



Faculty of Law

Lund University

**Master of European Affairs programme,
Law**

Master thesis

By

Luu Quoc Thai

**The Relationship between EC
law and National law**

Supervisor: Professor Peter Gjötler

Field: EC Law

Spring 2002

Contents

PREFACE	1
ABBREVIATIONS	2
1 INTRODUCTION	3
2 THE DIRECT EFFECT OF COMMUNITY LAW	5
2.1 Introduction	5
2.2 The Criteria of Direct Effect	6
2.2.1 Clear and Precise	6
2.2.2 Unconditional	7
2.2.3 The Absence of a Discretion in the Implementation of Obligations	8
2.3 The Nature of Direct Effect: a Duty to Apply	10
2.4 Community Provisions Capable of Direct Effect	11
2.5 Indirect Effect: The Interpretative Duty of National Courts	17
2.6 The Relationship Between Direct Effect and Indirect Effect	21
3 THE SUPREMACY OF COMMUNITY LAW OVER NATIONAL LAW	22
3.1 Introduction	22
3.2 The Establishment and Development of the Supremacy Principle	22
3.3 The Nature of Supremacy: a Duty to Disapply	26
3.4 The Scope of Supremacy	28
3.4.1 Absolute Supremacy	28
3.4.2 Structural Supremacy: Disapply Procedures and Remedies in National Courts	29
3.4.3 Supremacy: a Duty to Disapply for Administrative Authorities	34
4 NATIONAL LAW AND THE ACCEPTANCE OF COMMUNITY PRINCIPLES	37
4.1 The Acceptance of the Direct Effect Doctrine	37
4.2 The Acceptance of the Principle of Supremacy	38
5 CONCLUSION	42

BIBLIOGRAPHY	44
TABLE OF CASES	47

Preface

The question of how EC law affects National law is a complex, interesting and delicate question. This can only be solved by clearly understanding the relationship between Community law and those of the Member States, which is also intricate and complex. Since the foundation of the doctrine of direct effect and supremacy is established by the ECJ in the 1960s, there have been plentiful academic literatures written about the relationship between EC law and National law. In practice, a string of important cases concerning this matter have been decided by the European Court of Justice. Therefore, we must naturally accept that it is not a very new issue in EC law. However, it could hardly be said that it is obsolete, since controversies have been continued to happen through the process of European integration and enlargement. Scholars, the ECJ and the Member States still have some divergences in their points of view. Consequently, this issue is still a fertile land for much discussion.

For a person who has a first and very short time to study EC law like me, it is a great interesting to approach a new legal order, that is the legal order of EC law, of international law. In my situation, I dare not have any ambition to make invention. The purpose of this thesis is to learn generally the nature of EC law by combining, systemizing and analyzing opinions of scholars as well as that the ECJ. Shortcomings are inevitable due to my limited knowledge and time for doing it. However, I hope that I shall be able to draw a general picture about the nature of EC law after finishing this thesis.

I am indebted to SIDA (Swedish International Development Cooperation Agency) that gave me an invaluable chance to study in Sweden. I would like to thank to the Faculty of Law of Lund University that helped me so much during my studying in Lund, and to all of the Professors as well as staffs here. Especially, I am very much grateful to Professor Peter Gjötlér, my supervisor, who was very patient to offer kind helps to me to finish this thesis.

Luu Quoc Thai

Lund,
May 2002

Abbreviations

A. G.	Advocate General
CMLR	Common Market Law Report
CMLRev.	Common Market Law Review
Dir.	Directive
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EEC	European Economic Community
ELRev.	European Law Review
EU	European Union
JCMS	Journal of Common Market Studies
LIEI	Legal Issues of European Integration
LQR	Law Quarterly Review
MLR	Modern Law Review
OJ	Official Journal of the European Communities
TEU	Treaty on European Union ('Maastricht Treaty')
UK	United Kingdom
VAT	Value Added Tax
YaleLJ	Yale Law Journal
YEBL	Yearbook of European Law

1 Introduction

The political and economic bases of the European Community have made it more specific characteristics, that it is based on the consents of the Member States for the common objectives. The EEC founders' objectives for the Community included laying the "foundation for an ever-closer union among the people of Europe" and ensuring the "economic and social progress of their countries by common actions to eliminate the barriers divide Europe".¹ The goals were to be accomplished by introducing the free movement of goods, persons, services, and capital.² The resulting Community, while possessing many attributes characteristic of traditional international organizations, also contains the mechanism for enforcement of EC law.³ Such a system, however, presupposes an effective regime for implementation an enforcement that is more characteristic of a nation-state than an international organization. In fact it is considered as a supranational organization which requires particular relationship between its law and those of the Member States.⁴ In turn, the relationship between Community law and National law is characterized by the application and enforcement of Community law in the Member States. The most important features of this relationship are the direct effectiveness of Community law in the national courts, the supremacy of Community law over national law and the procedures by which Community law can be enforced in the Member States.⁵ In other words, the impact of Community law upon the laws of the Member States depends on two principles: the direct effect and supremacy of Community law. The former is relevant to implementation, the later to the enforcement of Community law.⁶

Undoubtedly, to attain the Community's objectives, EC law must be applied uniformly in all Member States. It means that Community law must have the same meaning and effect: it would be wrong if Community law had greater effect in one

¹ See the Preamble of Treaty Establishing the European Community, Fe. 7, 1992, O.J. (C224) 1.

² Article 3(1) (c) EC Treaty.

³ For example, Article 177 (now 234) provides the preliminary rulings given by the ECJ to assist national courts in making judgment; Article 169 (now 226) provides the enforcement procedure brought by the Commission against Member States. Indeed, the core of Community law is formed by the rules for the establishment and maintenance of a common market. Therefore, those Community rules the object of which is the establishment and functioning of the common market cannot, upon closer analysis, be reduced exclusively to mutual rights and duties of the Member States, as is often the case in traditional international law. See P.J.G. Kapteyn and P. Verloren Van Themaat – *Introduction to the Law of the European Communities*; Kluwer Law International; London – The Hague – Boston, 1998, p. 78.

⁴ T.C. Hartley – *The Foundation of European Community Law*, Oxford University press, 4th Ed., 1998, p.185.

⁵ *Ibid.*

⁶ D. Lasok & J. W. Bridge, *Law and Institutions of the European Communities*, London – Butterworths, 1987, p. 301.

country than in another. And because the enforcement of Community law “is largely done by national authorities and courts”,⁷ this in turn requires the ultimate authority to decide these questions should reside in a single court whose jurisdiction extends over the whole Community. The only such court in existence is the ECJ.⁸

It also follows from these premises that Community law must override national law in the case of conflict. If there was not so, Member States could avoid the application of Community rules disadvantageous to their interest by the simple expedient of passing conflicting legislation. If the Community were required to rely on notions of comity and reciprocity, Member States could also easily circumvent or even disregard EC-imposed rules and obligations.⁹ But if Community law is directly effective, an essential characteristic of a supranational system, the Community Court must have the final ruling with regard to its validity and interpretation. Community law would be useless if it could not be effectively applied and enforced in Member States, it would prevent individuals with a right under Community law – or an interest in its application – from bringing proceedings in national courts and those make use of national legal remedies to enforce it. Inevitably, the direct effect and supremacy of Community law over national law, as has been regarded as the most important features of the relationship between EC law and national law¹⁰, must be accepted within the whole Community. In this thesis, I would like to confine my studying within the two principles which feature the relationship between EC law and National law, those are direct effect and supremacy of EC law. I shall also mention the indirect effect doctrine, which has a very close connection with the direct effect in order to understand comprehensively how the EC law impacts on National legislation.

⁷ John Temple Lang has noted that “*the enforcement of Community law is largely done by national authorities and courts. There is no other way it could be done. The Commission is far too small to do it. Far more than any confederation, the Community relies on the authorities of its Member States to carry out its law and policies*”. See John Temple Lang, *The Duties of National Authorities under Constitutional Law*, 23 ELRev., 1998, 109.

⁸ T.C. Hartley, *supra* note 4.

⁹ Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, International Law and Politics, Vol. 31:307, p. 314.

¹⁰ T.C. Hartley, *supra* note 4.

2 The Direct Effect of Community law

2.1 Introduction

The impact of EC law on the legal system of the Member States is one of the most significant of its features. The European Community has developed into an organization of states with a relatively autonomous legal system, a system of norms which bind each of the states and which has been internalized – in many cases without national implementing measures – into the domestic systems of the different states as a fairly uniform body of law.¹¹ Direct effect can be provisionally defined as the capacity of a norm of Community law to be applied in domestic court proceedings. That is the capacity of a provision of Community law to create individual rights enforceable by all persons concerned in the national courts.¹² In its early case law, *Van Gen en Loos*¹³, the ECJ stated that the Community constitutes a new legal order of international law for the benefits of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. The ECJ has consistently outlined what has been known as the “direct effect”.¹⁴ The basis of direct effect lies in the idea of new legal order. Community law has its subject not only the Member States but also their nationals. The Community legal order confers directly on interested parties individual rights which they can invoke on their own behalf.¹⁵

¹¹ Paul Craig & Grainne De Burca – *EU Law – Text, Cases and Materials* – Oxford University Press, 2nd ed., 1998, P.164.

¹² See for instance Case 57/65 *Lüttike v. Hauptzollamt Saarlouis* [1966] ECR 205; Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337. In cases concerning directives, the ECJ uses a different formula, i.e. ‘that the provisions may be relied upon by an individual against any national provision...’ See Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53.

¹³ Case 26/62 - *Van Gend en Loos v. Nederlandse tariefcommissie* [1962] ECR 1, [1963] CMLR 105.

