bronckers (2008: 133-136).

[86] Article 216 TFEU states: " *1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*
2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

institutions and the Member States. Still, two things are worth noting for the inquiring purpose of this chapter. The first is that even before the introduction of this provision in 2008 with the Treaty of Lisbon, the case law of the ECJ had supported the view that international agreements, upon conclusion, become part of EU law and are thus binding. The second is that, however, binding effect and direct effect are two different concepts with different legal consequences. Since the Treaties do not explicitly regulate the legal status or internal effect of international agreements, it is the Court that tried to shed some light on the issue with its case law, although not without ambiguities.

3.2.1 Two main lines of case law

The first noteworthy line of case law regards the General Agreement on Tariffs and Trade (GATT), for which direct effect was consistently denied by the Court, starting, in 1972, with the *International Fruit Company* judgement[87]. The Court denied direct effect to GATT using the same kind of assessment of *VGL*, specifically, analyzing the spirit and general scheme of the multilateral international agreement it concluded that it was not able to directly confer rights to individuals and thus potentially render invalid any EU measure contrary to the rule in question. The ground for the decision was the great flexibility of the provisions of the General agreements, however, the Court did not change its position even when the WTO was established, actually decreasing the level of flexibility possible with the GATT. In fact, in *Portugal v Council*[88], the Court rejected the possibility of direct effect of the WTO. It is important to note that the refusal of the Court to recognize direct effect was not directed to all internal agreements, in the same period, in fact, others were granted direct effect; importantly, in 1976, in the *Bresciani* judgement[89], for the first time the Court explicitly recognized the possibility of invoking directly an EU international agreement before a national court. Nonetheless, there are doctrinal reasons that can explain the behavior of the Court, for example, many agreements for which direct effect was recognized were aimed at creating and developing a higher form of integration with the countries involved in respect to the GATT, thus somewhat guaranteeing reciprocity and good faith in application, which were instead lacking in the WTO Agreements. The *Portugal v Council* judgement attracted substantial criticism but the successive case law on direct effect of the WTO remained nevertheless consistent with this initial judgement. The only two 'escape routes' developed in this line of case law are the duty of consistent interpretation of secondary law in light of the WTO and

[87] Joined cases 21 to 24-72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972].

[88] Case C-268/94 *Portuguese Republic v Council of the European Union* [1996] ECR I-6177.

[89] Case 87-75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129.

the *Nakajima*[90] doctrine, for which an individual can challenge an EU measure in case in the latter the legislature has specifically indicated its intentions to implement an existing WTO obligation[91]. While it is possible that these intentions may be observed in other areas of EU law in the future, an explicit intention to follow WTO law has only been found so far in the antidumping legislation area and in the Trade Barriers Regulation[92].

The approach of the Court towards the GATT and WTO Agreements is rather the exception than the rule, in fact, to many agreements concluded between the 1990s and 2010, direct effect was granted more readily, showing a continuous line of acceptance of direct effect for international agreements[93], this second line of case law appeared to settle the 'gatekeeper' role of the Court as more of a 'door opener', but, as it will be observed in the next section, this turned out to be not set in stone. As already mentioned, to assess the possible direct effect of the GATT and, later, of the WTO, the Court followed a similar reasoning to the one established in *VGL*. In the second line of case law, the Court defined the so-called 'double test' of *VGL* applied to international agreements more precisely. The two interpretative criteria are, first, an assessment on whether the spirit, structure and nature of the agreement are to be intended as conferring rights on individuals, specifically, such intention of the parties and the reciprocity in the implementation are to be evaluated; second, an analysis on whether the specific provision on which the individual wishes to rely, contains a clear, precise and unconditional rule. It is worthy of note that the Court applied the double test both in proceedings where the validity of an EU measure was challenged and in those where individuals derived rights from international law against a Member State or an EU institution.

3.2.2 *Van Gend en Loos* and international law

It can be assumed that the first part of the test has to be undertaken just once 'per agreement', in the same way that, after *VGL*, the Court only focused on the wording of the Treaty provisions, without reassessing the nature of the Treaty itself. The first step is important, instead, when the Court has to determine the possible direct effect of an EU international agreement for the first time, since the specific structural feature of the EU legal order cannot be simply assumed for international law, where the status of individuals as direct subjects remains the exception. In fact, in *VGL* itself, the Court made explicit the distinction between the new EU legal order and classical international law, defining the former 'in opposition' to the latter, in order to recognize the possibility of direct effect for EU law provisions. Thus, it

[90] Case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities* [1991] ECR I-2069.

[91] Stoynov (2017: 45-48).

[92] Martines (2014: 887).

[93] Stoynov (2017: 49).

seems rather paradoxical that the Court has extended the same docrine to international agreement that it has concluded. However, only in the case where the Court verifies that the international agreement is reproducing the conditions which render it 'comparable' to the EU legal order, then the Court can 'revise' what it established in *VGL* and assess the direct applicability of a specific international provision. In other words, only if the global analysis of the agreement leads the Court to conclude that it intended to create rights for individuals *in the same manner* that the EU legal order creates them, it can then be assessed the direct effect of an international provision[94].

Nonetheless, the double test may be very contentious and leave the ECJ a rather wide margin of discretion in deciding if, how and to what extent the EU legal system is permeable to international law[95]. The issue of direct effect is a political issue, the flexibility of the double test permits the Court, on one hand, to take into the account the division of power issue, for example deciding whether the international provision require legislative execution or leaving the choice of implementation of the provisions to the political branches of the government, while, on the other hand, maintaining enough flexibility to respond and adjust to changing circumstances and situations. It appears clearly how the role of 'gatekeeper' assumed by the Court, entails an important shift of responsibility from the executive to the judiciary. It is not inherently a negative aspect if taken 'mindfully', the Court in fact is seen as being more objective in its interpretative task in comparison with the executive[96].

3.2.3 Excursus: the protection of legal equality and non-discrimination

The rulings of the Court on the direct effect of EU agreements can also be analysed to point out how the ECJ, through them, contribute to strengthen the concrete implementation of EU twin principles of legal equality and non-discrimination. Two approaches can be distinguished, specifically, a 'functionalist' approach, within which an affirmative finding of direct effect is used by the Court as a tool to strengthen a proper implementation of the principles, and a 'protective' one, within which, conversely, the lack of direct effect is justified with the need to protect, in fact, those principles, and also EU law in general, from being jeopardized[97]. The functionalist approach is sustained by the simple argument that the ability of individuals to directly invoke international law provisions makes an eventual harmonization of application more likely, since all the nationals of all the Member States could rely directly on those provisions. However, it can be pointed out that it is hard to

[94] Martines (2014: 138).

[95] *ibid.* (145).

[96] Ghazaryan (2018: 45-46).

[97] Casolari (2017).

imagine a homogeneous interpretation and implementation by the many different judges of the 27 Member States. Still, this is a common issue and it is for the ECJ to ensure the uniform implementation of EU law, whichever the specific source may be.

To ensure the proper implementation of this approach, the two-stage test needs to be satisfied, this remains true even if changes over time in the necessary criteria have been observed[98]. There is jurisprudence which shows the existence of a nexus between the realization of the EU equality and non-discrimination principles and the ECJ's case law recognizing as directly effective provisions of non-discrimination enshrined in EU bilateral agreements. For example, the recognition of direct effect for a rule prohibiting tax discrimination contained in the Free Trade Agreement (FTA) between the EEC and Portugal; or the admission of direct effect for certain decisions of the Association Council set up under the Association Agreement (AA) between the EEC and Turkey containing non-discrimination rules on grounds of nationality[99]. However, the Court has never recognized direct effect for the AA itself in this case, upholding its *Demirel* judgement where the Court firstly observed that the wording of the provisions in question showed that the objective of the drafters was to "*set out [only] a program*"[100]. Importantly, in the same case, the Court recognised the possibility for certain agreements to have direct effect, in accordance with the same criteria identified in the *VGL* case.