¹⁴ There has been much discussion of differences in meaning between ‘direct effect’ and ‘direct applicability’, although they have been used interchangeably in literatures and in the ECJ’s case law (Case 2/74 *Reyners* [1974] ECR 631, Case 17/81 *Pabst* [1982] ECR 1331, Case 104/81 *Kupferberg* [1982] ECR 3641). The difference between the two concepts is that direct effect needs to confer rights on individuals but direct applicability need not, e.g. Article 234 (ex 177) EC Treaty can be directly applicable but not giving rise to rights in individuals. In fact the differences do not have much practical importance. For more details, see T. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 CMLRev. 425, 1972; S. Prechal, *Directives in European Community Law*, Oxford University Press 1995, 260-4. I do not propose to discuss the distinction.

¹⁵ S. Prechal & Noreen Burrows, *Gender Discrimination Law of the European Community*, Dartmouth 1990, p. 27.

2.2 The Criteria of Direct Effect

Through its early case law, The ECJ has developed the specific conditions for direct effect in the context of reference from national courts. The usual questions were that whether private parties could rely on various provisions of the EC Treaty in the national courts against national authorities¹⁶. Apart from the provisions of the Treaties, other measures of the Community (such as regulations, directives and decisions as well as International agreements binding the Community), after 1970 have also been considered having direct effect in the standards of direct effect set out by the court. Concretely, a provision of EC law can have direct effect if it meets all specific conditions as below:

2.2.1 Clear and Precise

The condition can be understood that the content of the obligations imposed on the Member States must be clear and precise. This condition need not exclude the direct effect of provision whose interpretation caused difficulties. Neither the complexity of the wording of the provision¹⁷ nor the fact that a provision involves the evaluation economic factors¹⁸ need be an obstacle to the provision having direct effect. If the idea is that the same Community goals should be pursued similarly in all states must be appreciating the precise scope and meaning of the provision of Community law in question, so that they may be applied to the context of the case in which they are pleaded. If a provision is vague, e.g. it set out only a very general aim which need further implementing measures to be made concrete and clear, then it is difficult to accord direct effect to that provision and allow its direct application by a national court¹⁹. A provision is not sufficiently precise when it is so vague that the national court is not able to apply it without dealing with questions beyond its competence, such as the economic policy to be pursued.²⁰ A relevant example of such a provision is Article 10 (formerly Article 5) of EC treaty, which states:

“Member States shall take all appropriate measure, whether general or particular, to ensure fulfillment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.”

In one hand, its interpretation and application by different national courts in different states would be likely to differ, thus undermining the uniform pursuit of

¹⁶ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, P.529.

¹⁷ Case 6/64 *Costa v. Enel* [1964] ECR 585 at 597 – 598.

¹⁸ Case 27/67 *Firma Fink – Fruchht GmbH v. Hauptzollant Muchen Landsbergertan* [1968] ECR 223 at 232.

¹⁹ *Paul Craig & Grainne De Búrca*, *supra* note 11, P.168.

²⁰ S. Prechal & Noreen Burrows, *supra* note 15, p. 28.

the same goals. And in the other hand, if the national courts were to flesh out a provision which clearly required further elaboration or discretion in its implementation, those courts would be usurping the political discretion of which ever authority – be it the Member States or one of the Community institutions was entrusted with the power of implementing that provision.²¹

In case *Firma Fink*²², the Court had to consider indefinite legal concept such as “similar products” and “indirect protection” in interpreting and applying Article 95 EC²³. Therefore, if the concepts contained in a provision leave the Member States a certain discretion in their application, then such a provision will not have direct effect. In case *Salgoil*²⁴ the Court concluded that a number of concepts used in Article 33(1) and (2)²⁵, such as “national production” or “total value”, contained a certain margin of discretion because as the Treaty gave no indication of the data to be used in calculating these concepts or of the methods to be applied, several solutions could be envisaged. The national court is, of course, able to examine whether the margin of discretion has been exceeded.²⁶ The distinction between indefinite legal concepts and concepts which imply a policy discretion will be discussed under the third condition of direct effect.

2.2.2 Unconditional

The wording of the provision must make the obligation unconditional and unqualified. In case *Van Gend en Loos*²⁷ the Court set out certain criteria for the direct effect of a Treaty provisions:

“ The wording of Article 12 (now 25) contains a clear and unconditional prohibition which is not positive but negative obligation. This obligation is not, moreover, 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 very nature of this prohibition makes it ideally

²¹ See e.g. the arguments of the German government submitted to the Court in case 8/81 – *Becker v. Finanzamt Münster – Innenstadt* [1982] ECR 53, [1982] CMLR 449.

²² Case 27/67 *Firma Fink – Fruchht GmbH v. Hauptzollant Muchen Landsbergertan* [1968] ECR 223 at 232.

²³ Article 95 now is Article 90 EC, provides that “No member state shall impose, directly or indirectly, on the products of other member states any internal taxation of any kind in excess of that imposed directly or indirectly on *similar domestic products*.”

Furthermore, no member state shall impose on the products of other member states any internal taxation of such a nature as to afford *indirect protection* to other products.”

²⁴ Case 13/68 – *SPA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453 at 461.

²⁵ Article 33 has been repealed by the Treaty of Amsterdam.

²⁶ See case 51/76 – *Verbond Van Nederlandse Ondernemingen v. Inspecteur Des Invoerrechten Accijnzen* [1977] ECR 113 at 125 – 127, in relation to the margin of discretion relating to the term “capital goods” in Article 17 of the Second VAT Directive – O.J. English Special Edition 1967, p. 16.

²⁷ Case 26/62 - *Van Gend en Loos v. Nederlandse tariefcommissie* [1962] ECR 1, [1963] CMLR 105.

adapted to produce direct effects in the legal relationship between member states and their subjects.

The implementation of Article 12 (now 25) does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their national does not benefit from this obligation...”

However, a Community provision will not be prevented from being directly effective merely because the rights it grants are dependent on some objective factors or events. Once the condition is satisfied there is no further obstacle to direct effect.²⁸

The requirement of unconditionality means that the right must not be dependent on something within the control of some independent authorities, such as Community Institutions, or the Member State itself.²⁹ Of course it must not be dependent on the judgment or discretion of any such body. For example, a situation where a judgment or discretion of a Community institution is involved can be seen in Article 87 – 89 (formerly 92 – 94) EC concerning state aids. This is stated by Article 87(1) (formerly 92(1)) that to be “incompatible with the common market” where state aids affect trade between Member States. However, Article 88(2) (formerly 93(2)) allows the Commission to decide whether any such aid infringes the provision of Article 87 (formerly 92) and to order the offending Member State terminate it within a period of time laid down by the Commission. This situation can also be viewed in Article 88(2) (formerly 93(2)): the Council is allowed to authorize any aid which might otherwise be regarded as contrary to the Treaty. In this view, Article 87(1) (formerly 92(1)) can not be directly effective: the prohibition it contains is conditional on the decision of the Council and the Commission.³⁰

2.2.3 The Absence of a Discretion in the Implementation of Obligations

If the Community provision states that the rights it grants will come into effect when further action of a legislative or executive nature has been taken by the Community or the Member States, it would seem reasonable to hold that it can

²⁸ This occurred at the end of the transitional period in relation to Article 52 (now 43), 59 (now 49) EC; see case 2/74 – *Reyners v. Belgian State* [1974] ECR 631 at 651 – 652, the ECJ held at para. 30 of the judgment that “after the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect”.

²⁹ T.C. Hartley, *supra* note 4, p.192.

³⁰ In case 77/72, [1973] ECR 6111 at para. 4 – 6, the Court held that at least as regards systems of aids in operation at the time when the Treaty come to effect, Article 87(1) (formerly 92(1)) is not directly effective in the absence of a decision under Article 88(2) (formerly 93(2)).

not have direct effect until that action is taken.³¹ The criterion of the absence of discretion was clearly indicated in the judgment in Case 28/67³² and Case 13/68³³. In the later judgment, the Court considered the direct effect of the last sentence of Article 32, Article 33(1) and the first sub-paragraph of Article 33(2) EC and looked, as the provisions consisted of positive obligations, “at question whether the Member States may in their performing them exercise any discretion such as to exclude the above mentioned effects wholly or in part”.³⁴

An extreme example of an obligation dependent on the discretion of the Member States would be a provision stating: “each member state shall, in so far as it considers it desirable...”. So this obviously could not be directly effective. If the Member State failed to take action in question, it could always argue that it did not consider it desirable to do so. Another significant discretion is that which exist where Community law requires the attainment of an objective but allows the Member States to choose the means. If there are a number of quite different ways in which the objective could be attained, the discretion given to the Member State may prevent the provision from being directly effective. In this situation, discretion only exist if not only is a choice of different views possible but also it is lawful to follow any of them.³⁵

An example for this situation is the *Von Colson* case³⁶ in which the Court held that, there were several ways in which Member States could fulfil the obligation to provide a legal remedy for the victim of discrimination. Any effectiveness would constitute compliance with the obligation, the discretion given to the Member States consequently prevented the obligation from being directly effective.

The rulings of the ECJ on direct effect makes clear that, from the three conditions discussed above, the *absence of discretion* of the Member States or Community Institutions relating to the coming into force or application of the Treaty rule concerned is the central condition. This element is involved in the discussion of each of other criteria.³⁷ Once the principle of direct effect was accepted, the requirement that the obligation must be unconditional was considerably qualified, the rule regarding negative obligations was dropped. However, the direct effect of Community law can be relative in nature. Thus provisions may be dependent in some respects on further elaboration in Community or National measures. That does not prevent them having direct effect to the extent that they are not so dependent.³⁸

³¹ T.C. Hartley, *supra* note 4, p.195.

³² Case 28/67 – *Firma Molkerei - Zentrale Westfalen Lippe GmbH v. Hauptzollamt Paderborn* [1968] ECR 143 at 156.

³³ Case 13/68 – *SPA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453 at 461.

³⁴ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, P.532.

³⁵ *Ibid.*

³⁶ Case 14/83 – *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.

³⁷ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, P.533.

³⁸ *Ibid.* See also Case 13/68 *Salgoil* [1968] ECR 453 at 461.

2.3 The Nature of Direct Effect: a Duty to Apply

As mentioned above, direct effect can be provisionally defined as the capacity of a norm of Community law to be applied in domestic court proceedings. At the beginning, it was often defined as the creation of rights for individuals, which the national courts must protect. However, the evolution of EC law has proved that, direct effect should be much more than what had been defined.³⁹ It is the capacity of the norm to be invoked by individuals before national courts which are bound to apply them. The reason for this shift was the gradual realization that many norms of Community law, especially norms contained in Directives, thus not having their object the attribution of a benefit to individuals, may very well serve as a standard for reviewing the legality of Member States action when individual can show a sufficient interest in the outcome of such a review.⁴⁰

The case law⁴¹ of the ECJ showed that Treaty provisions (and sometimes-even provisions of Decisions or Directives addressed to Member States) penetrate into internal legal order without the aid of any national measure. Provisions of Community law which imposes clear and precise, unconditional obligations and leave the Community Institutions and the Member States no discretionary in their application or implementation will be directly effective in that the National courts can apply them, without stepping into the shoes of legislature.⁴² Such provisions must be applied by national courts without the intervention of a legal measure designed to transpose Community law into domestic law.⁴³ Therefore, direct effect really boils down, as far as courts are concerned, to a test of justifiability: is the norm ‘sufficiently operational in itself to be applied by a court’ in a given case. “*Direct effect is the obligation of a court or another authority to apply a relevant provision of Community law, either as a norm which governs the case or as a standard for legal review*”.⁴⁴

The duty of Member States to apply Community provisions, as the core of direct effect doctrine, has been developed through time by the ECJ. In Case *Wilhelm et al. v. Bundeskartellamt*⁴⁵ the Court held that the EC Treaty had ‘established its

³⁹ In Case 26/62 - *Van Gend en Loos v. Nederlandse tariefcommissie* [1962] ECR 1, [1963] CMLR 105, the ECJ held that “Article 12 of the establishing the European Economic Community produces direct effect AND creates individual rights which national courts must protect”. To some extents, this can be understood that the creation of individual rights does not belong to direct effect, and direct effect requires the Member States to do more than protect individual rights.

⁴⁰ Bruno De Witte, *Direct effect, Supremacy, and The Nature of Legal Order*, in Craig & De Búrca, *The evolution of EU law* – Oxford University Press, 1998, p. 187.

⁴¹ E.g. Case 28/67 – *Firma Molkerei - Zentrale Westfalen Lippe GmbH v. Hauptzollamt Paderborn* [1968] ECR 143 at 152-154.

⁴² See Case 43/71 *Palotti S.A.S v. Ministry of Finance of Italian Republic* [1971] ECR 1039 at 1048 – 1049.

⁴³ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, P.84.

⁴⁴ Prechal, S., *Directives in European Community Law: A Study On EC Directives and their Enforcement by National Courts*, Oxford University Press, 1995.

⁴⁵ Case 14/68 *Wilhelm et al. v. Bundeskartellamt* [1969] ECR 1 at 14.

own system of law, integrated into the legal systems of the Member States, and which *must be applied by their courts*. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. In *Simmenthal II*⁴⁶ with referring to the concept of direct effect, the Court ruled that *'that the rules of Community law must be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force'* (emphasis added). The existence of the doctrine of direct effect, until now, is justified by the fact that the judicial enforcement of Community norms is still different from that of national norms in certain respects. *First*, because the existence of direct effect is a matter of interpretation of EC law to be settled by the ECJ, rather than by the national courts separately; *secondly*, because there are special categories of Community law containing norms which by themselves seem sufficiently operational but which may not be enforced by national courts for other reasons; *thirdly*, the fact that, the direct effect of Community law is an obligation for a court or 'another authority' to apply Community norms.⁴⁷

2.4 Community Provisions Capable of Direct Effect

According to the criteria of direct effect mentioned above, provisions of Community law shall have direct effect if they meet those criteria. Besides the provisions of the Treaties, which are seen as the foundation or constitutional basic of the community,⁴⁸ there are various other sources of Community law may have direct effect, such as regulations, decisions, directives, and agreements with third countries.

❖ Regulations and Decisions

In the case of Regulations, there is no doubt that they should be capable of direct effect and enforcement in National courts. Article 249 (formerly 189) EC provides that Regulations 'shall be binding in its entirety and directly applicable in all Member States'. Policy consideration aside, this language seems to envisage that regulations, at least, will immediately become part of domestic law of Member States, and presumably that they may then be capable of being relied upon by individuals in National courts, and subject to direct enforcement of these courts.⁴⁹ In Case *Politi*⁵⁰ the Court held that:

⁴⁶ Case 106/77 *Amministrazione delle Finanze dello stato v. Simmenthal SpA* [1978] ECR 629 at 643.

⁴⁷ Brunno De Witte, *supra* note 40, p. 188.

⁴⁸ Case 294/83 *Parti Ecologiste 'Lesverts' v. Parliament* [1986] ECR 1339, [1987] 2 CMLR 343, para. 3.

⁴⁹ Craig & De Búrca, *The evolution of EU law* – Oxford University Press, 1998, p. 176.

⁵⁰ Case 43/71 *Politi v. Italian Minister of Finance* [1971] ECR 1039.

“By reason of their nature and their function in the sources of Community law, regulations have direct effect and are as such capable of creating individual rights which national courts must protect”.

In Case *Commission v. Italy*⁵¹ the Court emphatically confirmed the direct effect of regulations and criticized any attempt by a Member State to alter or dilute the requirement of a Community regulation. Member States may not even to pass implementing measure which might the consequence of limiting or altering the effect of a regulation which must be enforced as it stands.⁵²

However, a provision of a regulation may not have direct effect if it does not fulfil the necessary criteria set out above, e.g. it is too vague or contingent upon action by third party.⁵³

Another of the forms of Community provisions listed under Article 249 (formerly 149) is the Decision. Generally, Decisions are more limited and specific application than Regulations, because it is to be “binding in its entirety upon those to whom it is addressed”. It means that a decision will not be a general measure, but an individual one which is directed to a specific addressee. Despite the fact that, unlike regulations, Article 249 (formerly 189) made no reference to the Decisions’ ‘direct applicability’, the Court held that the decision was capable of direct effect when it meet the criteria set out above. The reasoning of the Court for the directly effective of decisions is the effectiveness of Community law. In Case *Grad*⁵⁴, the plaintiff sought to rely directly on a Council decision on VAT in order to have a German law on transport tax declared incompatible with them. The ECJ stated:

“Where ... the Community authorities by mean of a decision have imposed an obligation on a Member State... to act in a certain way, the effectiveness (*effet utile*) of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the National courts could not take it into consideration as part of Community law”

The direct effect of Decisions has been confirmed in the ECJ’s recent case law. In *Fleisch*, the Court concluded that a decision addressed to a Member State could be relied on as against that State where the provision in question imposed on its addressee an obligation which was unconditional and sufficiently clear and precise.⁵⁵

❖ International Agreements

⁵¹ Case 39/72 *Commission v. Italy* [1973] ECR 101.

⁵² David A O Edward & Robert C. Lane, *European Law – An Introduction*, Butterworthe Law of Society of Scotland, 1995, p. 61.

⁵³ See case 131/79 *R. v. Secretary of State for Home Affairs, ex parte Santillo* [1980] ECR 15.

⁵⁴ Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825.

⁵⁵ Case C-156/91 *Hansa Fleisch Ernst Mundt GmbH & Co. KG v. Landrat des Kreises Schleswig-Flensburg* [1992] ECR I-5567.

According to Article 281 (formerly 228) of the EC Treaty, the Community has legal personality and is empowered to enter into contractual relation with other person or organizations. Furthermore, Article 133 (formerly 113) and Article 310 (formerly 238) give the Community external power to enter particular agreements with countries and organizations outside the Community itself. A notable difference between International agreements and other measures of Community law is that the formers are not included in the so-called “Community secondary law” as provided by Article 249 EC. No where in the Treaty is the applicability of such agreements mentioned save for only one provision in Article 300 EC paragraph 7, which states in general term that these agreements shall be binding on the Institutions of the Community and on the Member States. However, such Agreements may also be capable of direct effect. In *Kupferberg*,⁵⁶ where it was argued that German tax on wine could not apply to imports from Portugal (before Portugal joined the Community) because it is conflicted with a provision in the Free Trade Agreement between the Community and Portugal. This raised the question whether the relevant provision of the Free Trade Agreement was directly effective in Germany. The European Court held that this question could no be left to the National law of each Member State because a uniform solution throughout the Community was desirable. So Community law had to decide, and the ECJ after examining the provision, held that it was directly effective.⁵⁷ The fact that it was probably not directly effective in Portugal was regarded as irrelevant.⁵⁸ The direct effect of international agreements has been restated by the Court in Case *Sevince*⁵⁹ and *Bahia Kziber*⁶⁰. The main reason for this direct effect is that agreements concluded under the EC Treaty form an integral part of the Community legal system. Of course, in order to be directly effective they must be satisfied the criteria set out by the Court.

❖ Directives

Directives are always addressed to Member States. In principle, it prescribes a particular result to be achieved by a particular date, leaving it to the Member States in accordance with their own constitutional rules, to determine how and by whom it should be implemented or “transposed” into national law.⁶¹ Article 249 (formerly 189) provides 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”. This provision makes directives different from other measures as regulations, decisions... A directive may leave some discretion to the Member States; it will always require further

⁵⁶ See Case 104/81 *Kupferberg* [1982] ECR 3641.

⁵⁷ See also Case 12/86 *Demirel* [1987] ECR 2719; Case C-18/90 *Kziber* [1991] ECR I-3719.