Two elements can be noted from this line of case law. The first is that there is clearly a link between the anti-discrimination provisions of EU agreements and the same principle enshrined in EU primary law; this is because the Court considers, to some extent, these provisions as a projection of EU principles onto the international arena. The second element is that the Court makes use of the two-stage test in a different way in this area of case law, specifically, it gives more weight to the wording of the provision itself than to the nature of the agreement. This is most likely because the Court is interested into giving full power to the single provision embodying the important principle of non-discrimination rather than focusing on the agreement as a whole. The ECJ's case law has also revealed an opposite attitude, parallel to the functionalist one, that is, protecting EU law and its principles by denying direct effect to international agreements, especially when dealing with multilateral agreements, such as the WTO. The seminal ruling of *Portugal v Council* is a perfect example. The Court denied direct effect to WTO provisions because, otherwise, it would not be able to ensure the legal equality of individuals. Furthermore, as already mentioned, in all the later case law related WTO, the Court seemed to maintain this protective approach in order to

[98] Casolari (2017: 86-88).

[99] *ibid.* (89-91).

[100] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 23.

preserve legal equality in the EU legal order[101]. In the next section, among other issues, a recent trend will be analyzed, specifically one that is likewise characterized by the denial of direct effect to multilateral agreements but that is not however based on the same rationale, actually, as it will be observed, the Court is using different combinations of arguments to reach the same conclusion.

After the overview of this section it can be concluded that, with the exception of the GATT-WTO case law, the Court has generally showed itself to be rather open to international law, especially in regard to bilateral agreements. It has developed the use of the double-test to let itself have somewhat of a leeway to decide whether to be 'permeable' to international law or not. The same principle is also reflected in the two opposite functionalist and protective approaches; however, if the Court behaved more openly than protectively for a few decades, in the next section it will be observed and argued that the Court seems to be becoming more skeptical towards international agreements, both multilateral and bilateral, thus more protective of the EU legal order and the principles on which it is based.

3.3 The recent attitude of the Court and of the other EU institutions

In this section, it will be argued that the Court is becoming more protective towards international law, inaugurating, it seems, a new line of case law which does not recognize direct effect of multilateral agreements. On the other hand, the Court has found more subtle ways of ensuring effect of EU agreements in the domestic legal orders. In any event, the other EU institutions still perceive the Court as 'too open' and have in turn elaborated various techniques to prohibit direct effect of agreements even before the Court is able to assert its gatekeeper role.

3.3.1 The Court's recent skepticism towards international law

As it has already been observed, the way WTO law was treated by the Court differed from how the latter dealt with other international agreements. However, it seems that in the recent years the Court has become more skeptical towards international law permeating the EU legal order, reserving the same treatment of WTO to other major international agreements. In 2008, in the *Intertanko* case[102], the Court concluded that the nature and the general scheme of UNCLOS prevented it from having direct effect in the Union, thus the Court could not assess the validity of EU secondary legislation on the basis of the Convention at the request of private parties. In particular, the Court relied on the argument that UNCLOS was *not* able to

[101] Casolari (2017: 96-98).

[102] Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057.

confer rights to conclude that the Convention was *not* capable of direct effect. This injected further inconsistency in the case law since, if the conferral of rights was incorporated and given primacy into the analysis of direct effect, it would preclude such effect of the majority of international agreements; in fact, before *Intertanko,* the Court had been focusing on the second part of the test, regarding the wording of the provisions, not on the general scheme of the agreements. Still, this judgement is not be understood as giving rise to a completely new and consistent line of case law, in fact, in other recent cases, the Court gave instead more weight to the second condition, albeit in a flexible and often lenient manner. For example, the Court may declare a provision to be unconditional even though it is subject to recommendations by an institution established within the agreement, or it may engage only in a scarce and fleeting analysis of the provisions. In conclusion, a recent trend that can surely be observed regards, not a consistently given primacy to either conditions, but a general inconsistent application of the double test. There are times in which the Court gives precedence to the second condition, even if it would be logically useless to assess the wording of a provision to then, theoretically, find that the agreement does not have the general scheme necessary to 'host' potentially directly effective provisions. Furthermore, the second condition itself seem to be applied flexibly[103]. This is strikingly at odds with the case law on WTO, in which the first condition had been definitely more decisive than the second.

Scholarly practitioners have tried to give reason to the *Intertanko* ruling and the general change in behavior of the Court. Some have pointed to the fact that, since the Union has become a much more powerful actor on the international scene, the 'openness' of the Court to grant direct effect to international agreements could negatively impact the negotiating power of the Union, thus pushing the Court not to grant direct effect so readily. Others brought the focus to the fact that the Court's methodology might actually differ depending on whether it is dealing with a bilateral agreement or a multilateral one, such as WTO or UNCLOS. By emphasizing that the EU's negotiating power is stronger in bilateral negotiations compared to multilateral ones, the Court may be considering that in multilateral settings, the Union might be unable to assert its position forcefully and, consequently, the Court might be less inclined to grant direct effect to the provisions in the final agreements. However, it remains doubtful whether the Court will long remain more favourable towards bilateral agreements, since the latter lately include dispute settlement mechanisms that are more and more modeled after the WTO's. It can be noted that denying direct effect to international agreements, not only accords more negotiating power to the Union, but also gives more implementation responsibility to the other EU institutions. Furthermore, once an international provision has been deemed directly effective, it also has primacy over EU secondary legislation, thus

[103] Ghazaryan (2018: 54).

invalidating inconsistent EU acts from a prior and later date. It can be concluded that, maybe at the expense of legal certainty, the Court is in this way able to retain its role of gatekeeper in numerous scenarios, maintaining the possibility to deviate from international precedents when the need to do so arises, while still using other means to avoid inconsistencies as much as possible[104].

3.3.2 Other ways of guaranteeing effect

If on one hand, it seems that the Court has opted for a more protective approach, on the other hand, it is also finding more discreet ways than direct effect to still give effect to international agreements, for example engaging in somewhat of a dialogue with other international tribunals. With this janus-faced attitude the ECJ is able to both show respect to international law and to maintain its role as a gatekeeper to resist 'inimical' international legal norms. The first way in which the Court ensures internal effect of international law provisions is consistent interpretation; within the use of this approach the ECJ has shown a tendency to be more open to grant rights to individuals rather than accepting challenges to the legality of EU measures. The second approach entails a 'muted' dialogue with WTO tribunals[105]. When the national laws are unequivocal and cannot be interpreted in consistency with a provision of international law in fact, the Court has sometimes made reference to WTO law. This 'reference' must not be intended as an explicit reliance on a WTO ruling, but more as an 'influence' by WTO precedents on the Court which seeks to avoid inconsistencies. Otherwise, private litigants can also take 'inspiration' in WTO rules in order to substantiate general principles of law. The last resort is represented here, as in other cases, by damage actions. However, even if financial compensation may seem an 'easy way out', the Court as rightfully noted in its judgement *FIAMM and Fedon v Council and Commission* that "*any determination by the Community courts that a measure is unlawful, even when made in an action for compensation, has the force of res judicata and accordingly compels the institution concerned to take the necessary measures to remedy that illegality.*"[106] The Court therefore seems to have closed off this possibility in the absence of *unlawful* conduct. It remains to be seen whether in cases where the Union takes *lawful* measures that however impose a disproportionate burden on some private entities for the benefit of the public good, the Court will accept that the latter are entitled to financial damages[107].

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[104] Bronckers (2008: 894-896).

[105] *ibid.* (889).

[106] Joined cases C-120/06 P and C-121/06 P *FIAMM and Fedon v Council and Commission* [2008] ECR I-6513, para 124.

[107] *ibid.* [104] (892).