⁵⁸ Case 104/81 *Kupferberg* [1982] ECR 3641, para. 18 of the Judgment.

⁵⁹ Case C-192/89 *S. Z. Sevince v. Staatssecretaris van Justice* [1990] ECR I-3461.

⁶⁰ Case C-18/90 *Onem v. Kziber* [1991] ECR I-199.

⁶¹ David A O Edward & Robert C. Lane, *supra* note 52, p. 62.

implementing measures according to the express term of Article 249 (formerly 189) and since it might only set out its aim in general terms, it may not be sufficiently precise to allow for proper national judicial enforcement.⁶²

However, the ECJ has consistently held that Directives are capable of having direct effect. The controversy surrounding the direct effect of Directives was finally resolved by the Court in *Van Duyn*.⁶³ The Case concerned a Dutch woman who wanted to enter the UK to take up a post with the Church of Scientology. Scientology might be described as a 'fringe religion'. When Miss Van Duyn arrived in England, she was refused permission to enter, and this was justified on the basis of public policy proviso. The ECJ was asked whether Article 3(1) of Directive 64/221⁶⁴ was directly effective. The purpose of this Article is to limit the discretion of Member States when they invoke the public policy proviso under Article 48 (now 39) EC, and Article 3(1) lays down that such measures must be 'based exclusively on the personal conduct of the individual concerned'. It was argued on behalf of Miss Van Duyn that this provision was directly effective and that she could therefore rely on it before English court. The ECJ held that:

“ If ... by virtue of the provisions of Article 189 (now 249) Regulations are directly applicable and, consequently, may by very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 (now 249) to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.”

The ECJ, despite the fact that the concept of public policy is a discretionary matter for Member States to decide, established that the exercise of that discretion was restricted by a provision of the Directive which imposed a clear, precise, and 'complete' obligation.⁶⁵ The most important emphasis in *Van Duyn* is the Court's desire to make Directives an effective form of Community law, to enable them to be enforced by national courts.

However, it was felt that directives were specifically intended to leave the Member States with choices as how to enact a particular Community obligation, and that the Court should not allow this to be overridden by individuals pleading the provisions of the directives itself. Therefore, from its general reasoning in *Van Duyn*, the Court added a more specific line of reasoning in later case, *Ratti*.⁶⁶ The Case concerned two directives dealing with the packaging and labelling of solvents and varnishes respectively. Mr. Ratti was an Italian who ran a firm

⁶² There is little doubt that the authors of the Treaties did not intend directives to be directly effective. See the analysis of T. C. Hartley, *supra note 4*, p. 210.

⁶³ Case 41/71 *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1.

⁶⁴ OJ 1963/64 (Spec. Ed.) 117.

⁶⁵ See also Case C-72/95 [1996] ECR I-5403.

⁶⁶ Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1269.

selling both solvents and varnishes in Italy. The firm decided that it would package and label its products so as to comply with the two directives, even though neither had been implemented in Italy. The matter, however, was covered by an Italian law passed in 1963 which applied to both products. The requirements of the Italian legislation on the matter were more stringent than those under the Directives, providing penalties for those who failed to comply. When the firm put its products on the market, Ratti was prosecuted for failure to comply with the provisions of Italian law. At the relevant time, the deadline for implementation of one of the directives had expired, but that for the other had not. Ratti argued that his compliance with the directives was sufficient.

The ECJ, on a reference of the Italian court, held that a directive can become directly effective only when the deadline for implementation has expired; therefore, one of the directives in the case was directly effective but one was not. The ECJ also held that this result was not affected by the fact that some of the varnishes had been imported from Germany which had already implemented the second directive, and were therefore packaged and labelled in accordance with it. This was the so-called 'estoppel' reasoning, based on the argument that their failure to fulfil Treaty provision to implement a directive properly or on time precluded the Member States from refusing to recognize its binding effect in cases where it was pleaded against them.

To conclude the direct effect of Directives, the ECJ has used three arguments to justify its reasons.⁶⁷

First of all, there is an argument from general principle, the essence of which is that it would be inconsistent with the binding effect of Directives to exclude the possibility that they can confer rights. As stated in the ECJ's judgment in Case *Van Duyn* above, the mere fact that Regulations are deemed to be directly applicable, and hence capable of conferring rights, should not be taken to mean that other Community norms can never have the same effect.

Secondly, there is an argument from Article 177 (now 234). This Article allows questions concerning the interpretation and validity of Community law referred by national courts to the ECJ. From the generality of this provision, the Court has concluded that questions relating to Directives can be raised by individuals before national courts.⁶⁸

Finally, the reason for according direct effect to Directives in the estoppel argument. Given that the preemptory force of Directives would be weakened if individuals could not rely on them before national courts,⁶⁹ a Member State

⁶⁷ Paul Craig, *Directives: Direct effect, Indirect effect and the Construction of National Legislation*, ELRev., 1997, p. 519.

⁶⁸ Paul Craig & Grainne De Burca, *supra* note 11, Chapter 4 & 5.

⁶⁹ In Case 41/71 *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1, para12, the Court also stated that :

"In particular, where the Community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the useful effect of such an

which has not implemented the directive ‘may not rely, as against individuals, on its own failure to perform the obligation which directive entail’⁷⁰. Provided, therefore, that the directive is sufficiently precise, the basic obligation is unconditional and that the period for implementation has passed, and individual can derive enforceable rights from a directive.⁷¹

However, the ECJ also held that Directives only have vertical as opposed to horizontal direct effect. Treaty articles and regulations give individuals rights which can be used both against the States (vertical direct effect), and against private parties (horizontal direct effect), but Directives only have vertical direct effect. The authority for the limitation of direct effect was the *Marshall* case⁷² and it was reaffirmed by the ECJ’s ruling in *Dori*.⁷³ In case *Marshall*, the court stated explicitly that “a provision of a directive may not itself impose on an individual” and that “a provision of a directive may not be relied on as such against such a person”.⁷⁴ The ECJ has also proffered many arguments to justify its rulings for not having horizontal direct effect of Directives.⁷⁵

The doctrine of direct effect has been an essential component in advancing the effectiveness of Community law.⁷⁶ It allows EU nationals to bring suits based on Community law in National courts. The function of direct effect is that EC law is to be considered by National courts as a *source of law* to be applied to individual cases and controversies. Commenting on the importance of direct effect, notable Scholar Joseph Weiler has stated:

“The implications of this doctrine were and are far reaching. The European Court reversed the normal presumption of public international law whereby international legal obligations are result-oriented and addressed to states... The main import of the Community doctrine of direct effect was not simply the conceptual change it ushered forth. In practice direct effect meant that Member States violating their obligations could not shift the locus of dispute to the Interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individuals within their own legal order...

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”

⁷⁰ Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1269, para. 22.

⁷¹ Paul Craig, *supra* note 67, p. 520. See also Case 41/71 *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1.

⁷² Case 152/84 *Marshall v. Southampton & South West Hampshire Area Health Authority* [1986] ECR 723.

⁷³ Case C-91/92 *Dori v. Recreb* [1994] ECR I-3325.

⁷⁴ In Case 80/86 *Kolpinghiuis* [1987] ECR 3969, para 48 the Court stated that “a member state can not rely on the direct effect of a (non-implemented) directive in criminal proceedings against an individual”. See further, Case 14/86 *Pretore de salò v. X* [1987] ECR 2545.

⁷⁵ The Court based its justification on the four arguments: the textual argument; publication and the rule of law argument; the distinction between regulations and directives argument; and the legal certainty argument. See the analysis of Paul Craig, *supra* note 67, p. 519.

⁷⁶ Pescatore, P., *The Doctrine of Direct Effect: An Infant Disease in Community Law*, 1983, 8 ELRev.155.

Effectively, individuals in real cases and controversies (usually against state public authorities) become the principal ‘guardians’ of legal integrity of Community law within Europe.’⁷⁷

However, the distinction between vertical and horizontal direct effect of Directives has created a potential gap in the effectiveness of Community law and in its protection of individuals. EU citizens may only rely on the directly effective of Directives before national courts when the action is against a Member State.⁷⁸ As a result, significant gaps exist where direct effect ceases to protect individuals. Furthermore, for various reasons, not all Community provisions have direct effect. In this situation, the enforcement of Community law is left exclusively to Member States which can easily circumvent EC provisions. That why the ECJ has created the indirect effect doctrine that we are going to analyze below.

2.5 Indirect Effect: The Interpretative Duty of National Courts

The term “indirect effect” is a handy label for the doctrine that Community provisions, even if not directly effective, must be taken into account by national court when interpreting national legislation.⁷⁹ The doctrine of indirect effect was developed by the ECJ against the backdrop of the denial of horizontal direct effect of Directives. Therefore, it is applied mainly to Directives which can not be directly imposed obligation on individuals.⁸⁰ This doctrine originated in the *Von Colson* case⁸¹. The Case concerned a Council directive on sex discrimination⁸², in which a German prison denied two women, Von Colson and Kamann, employment because they were women and instead hired lesser-qualified men. Von Colson and Kamann brought an action against the State of *Nordrhein-Westfalen* by relying on the Council Directive. The *Arbeitsgericht Hamm* (Labor Court of Hamm) found discrimination but limited the women’s damages based on the German Civil Code to implement the Directive in Germany. In one of the reference questions to the ECJ, the German Court asked whether the Council Directive was capable of directly effective or not. The ECJ found itself unable to hold that the Directive was sufficiently precise and unconditional to have direct effect, it nonetheless held that:

⁷⁷ Joseph H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 1991.

⁷⁸ Craig, P. P., *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 1992, 12 OJLS 453.

⁷⁹ T. C. Hartley, *supra* note 4, p. 222.

⁸⁰ In *Grimaldi*, Case C-322/88 [1989] ECR 4407, the ECJ held that Recommendations, which have no binding force, must be taken into account by national court when interpreting national or Community legislation. There is no doubt that the same would apply with regard to any Community instrument that is not directly effective.

⁸¹ Case 14/83 *Von Colson and Kamunn v. Land Nordhein – West Falen* [1984] ECR 1891.

⁸² Directive 76/207/EEC 9 of February 1976.

“It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law”⁸³.

It meant that national courts had an obligation to interpret national law so as to be in conformity with the Directive. The purpose of the Directive was to provide an effective remedy in case of discrimination, and if states chose to fulfil this aim through the provision of compensation then this should be adequate in relation to damage which had been suffered. National courts should, therefore, construe their own national law with this in mind.⁸⁴

The doctrine of indirect effect was also applied to national legislation not adopted to implement Directives, indeed, which was passed before the directive. This was the Case *Marleasing*⁸⁵ concerning the Council Directive 68/151, which contained rules on safeguards for the establishment of companies within the Community. The plaintiff claimed that one of the defendant companies had been established “without cause” and that the purpose behind its establishment was to perpetrate a fraud. The plaintiff sought a declaration that the contract establishing this defendant corporation should be held to be void, based on a provision of Spanish law. The defendant resisted the claim on the ground that Article 11 of Directive 68/151, which lists the grounds on which the nullity of a company may be ordered, did not include lack of cause amongst these grounds. The Directive had not yet been implemented in Spain. The Spanish court asked the ECJ whether the Directive was directly effective. As the parties to the case were all private, this raised the question of horizontal direct effect.

The ECJ reaffirmed the ruling in *Marshall*⁸⁶ that a directive can not impose obligations on one private party. However, it extended the ruling in *Von Colson* to say that:

“In applying national law, whether the provisions concerned pre-date or post-date the directive, the national courts asked to interpret national law is bound to do so in every way possible in the light of the text and the aim of the directive to achieve the results envisaged by it and thus to comply with Article 189(3) of the Treaty”.

The judgment of the Court in this case clearly meant that in applying national law, whether passed before or after Directives, a national court was required to interpret national law as far as possible so as to be in conformity with the Directives. While the ruling of the ECJ preserved its previous position, that there is no horizontal direct effect of Directives, its finding on the interpretative duties of

⁸³ Para. 28 of the judgment, reproduced in the final sentence of para. 3 of the Ruling.

⁸⁴ Paul Craig, *supra* note 67, p. 525.

⁸⁵ Case 106/89 *Marleasing S.A v. La Comercial Internacional De Alimentacion S. A.* [1990] ECR 4135; [1992] CMLR 305.

⁸⁶ Case 152/84 *Marshall v. Southampton & South West Hampshire Area Health Authority* [1986] ECR 723.

the national courts go a considerable way to according Directives a measure of “indirect” direct effect.⁸⁷ Thus although an individual can not, in a literal sense, derive rights from a directive in an action against another individual, it is possible to plead the directive in an action, in the manner exemplified by the defendant in the present case. Once the directive has been placed before the national court in this way, the interpretative obligation derived from *Von Colson*, and built upon in *Marleasing*, come into operation. It has, moreover, been held that this interpretative obligation operates even before the time period for the implementation of the directive has expired.⁸⁸

There seems to be no limitation in the judgment that national provisions subject to interpretation in the light of Community should be those intended or deemed to implement Community law. If the Court meant that result envisaged by the directive had to be attained irrespective of whether or not there could be any doubt as to the meaning of the national provision and irrespective of whether or not the words of that provision could reasonably bear the meaning required by the directive, the effect would be that, while pretending to uphold the *Marshall* principle, the ECJ in fact making Directives directly effective against individuals⁸⁹.

However, the application of indirect effect principle is limited by reference to other general principles of Community legal order, such as the Prohibition on retroactivity and the principle of legal certainty. This point was made by Advocate General Van Gerven in *Marleasing*⁹⁰, and is illustrated by the judgment of the Court in *Case Kolpinghuis*⁹¹ where the use of principle of direct effect would have come to conflict with the principle of *nulla poena sine lege*. A national judicial could not rely upon an unimplemented directive in order to “sharpen” existing domestic sanctions on the market of unit goods. In *Kolpinghuis*, the defendant, who stocked and sold bottles of ‘mineral water’ was charged with infringing a Dutch measure which regulated the sale of goods for human consumption. At the time of the alleged offence, the 1980 Council Directive on marketing of mineral water had no yet been implemented in the Netherlands, but the public Prosecutor was of the opinion that the Directive already had the force of law at that time. The case was referred to the ECJ, asking whether the non-implemented Directive could be relied upon by the State against its nationals, and whether the national court was obliged or permitted to interpret its existing national law in the light of this non-implemented Directive. The Court, after repeating its ruling in *Von Colson*, stated in paragraph 14 of the judgment that:

⁸⁷Paul Craig, *supra* note 67, p. 525.

⁸⁸Case 80/86 *Officier van Justitie v. Kolpinghuis Nijmegen* [1987] ECR 3969.

⁸⁹T. C. Hartley, *supra* note 4, p. 223.

⁹⁰A. G. Van Gerven indicated that nothing in Article 5 (now 10) EC requires national courts to interpret national legislation *contra legem*, i.e. contrary to its express words, in order to achieve conformity with Community law which is not judicially enforceable.

⁹¹In Case 80/86 *Kolpinghuis* [1987] ECR 3969.

“...in applying its national legislation a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the first paragraph of Article 189 of the Treaty, but a directive can not, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability of persons who act in contravention of the provision of that directive”.

It means that where an interpretation of domestic law would run counter to the legitimate expectations of individuals, the *Von Colson* principle will not apply. In other words, the State can not benefit from the operation of the principle of indirect effect.

In a recent case, *Arcaro*,⁹² the Court stated in para. 42 of the judgment that:

“However, the obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed, or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and the absence of a law enacted for its implementation the liability in criminal law of persons who act in contravention of that directive’s provision”.

The ECJ had clearly meant in this statement that the limit to the interpretative obligation is reached “where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed”. This does not seem to be just a *contra legem* limit based on what the language of the domestic legislation can bear, but appears to be a limit based on the possible impact of the interpretation.⁹³ Indeed, the whole point of seeking an interpretation of national law in the light of Community law, and especially in the light of a directive, is presumably to give national law a different meaning from that which it might otherwise have been given. In litigation between two parties where one is seeking an interpretation in the light of a directive and other is resisting it, interpretation in conformity with a directive will usually entail a legal advantage for one of the parties. The limit placed on the interpretative obligation in *Arcaro*, to the effect that EC does not require national law to be read in the light of a directive where so to do would be “to impose on an individual an obligation contained in a directive which has not been transposed”. However, above all controversies, the doctrine of indirect effect has been accepted as one of the solutions to extend the application and effectiveness of Community law.

⁹² Case C-168/95 *Arcaro* [1997] ECR I-4705.

⁹³ Paul Craig & Grainne De Burca, *supra* note 11.

2.6 The Relationship Between Direct Effect and Indirect Effect

The doctrine of indirect effect is pivotal in picking up where direct effect leaves off, specifically in cases where a directive is incapable of being directly effective.⁹⁴ Both *Von Colson* and *Marleasing* indicate that even when a directive is not directly effective, National authorities still have duty, under Article 5 (now 10) and 189 (now 249), to interpret national provisions intended to implement that directive in the light of its wording and purpose. In *Johnston*,⁹⁵ the Court appeared to link the two concepts of direct effect and indirect effect together, indicating that it was the first duty of National courts to seek to interpret national law in conformity with Community law, and only if this was not possible to enforce Community law itself in reference to national law through the doctrine of direct effect.⁹⁶ Some commentators have argued that the *Marleasing* judgment is tantamount to the ECJ's recognizing horizontal direct effect of directives.⁹⁷ Others are more cautious in their analysis.⁹⁸ However what is clear that, the ECJ has established the doctrine of indirect effect, by using the provisions of Article 5 (now 10) EC Treaty, to strengthen the effectiveness of EC law. By crafting a specific Member States' duty to interpret national legislation in light of Community provisions, the ECJ has succeeded in filling a significant gap in the effectiveness of Community law,⁹⁹ where the Community provisions lack direct effect.

⁹⁴ Eric F. Hinton, *supra* note 9, p. 321.

⁹⁵ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁹⁶ Josephine Shaw, *European Community Law*, MacMillan 1993, p. 169.

⁹⁷ S. Prechal, *Remedies after Marshall*, 27 CMLRev. 451, 1990. J. Steiner stated that in extending the principle of direct effect by the doctrine of indirect effect, the ECJ is attempting to give horizontal direct effect to Directives by the backdoor, and imposes obligations, addressed to member states, on private parties... see J. Steiner, note 100 below, p. 40. See also analysis of Chris Hilson & Tony Downes in *Making Sense of Rights: Community Rights in EC Law*, ELRev. 1997, p. 121. The ECJ seemed to give "incidental horizontal direct effect" to Directives in cases: C- 194/94 *CIA Security International v. Signalson and Securitel* [1996] ECR I-2201; C- 129/94 *Rafael Ruiz Bernadez* [1996] ECR I-1829; C- 441/93 *Panagis Pafitis* [1996] ECR I-1347.

⁹⁸ Nick Maltby, *Marleasing: What Is All the Fuss About?*, 109 LQRev. 301, 1993.

⁹⁹ Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, International Law and Politics, Vol. 31:307, p. 327.

3 The Supremacy of Community law over National law

3.1 Introduction

The affirmation and extended application of the ECJ of the principle of direct effect, together with the wide scope of the EC Treaty, covering a number of areas normally reserved to national law alone, have led unavoidably to a situation of conflict between national law and EC law. In such a situation, a question of priority is to arise and must be answered. However, the EC Treaty is silent on this question.¹⁰⁰ Nowhere in the constitutive Treaties is stated that the Community law takes precedence over National law, although such a question can be derived from the duty of Community loyalty contained in Article 5 (now 10) EC. Like the principle of direct effect, supremacy (or primacy) had been ignored until the foundation years of them in the 1960s in *Van Gen en Loos* and *Costa case*¹⁰¹ when these principles were established by the ECJ.