3.3.3 The recent practice of other EU institutions

The most recent diplomatic and legislative practice of EU political institutions shows a general negative attitude towards direct effect of EU international agreements, this practice consists in explicitly denying direct effect in the agreement itself and it dates back to the early 2010s, specifically with the FTA with Korea in 2010[108] and the TA with Colombia and Peru in 2012[109]. It is important to remember that the role of the Court as the gatekeeper comes into play only if the EU institutions, which have power to negotiate and conclude international agreements, have not previously agreed with the other contracting parties what effects the provisions of the agreement are to have internally. The EU institutions have significantly increased the number of instances where they use various techniques in order to preclude direct effect of EU agreements, maybe also drove by the apparent openness of the Court in recognizing direct effect of bilateral agreements and in using the double test flexibly[110]. These different ways in which direct effect is precluded by EU institutions will hereby be analyzed. Via international law, this can be done thorough the incorporation of a 'no direct effect' clause into the agreement itself, otherwise, adding a provision into the schedules of any commitments in services annexed to the agreement or into the part of the agreement dedicated to the dispute-settlement procedures, thus denying direct effect of arbitral rulings[111]. Alternatively, via EU law, the objective can be reached through a preclusion of direct effect made explicit in the Council decision authorizing the signing and the provisional application of the agreements. Usually, these are also confirmed by a preclusion included in the Council decision on the conclusion of the agreement[112].

From the analysis of the scholar Casolari, it can be observed that all major bilateral agreements negotiated or signed by the EU between 2010 and 2016, with the exception of the Stabilisation and Association Agreement (SAA) with Kosovo, include at least one of the four just listed techniques to preclude direct effect of the same agreements. Interestingly, these techniques are increasingly used concurrently by EU institutions, underscoring the growing impatience of the Member States with the openness of the Court. It can be argued however, that a general preclusion of direct effect of association agreements risks fragmenting the implementation of the association process, differentiating between older and newer

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[108] OJ 2011 L 127/6.

[109] OJ 2012 L 354/3.

[110] Casolari (2017: 99-100).

[111] *ibid.* (102-106).

[112] *ibid.* (107).

associations, and also risks undermining the rationale behind the whole process, that is creating a close cooperation between the parties[113].

Fortunately for individuals, there are also remedies to the prohibition of direct effect in the text of EU agreements. In international law, the possibility of incorporating private enforcement mechanisms in the agreement or triggering individuals' remedies under International Human Rights Law present two possible paths to follow. However, they have shown to be incapable of adequately counterbalancing what EU institutions have decided to pursue[114]. Meanwhile, in EU law, consistent interpretation and actions for damages can bring some solace to individuals wishing to have their rights recognized, however, these techniques are not capable of yielding the same results as direct effect of international provisions would. There is also a possible inquiry regarding the Council decisions excluding direct effect that must be overviewed. It could be argued that a unilateral exclusion or limitation of direct effect by an act of EU legislature, in particular of the Council, is inconsistent with the EU loyalty clause and principle of sincere cooperation enshrined in Article 4(3) TEU[115], and should thus be declared invalid by the ECJ. In fact, EU institutions have the power to negotiate the effects of a certain agreement *with the other contracting parties*, they cannot however unilaterally define them. After the conclusion of the agreement, if the effects of the latter have not been defined, it is within the jurisdiction of the ECJ to rule *ex-post* upon them. In conclusion, the ECJ could bring a claim of invalidity for this kind of unilateral act of the Council, relying on the conflict with the principles of sincere cooperation and institutional balance[116]. Furthermore, even in the case that the no direct effect claim was included in the agreement itself, it cannot be excluded that the Court will exercise legal scrutiny over certain provisions of the agreement in question, especially if the provision is based on the principle of non-discrimination and if the agreement is not globally structured in a WTO-like logic.

3.3.4 Horizontal direct effect of international agreements

Recent researchers have found that domestic courts are more willing to apply directly international provisions in horizontal relationships rather than in vertical ones, because the former do not create significant new duties for national governments. Such practice is however in contrast with the historical case law of the ECJ which has focused more on

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[113] Casolari (2017: 108-111).