Although there is a close link between direct effect and supremacy, the later principle was not dealt with by the Court in *Van Gen en Loos* in which direct effect of Community law was confirmed. In fact, possible bases for the supremacy lie in stressing either the federal or international nature of Community legal system. The better view is probably to accept that supremacy is inherent in the ideal of creating a new “federal-type” legal order which lies at the heart of the project of economic integration in Europe, which has always had as its ultimate objective a “Union of people”.¹⁰² The postulate of supremacy of Community law over national is based on the idea of the necessary unity and effective operation of Community law. The process of economic integration would be much less effective if Member states were able to hinder the attainment of Community goals by denying the superiority of Community norms.¹⁰³

3.2 The Establishment and Development of the Supremacy Principle

The opportunity for the ECJ to affirm the principle of supremacy was in the *Costa v. Enel case*¹⁰⁴. Mr. Costa refused to pay the bills of the newly created national

¹⁰⁰ Josephine Steiner, *TextBook on EC Law*, 4th Ed., Blackstone Press Limited, 1994, p. 47.

¹⁰¹ Case 26/62 - *Van Gend en Loos v. Nederlandse tariefcommissie* [1962] ECR 1, [1963] CMLR 105., Case 6/64 *Costa v. Enel* [1964] ECR 585

¹⁰² See the Preamble of the Treaty of Rome 1957.

¹⁰³ Josephine Shaw, *supra* note 96, p. 164.

¹⁰⁴ Case 6/64 *Costa v. Enel* [1964] ECR 585.

Electricity Corporation Enel, and argued that the Act of Parliament of 1962, by which the electricity has been nationalized, violated the EEC Treaty. And because the Act nationalizing the Electricity Company was later in time than the Italian Ratification Act, the Act incorporating EC law, therefore it was argued to take priority. The reasoning of the ECJ in this case happened as follows:

“By contrast with ordinary international treaties, the EEC has created its own legal system which, on the entry into force of the Treaty, became an internal part of the legal systems of Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own capacity and capacity of representation on the international plane and, more particularly, real power stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit with limited field and have thus created a body of law which both binds their nationals and themselves.

The integration into laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure therefore can not be inconsistent with that legal system...

The precedence of Community law is confirmed by Article 189 (now 249) EC, whereby a regulation ‘shall be binding’ ‘and directly applicable in all Member states’. This provision, which is subject to no reservation, would be quite meaningless if the states could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all the observation that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basic of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”

It is clear in each argument made by the ECJ above that Community law had to be given primacy by national courts over any incompatible national law. Above all, what comes across most strongly in the judgment is the Court’s teleological approach the aims of the Community and the spirit of the Treaties are constantly emphasized, and there is a little support in the text of the Treaties for the proposition that Community law has a ‘special and original nature’ of which would be deprived if subsequent domestic law were to prevail. It was a bold step

to support its conception of Community legal order by asserting that the States had permanently limited their powers and had transferred sovereignty to the Community institutions.¹⁰⁵

In the case of *Internationale Handelsgesellschaft*¹⁰⁶, the ECJ has gone further to confirm the supremacy of EC law. In this case, the conflict happened between an EC regulation¹⁰⁷ and the provisions of German Constitution. The plaintiff claimed the Regulation infringed, *inter alia*, the principle of proportionality enshrined in the German Constitution and sought to nullify the Regulation on those grounds. The ECJ stated that:

“Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, can not because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a member state can not be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principle of a national constitutional structure”.¹⁰⁸

It is clear in the ECJ’s ruling that Community law prevails over all form of national law, including national constitutions and fundamental rights enshrined in those constitutions. Community measures derive their validity solely from Community law, and those the validity of a Community measure or its effect within a Member State can not be affected by objections that it runs counter to either fundamental rights as guaranteed by the constitutions of that State or the principles of a national constitutional structure.¹⁰⁹

Thus as far as the ECJ is concerned all EC law, whatever its nature, must take priority over all conflicting domestic law, whether it be prior or subsequent Community law.¹¹⁰ The supremacy of Community law, as continued to be emphasized by the Court, that it was not simply a matter of theory, but was given practical effect by all national courts in cases arising before them.¹¹¹ The following

¹⁰⁵Paul Craig & Grainne De Burca, *supra* note 11, P.259.

¹⁰⁶Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁰⁷ Council Regulation 120/67.

¹⁰⁸ Case 11/70, *supra* note 106, para. 3 of the Judgment.

¹⁰⁹ Josephine Shaw, *supra* note 96, p. 165.

¹¹⁰ Josephine Steiner, *supra* note 100, 1994, p. 50.

¹¹¹ Paul Craig & Grainne De Burca, *supra* note 11, P.260.

judgment of the Court in *Simmenthal II*¹¹² also confirmed the principles established in *Costa v. Enel* that the supremacy of Community law logically must limit national law making powers. It held:

“Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the Institutions on the one hand and national law of Member States on the other is such that those provisions and measures not only by their entry into force automatically inapplicable any conflicting provision of concurrent national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member state – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of the obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundation of the Community”.

Simmenthal is an interesting and important case, since it spells out quite starkly the practical implications for the Community legal order of the principle of supremacy and direct effect.¹¹³ And that ‘a national court which is called upon, within the limit of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional mean’.¹¹⁴

In practice, of course, the principle of direct effect or supremacy can be put to effect only by the domestic institutions themselves. The ECJ has no power to invalidate national legislation, although it may state in a preliminary ruling that national legislation of the type at issue in a given case is inconsistent with Community law, or make a declaration under Article 171 (now 228) EC that a given provision of National law is incompatible with Community law. The pre-emptive effect of Community law is particularly apparent in those areas where Community legislature has exhaustively regulated the field, in particular using the form of Regulations.¹¹⁵ In case *Prantl*¹¹⁶ the Court stated that: “once rules on the

¹¹² Case 106/77 *Ammistrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

¹¹³ Paul Craig & Grainne De Burca, *supra* note 11, P.261.

¹¹⁴ Case 106/77 *Ammistrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, para. 24.

¹¹⁵ Josephine Shaw, *supra* note 96, p. 166.

common organization of the market [in wine] may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise”.

3.3 The Nature of Supremacy: a Duty to Disapply

The supremacy of EC law entails duties for various national authorities.¹¹⁷ For the national legislator, it implies a prohibition to adopt laws that are inconsistent with the binding rules of Community law.¹¹⁸ For the National courts *Simmenthal II* also tells that, they are responsible for ‘disapplying’ national law which comes into conflict with Community law.¹¹⁹ In fact, the idea of disapplying national law of national courts comes from the established case *Costa*¹²⁰. The judgment of the Court in this Case demonstrated that the essence of common market stands or falls by ensuring a uniform effect of the relevant rules of Community law in each Member State. No domestic rule can be adduced before a national court against the law created by the Treaty (which springs from an original and autonomous source) lest the latter lose its Community character and the legal basis of the Community itself be impaired.¹²¹ Thus, the ECJ went further in *Simmenthal* to rule that it is unnecessary for the national court to request or await the prior setting aside of national provisions that inconsistent with EC law. In the United Kingdom, the European Community Act 1972, Section 2(4) provides, *inter alia*, that any enactment passed or to be passed is to be construed and have effect subject to the recognition of rights and obligations flowing from Community law contained in the Act and Section 3(1) of the Act makes it clear that the national courts must follow the principle laid down by and the decisions of the ECJ.

Rules of Community law, therefore, have internal effect without reference to national legal order, viz. in the area which has been created in consequence of the limitation of national sovereignty. In other words, national constitutional law which regard to the internal effect and the internal order of priority to be given to rules of international law does not apply with reference to rules of Community, because it can apply only within the limits of sovereignty. Beyond these limits, i.e. within the Community legal order, the national courts without being hampered by constitutional restrictions, may give to the rules of Community law the effect

¹¹⁶ Case 16/83 *Prantl* [1984] ECR 1229, at p. 1324 – under the rules governing the Common Agricultural policy (CAP).

¹¹⁷ Brunno De Witte, *supra* note 40, p. 189.

¹¹⁸ In *Simmenthal*, Case 106/77, *supra* note 112, at para. 17, 18 of the Judgment the Court stated that the provisions and measures of EC law... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

¹¹⁹ Josephine Shaw, *supra* note 96, p. 171.

¹²⁰ Case 6/64 *Costa v. Enel* [1964] ECR 585.

¹²¹ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, 1998, P. 85.

desired by the ECJ. If the national court comes across legal measures which conflicting with Community law, it must refrain from applying them, not because they are of lower order than Community law, but because in such a case the national legislator has acted *ultra vires*.¹²²

To say in a different way, for national courts, respecting the principle of supremacy means that, when an EC rule applies in a given case, any conflicting national norm should immediately be set aside. This is usually called the duty to disapply national law.¹²³

In the case of the United Kingdom, the idea of disapplying an Act of Parliament is a novel concept for a UK judge, accustomed to occupying subordinate position in relation to legislative.¹²⁴ However, the ECJ made clear in its ruling on the reference from the House of Lords in case *Factortame*¹²⁵ that, it is inherent to the system of Community law that national courts must be able, in either final or interim proceedings, to issue appropriate orders to give effect to Community law. It held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law...

And “it must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent the court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it was not a rule of national law, is obliged to set aside the rule”.¹²⁶

On these grounds the House of Lords was obliged to abrogate, at least as regards matters of Community competence, the rule prohibiting the granting of interim injunctions against the Crown, as it had indicated in its judgment prior to ordering a reference that it would be it would be prepared to do if required by the Court.¹²⁷ The ECJ also held that a national court be prepared to grant such a

¹²²P.J.G. Kapteyn and P. Verloren Van Themaat, *supra* note 3, P. 87.

¹²³ Brunno De Witte, *Direct effect, Supremacy, and The Nature of Legal Order*, in - *The Evolution of EU Law*, Craig & De Búrca, Oxford University Press, 1998, p. 190.

¹²⁴ Josephine Shaw, *supra* note 96, p. 171.

¹²⁵ Case C-213/89 *R v. Secretary of State of Transport, ex parte Factortame Ltd.* [1990] ECR I-3313 (*Factortame I*).

¹²⁶ Para. 21 of the Judgment in Case C-213/89 *R v. Secretary of State of Transport, ex parte Factortame Ltd.* [1990] ECR I-3313.

¹²⁷ *Ibid.*

remedy even in advance of an authoritative ruling by the Court on the existence of an infringement of Community law.¹²⁸

However, it is necessary to distinguish between non-application and invalidity, since the result in practice of the operation of setting aside conflicting national law is close to the invalidation of the rule. A national rule which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm,¹²⁹ and it may be fully applied again if and when the Community norm ceases to exist. Things are different only when EC law is intended to harmonize national legislation, then inconsistencies must be removed by repealing or modifying national law to the extent required by harmonizing act. In this case, the possible disapplication of inconsistent national norm by the court can not be an excuse for the legislator's failure to change the law.¹³⁰

3.4 The Scope of Supremacy

3.4.1 Absolute Supremacy

The supremacy of Community law over National law is absolute, it means that, supreme even to national constitutions. Scholar S. Weatherill stated that supremacy is absolute: 'even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm'.¹³¹ In practice, The ECJ, in its settled case law, has already given Community law absolute supremacy over the rules of national law, even if they are constitutional. The Court has not hesitated for its part to affirm the obligation of the Member states to refuse to apply in any situation law which are contrary to Community measures. In *Costa*¹³² the Court held that Community law 'can not be overridden by domestic legal provisions, however framed' and 'no domestic rule can be adduced before a national court against the law created by the Treaty'. In *Simmenthal*¹³³ the Court implied that, if the Community provision is 'directly applicable', no matter what it is Treaty provision or other Community measures, such as regulation, decision, or directive, it will also prevail over inconsistent national legislation.¹³⁴

¹²⁸ Josephine Shaw, *supra* note 96, p. 172.

¹²⁹ For example, restrictions of the rights of non EU citizens. See Case C-264/96 *Chemical Industries plc (ICI) v. Kenneth Hall Colmer* [1998] ECR I-4695, para. 34 of the judgment.

¹³⁰ Brunno De Witte, *supra* note 40, p. 190. For a recent affirmation of the rule that national authorities have a duty to eliminate conflicting national norms quite apart from the disapplication of those norms by the courts, see case C-197/96 *Commission v. France* [1997] ECR I-1489.

¹³¹ S. Weatherill, *Law and Integration in The European Union*, Oxford University Press, 1995, p.106.

¹³² Case 6/64 *Costa v. Enel*[1964] ECR 585.

¹³³ Case 106/77, discussed note 112 above.

¹³⁴ T. C. Hartley, *supra* note 4, p. 219.

The classic assertion of the full supremacy of Community law came in the *Internationale Handelsgesellschaft*¹³⁵ in 1970 which faced with the challenge to the validity of a Community regulation for violation of German basic law. The applicant, a German import-export company, obtained an export license in respect of 20,000 metric tones of maize meal, the validity of which expired on 31/12/1967. Council Directive 120/67 had set up a system for common organization of the cereal market, whereby a license could be obtained by lodging a deposit, and that deposit would be forfeit if the goods were not exported within the period of time set. A part of the applicant company's deposit was forfeit when the license expired without all of the maize having exported, and the company brought proceedings before the administrative court claiming the validity of the deposit system, since it was contrary to constitutional law. The ECJ held that:

“Community law prevails over all forms of national law, including national Constitutions and fundamental rights enshrined in those constitutions. Community measures derive their validity solely from Community law, and thus the validity of a Community measure or its effect within a Member State can not be affected by objections that it runs counter to either fundamental rights as guaranteed by the constitution of that state or the principles of a national constitutional structure”.

Recently, to affirm this absolute supremacy the court stated that neither constitutional rights nor rules of an institutional nature are allowed to hamper the full effect of Community law.¹³⁶ This scope of supremacy has been promoted for the ‘practical’ reason that: the ECJ was given monopoly to interpret the EC Treaty and secondary EC law, uniformity must be ensured as a top priority through out the EU as regards the scope and meaning of EC law. Therefore there should be no room for constitutional obstacles or reservations defines state by state, on the basis of national constitutional jurisdiction, according to variable criteria of national constitutional adjudication. Because the status, the unity, uniformity and efficacy of the EC legal regime would be put in danger, if one was allowed to review of its validity on the basis of particular national legal standards.

3.4.2 Structural Supremacy: Disapply Procedures and Remedies in National Courts

The supremacy of the substances of Community law over National law has been affirmed and developed by the ECJ over years. This does not mean that, to obtain the objectives set out by the EC Treaty, EC provisions on procedures and remedies need not to be primacy over those of the Member States, since the principles of EC law can be put into effect only by domestic institutions

¹³⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹³⁶ Case 473/93 *Commission v. Luxembourg* [1996] ECR I-3207, 3259 – 9.

themselves.¹³⁷ Therefore, the ECJ has tended to regard national procedural law merely as an ancillary body of law the function of which is to ensure the effective application of substantive Community law.¹³⁸ Furthermore, the substantive law flowing from Community law is now filtered through fifteen different procedural systems of fifteen Member States. This can lead to the risk that the ability to invoke the Community norm may be rendered ineffective by national procedural or remedial rules.¹³⁹ Therefore, the established case-laws of the ECJ have made clear that ‘the harmonization of legal remedies’ wanted by the Court requires National courts to do more than just ‘set aside’ national laws.¹⁴⁰ In fact National courts have been supposed to assume new jurisdictional power and therefore create new law rather than simply choose between two applicable norms.¹⁴¹ Or they, in other words, have been suggested to ‘set aside’ constitutional norms defining their jurisdictions or their powers in relation to other state authorities. This development of a European standard with respect to judicial remedies might perhaps be called ‘procedural’ or ‘structural’ supremacy.¹⁴² *Simmenthal*¹⁴³ is an early example of what we can see in the matter on remedies, i.e. how Community law has ‘conferred’ on domestic courts, and even has required them to exercise power and jurisdiction which they do not have under national law. The key emphasis in these decisions is on the principle of effectiveness that: national courts must not apply national rules which form an obstacle to the immediate applicability or effectiveness of Community law.¹⁴⁴ As a result, such decisions do sometimes result in an increase in the jurisdiction and function of National courts, even where the national jurisdictional limitations are of a constitutional nature.

The second example is the well-known *Factortame* case¹⁴⁵ in the United Kingdom. The origin of the series of cases that goes under the name *Factortame* was a decision by the Community to adopt fish conservation measures. To achieve this objective, limits were laid down to the total number of fish of various species that could be caught in a given period. Quotas were allotted to each member state. Certain Spanish fishermen, however, thought that they could obtain a share of the British quota by the expedient of registering companies in

¹³⁷ Josephine Shaw, *supra* note 96, p. 165.

¹³⁸ C.N. Kakouris, *Do the Member States Possess Judicial Procedural “Autonomy”?*, CMLRev. 1997, p. 1389.

¹³⁹ Brunno De Witte, *supra* note 40, p. 188.

¹⁴⁰ W. van Gerven, *Bridging the Gap between Community and National laws: Towards the Principle of Homogeneity in the Field of Legal Remedies*, CMLRev. 1995, p.679.

¹⁴¹ Brunno De Witte, *supra* note 40, p. 191.

¹⁴² *Ibid.*

¹⁴³ Case 106/77 *Ammistrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629. At para. 20 of the Judgment, the Court focussed on the effectiveness of Community law and clearly gave that principle priority over procedural rules and principles of National law. See also Paul Craig & Grainne De Burca – *EU Law – Text, Cases and Materials* – Oxford University Press, 2nd ed., 1998, P.221.

¹⁴⁴ Paul Craig & Grainne De Burca, *supra* note 11, P262.

¹⁴⁵ Case C-213/89 *R v. Secretary of State of Transport, ex parte Factortame Ltd.* [1990] ECR I-3313.

the United Kingdom and transferring the ownership of their boats to those companies. They claimed that since the boats were owned by British companies, they were entitled to fly the British flag and therefore take fish from the British quota, rather than Spanish quota. British fishermen objected this manoeuvre, and the British government passed legislation to prevent it. The Spaniards immediately challenged the legislation in British court and a reference was made to the ECJ to determine whether it was contrary to Community law.

Since the ECJ normally takes between one and two years to decide such case, the Spaniards therefore applied for an interim injunction to preclude the Government from enforcing the British statute until the ECJ had given its ruling. This was granted by the Divisional Court but rescinded by the Court of Appeal, a decision upheld by the House of Lords, which ruled that, under United Kingdom law, there was no power to grant an injunction against the Crown to suspend the application of an Act of Parliament. The House of Lords referred to the ECJ the question of whether Community law requires a British court to issue a provisional injunction suspending the application of a measure alleged to violate Community law in order to avoid irreparable injury to a complainant pending judgment on the merits. The ECJ's answer is affirmative. It ruled that, where, in a case involving Community law, a national court considers that the sole obstacle to the granting of interim relief is a rule of national law, Community law requires it to set aside that rule.¹⁴⁶ The Court's decision in this case has obviously demonstrated its willingness to require national courts to set aside a national procedural rule even if the rule is based on important policies of the Member State.¹⁴⁷ The judgment of the Court in *Factortame* is highly significant, because the rule to be set aside was a fundamental national rule, ranking a quasi-constitutional norm.