[114] *ibid.* (114-118).

[115] Article 4(3) TEU states: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. […]*
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[116] *ibid.* [113] (121-123).

vertical proceeding, since it is in this area that the most contentious issues have arisen[117]. In cases between private parties that involve international agreements, the double test applies, but attention must also be payed to the nature of the parties and the context in which the agreement was concluded, specifically the different domestic and foreign interests involved, which can help delineate whether direct effect will be deemed possible. Furthermore, two questions that need to be answered positively can be outlined, the first is whether the agreement contains an obligation that one of the private parties has to uphold, the second regards the presence of a correlative right which the other private party can be beneficiary of. Answering these questions can be difficult in principle, because provisions which specifically address private parties are rare, especially when the international agreement in question does not govern private contractual relationships. It is important to clarify that a *valid interest* might be sufficient for a party to be considered a *beneficiary* and thus be able to rely on those provisions. This is most evident in *L'Étang de Berre I*[118], where the Court outlined this reasoning and did not base itself on a simple obligation-right approach[119].

The case law on disputes between private parties displays certain situations which presented themselves as horizontal but in which, realistically, one of the parties enjoyed particular prerogatives and functions similar to the ones of the State, hence they were effectively treated as semi-vertical, as in the case of directives. Private parties against emanations of the State or private regulatory bodies of a profession fall within this area of case law. Rulings instead on proceeding between two private undertakings at an equal level of hierarchy have been rare, specifically, there have been only two[120]. It can be observed that the Court did not discuss direct effect in either, but preferred to avoid the question altogether and interpret the international provision in question. Moreover, similarly to directives, direct effect has been granted to a general principle, specifically non-discrimination based on nationality, contained in an international provision, but not to the legal instrument itself[121]. It can be concluded that the Court has been 'shy' to give a clear answer to the question of whether international agreements can have horizontal direct effect, preferring to keep a cautious, case by base approach[122]. On the other hand, while there is a clear prohibition of horizontal direct effect for directives, there is no such explicit ban for international agreements. This issue is not yet fully settled, however, given the new legal climate regarding direct effect, one in which regulations

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[117] Gáspár-Szilágyi (2015: 96).

[118] Case C-213/03 *L'Étang de Berre I* [2004] ECR I-07357.

[119] *ibid.* [117] (100-102).

[120] Case 52/77 *Cayrol v. Rivoira* [1977] ECR 2261 and Case 270/80 *Polydor v. Harlequin* [1982] ECR 329.

[121] Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-4135.

[122] *ibid.* [117] (103-114).

and Treaty provisions can have undoubted direct effect, the no horizontal direct effect rule for directives has seen an intricate list of exceptions and alternatives attached to it, and other jurisdictions apply such agreements in veritable horizontal proceedings, it is probably time for the ECJ to fully acknowledge the ability of horizontal direct effect of EU agreements[123].

3.4 Conclusion

After analyzing the general framework and principles that regulate EU international agreements in the EU legal order. A general functionalist attitude of the Court was initially observed, especially in regard to bilateral agreements. The ECJ however always retained its role of gatekeeper, leaving itself some room to decide if and to what extent give direct effect to the agreements it had concluded. Recently however the lack of conclusive reasoning and the introduction of new factors in the two-stage test has brought new incoherencies in the case law of the ECJ, undermining even more its continuity. The Court has retained a broad range of discretion for ad hoc remedies rather than confining itself to being either open or closed. Even a more lenient stance toward bilateral agreements does not imply complete openness to their potential to directly affect individuals. A negative finding in the inquiry for the second condition of the double test might be used to counter this openness, leaving the provision effectively ‘toothless’. Furthermore, a positive finding regarding the second condition does not ensure that the individual's legal position will be altered positively. This is because of the Court's discretion in interpreting the scope of the provision[124]. Nevertheless, other EU institutions are keen to challenge the perceived ‘generosity’ of the Court, either by agreeing with the other contracting parties on a no direct effect clause or by internally challenging the jurisdiction of the Court through unilateral Council decisions. Remedies to these challenges exist both in international and EU law, however these are not able to fully counteract the recent attitude of EU institutions. It is probably time for the Court to define which approach to have towards international law, whether to be more functionalist or protective, other than also defining internal issues such as the contentions of the Council to the Court's role of gatekeeper and the horizontal direct effect of international agreements.

[123] Gáspár-Szilágyi (2015: 115-118).

[124] Ghazaryan (2018: 57-58).

Conclusion

This thesis aimed at highlighting the contemporary trends and challenges related to direct effect in the cases of directives and international agreements. Nevertheless, the work started from the very origins of direct effect. The only instance where direct effect can be said to have been envisaged originally is the one of regulations, for which already in Article 189 of the EEC Treaty reference was made to direct applicability. The first major expansion of the docrine of direct effect took place in 1963 by the hands of the ECJ with its *Van Gend en Loos* judgement, which expanded the possibility of direct effect to Treaty provisions. This judgement also recognized that the EEC Treaty founded a new international legal order, in which individuals were direct subjects of the law, and established the three general criteria for direct effect, namely clarity, precision and unconditionality. Even if the focus of this thesis was on directives and international agreements, space was given in the first chapter to investigate the general evolution of direct effect in these first two areas where it was deemed possible. It was found that the original objectivity of the test's criteria were somewhat blurred by later case law. This happened in mainly two ways. The first is that even provisions which depended on further national implementation measures were deemed directly effective by the ECJ. The second regards the expansion of the potential for direct effect to other sources of EU law, specifically, directives and EU agreements. Given the differences between them, some criteria were more disregarded than others and additional ones were instituted.

In the second chapter it was observed how the Court, through its case law, has made directives evolve from an indirect form of legislation to an instrument with broad capabilities; however, the Court has always tried to maintain a precarious balance between maintaining the specific 'identity' of directives and ensuring their effectiveness. Some scholars argue that in *Marshall I* the Court could have made a clear choice of priority between the two objectives, instead, it decided to institute the no horizontal direct effect rule. From then on, the case law has attached numerous limits to the initially absolute prohibition of direct effect in horizontal situations. The two most important ones were the broad conception of the State, which widened the umbrella of scenarios falling within the possibility of 'vertical ascendant' direct effect, and the possibility of invoking directly the directive in disputes between private parties when the directive embodies a general principle of law. The analysis of the contemporary application confirms this latter point with the *Kücükdeveci* case, expanding it also through observing the interaction between the CFR and directives embodying a general principle of law. In particular, in multiple judgements of 2018 the Court recognized horizontal direct effect to certain CFR provisions. The substance of the cases was dealt in multiple directives, however, since the latter cannot be directly invoked in horizontal disputes, the Court turned to the relevant CFR provisions. It can be argued however that in this way the Court has found a

new stratagem to ensure the protection and effectiveness of fundamental rights and freedoms when it cannot rely directly on directives. Furthermore, the Court has established in the *Portgás* case the possibility of an 'intermediate' form of direct effect of directives when the dispute is between an emanation of the State and the State itself. This judgement leaves two matters open, firstly, the Court missed yet another possibility to clarify whether the *Foster* test's criteria are cumulative; secondly, a possible implication for future cases could be new situations of 'halfway' ascendant vertical direct effect, specifically emanations of the State against the State itself, or other forms of 'intermediate' horizontal direct effect, namely one emanation of the State against another. The chapter ended with the analysis of a judgement delivered in April 2024, used, for the purpose of this thesis, to show how issues are still faced by national courts in dealing with direct effect of directives.

In the third chapter, initially, the general framework of international agreements signed by the EU was described. Two main lines of case law were identified, the first, more protective, where the Court denied direct effect to multilateral international agreements, the second, more functionalist, where the ECJ granted direct effect to bilateral agreements more readily. It was also observed how in this area a 'double test' needs to be satisfied, first, an assessment of the general framework of the agreement, to verify whether the agreement intended to create rights for individuals *in the same manner* that the EU legal order creates them; second, an assessment of the wording of the single provision. Nevertheless, later case law showed how in certain cases, specifically regarding bilateral agreements, the first condition was rather disregarded, while in cases dealing with multilateral agreements it was highlighted as the cause for denying direct effect. It seems that the Court has set a rather flexible test, in order to retain the role of 'gatekeeper' and decide when to 'open' the Union to International law and when to 'shut the door' to protect itself and its values from being jeopardized. The recent attitude of the Court confirms a higher grade of protectionism in relation to multilateral agreements and a more favourable approach towards bilateral agreements, which by nature create tighter relations. Nevertheless, the other institutions seem to perceive the Court as too negligent and, from the 2010's, a trend consisting in them explicitly denying direct effect in the agreement itself using various techniques can be observed. Notably, via EU law, this has been achieved by unilateral Council decisions precluding direct effect explicitly. However, if the decision on the effects of the agreements is unilateral, meaning that it is not mirrored by a no direct effect clause included in the agreement and negotiated with the other contracting parties, the ECJ could bring a claim of invalidity for the unilateral act of the Council, relying on the conflict with the principles of sincere cooperation and institutional balance. The time might be coming for the ECJ to take a stand against the challenges of the Council to the Court's role of gatekeeper, to clarify its positions towards international law and whether international agreements are capable of horizontal direct effect.

In conclusion, this thesis has shown how the docrine of direct effect has evolved greatly, remaining however always integral and relevant part of the Court's case law. Direct effect has gone from being restricted to maybe regulations, to becoming, through the expansion to Treaty provisions, directives and EU agreements, the cornerstone of the Union legal order. Nevertheless, it was generally observed that the Court has retained for itself incredible power in deciding when and how to grant direct effect. It has constructed clear-cut tests that however it later started using flexibly, leaving also room for ad hoc remedies and stratagems. The same pattern can be detected for *Van Gend en Loos*'s objective test for Treaty provisions and double test for international agreements, *Marshall*'s no horizontal direct effect rule for directives, specifically, clear-cut tests and absolute prohibitions become flexible in the hands of the ECJ.

The objective of this work was however to investigate recent trends in applications and challenges related to direct effect in the areas of directives and international agreements. In the former area it was found that the Court upheld its 'combination-approach', effectively giving horizontal direct effect to directives that *gave expression* to general principles. It also established that if a directive embodies a fundamental right but cannot be applied because the case regards a private dispute, the former can trigger the application of the CFR. Finally, the Court recognized a new form of 'intermediate' horizontal direct effect possible for directives. In this area however the ECJ has also left some loose ends, national courts are still unsure when the possibility of direct effect of directives presents itself, showing the need for clarifications on the matter. Furthermore, the Court needs to clarify the limitations of horizontal direct effect of directives embodying general principles or fundamental rights.

Regarding international agreements, the Court has recently shown more skepticism towards international law, especially multilateral agreements. Nevertheless, the Court has retained a broad range of discretion for ad hoc remedies rather than confining itself to being either open or closed. This has brought new incoherences in the case law of the ECJ, undermining even more its continuity. For these reasons, the other EU institutions still perceive the Court as too 'generous' and are now keen to challenge its unique role of gatekeeper, either by agreeing with the other contracting parties on a no direct effect clause or by internally challenging the jurisdiction of the Court through unilateral Council decisions. It is probably time for the Court to clarify its approach to international law and to unequivocally assert its role of gatekeeper.

It remains to be seen if the recent trends will solidify in established practice and how and when the Court will decide to clarify its positions regarding the various issues just presented. Surely, non addressing these issues does not promote legal certainty, legitimacy and institutional balance in the Union. Progressing towards a scenario in which direct effect constitutes "*the normal condition of [the] rule of law*", probably would.

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