In its recent decisions in *van Schinjdel*¹⁴⁸ and *Peterbroeck*¹⁴⁹ the Court added a new analytical layer to its evaluation of national procedures. These decisions, it may be argued, narrowed the range of procedural rules that remain within the exclusive jurisdiction of national law and may have signaled the Court's intent to move further into the harmonization of the field of legal remedies against Member states.¹⁵⁰ Both cases presented challenges to procedural principles preventing the national court from raising issues of Community law of its own motion. In *van Schinjdel*, the plaintiffs challenged a Dutch law requiring certain professionals to participate in a pension fund. When their case reached the Supreme Court of the Netherlands (Hoge Raad), the plaintiff sought for the first time to rely on Community rights. The Hoge Raad, however could not entertain the Community law claims because Dutch procedure prevents litigants from raising new points of

¹⁴⁶ T. C. Hartley, *supra* note 4, 1998, p. 225.

¹⁴⁷ See Ari Afilalo, *How Far Francovich? Effective Judicial Protection and Associational Standing to Litigate Disffuse Interest in the European Union*, Working Paper under Jean Monnet Chair, Harvard Law School, 1997.

¹⁴⁸ Joined Case C-430, 431/93 [1995] ECR I-4705.

¹⁴⁹ Case C-312/93 [1995] ECR I-4599.

¹⁵⁰ See Ari Afilalo, *supra* note 147.

law in cassation and the Hoge Raad from raising of such points of its own motion if doing so entails a new inquiry. In *Peterbroeck*, the plaintiffs unsuccessfully challenge a tax assessment before an administrative officer based solely on national law. They sought to rely on Community rights for the first time when appealing the adverse administrative determination before an appellate court (the Cour d'Appel). However, a statute of limitation barring claims made after the expiration of a 60-day period commencing with the filing of the challenged tax determination prevented the litigants from asserting, and the court from considering of its own motion, the Community law claims.

The judgment of the ECJ reached opposite results in the two cases. In *van Schijnadel*, the Court found the challenged procedural rule justified on the ground that it “safeguards the rights of the defence and ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas”.¹⁵¹ In *Peterbroeck*, the Court found the 60-day limit not objectionable *per se*, but held that its “special features” precluded its application consistent with Community law. These special features were that the Cour d'Appel was the first “court or tribunal” that could make a reference under Article 177 (now 234), and the expiry of the 60-day period precluded the Cour d'Appel and any higher court from raising the Community law issues of its own motion and, if appropriate, make reference.¹⁵² Nonetheless, both in *Peterbroeck* and *Van Schijnadel* the Court confirmed that, in the absence of Community procedural law, the national court apply the national rules of procedural law, which thus become ancillary to Community law. Those rules are applicable only insofar as they are compatible with the objective of ensuring the uniform and effective application of Community law or, put it in another way, of safeguarding the rights confer on litigant as the result of direct effect of Community law. They are not compatible with that objective if they are such as to render the objective of those rights by litigants excessively difficult in practice.¹⁵³

The structural supremacy of EC law has been further confirmed by the pronouncements of the Court relating to the need for uniformity of certain legal procedural rules in cases brought under Community law. The Court's case law demonstrates that “effectiveness requires uniformity so far as the essential or ‘constitutive’ precondition of the remedies are concerned, and sufficient comparability, through the so-called ‘bottom line’ approach, as far as other rules are concerned.”¹⁵⁴ In fact, the Court is *de facto* creating a European law of procedures each time it rejects a national procedural provision as incompatible with effective judicial protection or *effet utile*.¹⁵⁵

¹⁵¹ Case C-430, 431/93 [1995] ECR I-4705, para. 21.

¹⁵² Case C-312/93 [1995] ECR I-4599, para. 17-19.

¹⁵³ C.N. Kakouris, *supra* note 138, p. 1389.

¹⁵⁴ W. van Gerven, *supra* note 140, p.679.

¹⁵⁵ Ari Afilalo, *supra* note 147.

The theme of unification of remedies was also sounded by the ECJ in cases such as *Francovich*¹⁵⁶ and *Brasserie du Pêcheur*¹⁵⁷. Thus the Court held in *Francovich* that the principle of Member State liability for breach of Community law is ‘inherent in the Treaty’, and therefore asked national courts to apply a Community rule that necessary must be uniform throughout the Union. In *Brasserie du Pêcheur*, the Court was asked to specify the “condition under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member state is guaranteed by Community law. After restating the familiar principle that these conditions should be determined in the light of the doctrines of effective judicial protection and *effet utile*, the Court moved on to the unification concept and held that the conditions for state liability “can not, in the absence of particular justification, differ from those governing liability of the Community in like circumstances”.¹⁵⁸

The feeling of high spirits of the *Factortame/Francovich* era has become less intense somewhat today. There is a limit to what the supremacy principle can achieve in this respect: “the idea that the principle of supremacy can be invoked to sweep aside all national rules which stand in its way appears to be based on a utopian idea of litigation. The belief that the “correct” result should be reached as a matter of Community law in every case treats litigation like an academic puzzle, rather than means for resolving a dispute which arising between two parties”.¹⁵⁹ The road forward may be that, where a remedial deficit is found to exist, the Community legislator should take specific measures geared to the problems in a particular area of the law, and perhaps, in some more distant future, a more general effort to harmonize national procedural laws could be undertaken.¹⁶⁰ Anyhow, Community law has its own particular needs. It may be reasonably expected, therefore, that even after harmonization has been introduced, there will still be procedural rules requiring to be adapted to the needs of substantive Community law.¹⁶¹ It is interesting to observe that there are a growing number of rules of secondary Community law ‘governing’ procedures and remedies, that are usually adopted to accompany substantive rules of Community law in a particular sector.¹⁶²

¹⁵⁶ Case C-6, 9/90 *Francovich v. Italian State* [1992] ECR I-5357.

¹⁵⁷ Case C-46/93 *Brasserie du Pêcheur v. Germany* [1996] ECR I-1029.

¹⁵⁸ Ari Afilalo, *supra* note 147.

¹⁵⁹ M. Hoskins, *Tilting the Balance: Supremacy and National Procedural rules*, ELRev, 1996, 365.

¹⁶⁰ Brunno De Witte, *supra* note 40, p. 192.

¹⁶¹ C.N. Kakouris, *supra* note 138, p. 1389.

¹⁶² For example, certain provisions in Dir. 76/207 on equal treatment of men and women ([1976] OJL 39/40, Art. 3(2)(b), 4(b), 5(2)(b), and 6), and the entire Dir. 89/665 on remedies in the field of public procurement ([1989] OJL 395/33).

3.4.3 Supremacy: a Duty to Disapply for Administrative Authorities

In the process of giving effect to Directives, the ECJ has broadened the concept of “State” which is under the obligation to apply Community law. In *Marshall*¹⁶³, Advocate General Slynn stated that “what constitutes the ‘state’ in a particular national legal system must be a matter for the national court to decide. However...as a matter of Community law, where the question of an individual relying upon the provisions of a directive as against the state arises, I consider that the ‘state’ must be taken broadly, as including all the organs of state...”. Following this opinion, the ECJ has held that direct effect does not simply operate to give a legal instrument to the affected individual before a national court, but also that state organs and domestic administrations, which play no part in the formal implementation of European legislation are bound to apply provisions of Directives in practice.¹⁶⁴

More recently in *Costanzo*¹⁶⁵ the ECJ held that:

“It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in the proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provision of the directive and *refrain from applying provisions of national law which conflict with them*. It follows that when the conditions under which the court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions”.¹⁶⁶ (Emphasis added)

The rulings of the Court mean that, the duty to apply directly effective EC law provisions rest not only on national courts but also on national administrative authorities. It has now long clearly accepted that Community law is to be applied by administrative tribunals as well as by the courts.¹⁶⁷ Notably, the ECJ seems also implicitly to mention the duty to set aside national legislation of administrative organs, can these rulings be applied to the doctrine of supremacy (since the relevant phrase of the judgment was not repeated by the ECJ in later cases, in

¹⁶³ Case 152/84 *Marshall v. Southamton and South West Hampshire AHA* [1986] ECR 723.

¹⁶⁴ Paul Craig & Grainne De Burca, *supra note 11*, P.194.

¹⁶⁵ Case 103/88 *Fratelli Costanzo v. Milano* [1989] ECR 1839, para. 30, 31.

¹⁶⁶ *Ibid*, para. 31 of the Judgment.

¹⁶⁷ P.J.G. Kapteyn and P. Verloren Van Themaat, *supra note 3*, P. 88. See case *Macarthy's Ltd v. Smith* [1979] 3 CMLR 44 at 46...

fact it hardly had the occasion to do so)? There is no doubt that the rulings of the Court did draw a conclusion on the substantive obligations of National authorities. It is the duty results from general principles of Community law: a duty not to apply any rules of national law if the result would be contrary to a rule of Community law.

The rulings of the ECJ have been identified as a very significant ruling in constitutional term since the executive power is normally subordinate to the legislative.¹⁶⁸ It would be constitutional in most, if not all, Member states if administrative authorities started to set aside, on their own motion, legislative norms conflicting with the constitution. Only appropriate (constitutional) courts can do so, if at all.¹⁶⁹ However, in the EC context, if we have to take the ruling of the court in *Costanzo* seriously, administrative authorities at all levels would be under a duty to set aside any national law conflicting with directly applicable of Community law, even though they can not use the mechanism of Article 234 (old 177) EC Treaty to ask the Court for guidance on whether the Community norm has direct effect and on whether there is a conflict with national law. We should probably discern between two situations. Where Member State has been found in breach of EC law through the procedure of Article 169 (now 226), this entails indeed, as the ECJ held in a few judgments, ‘a prohibition having the full force of law on the competent national authorities against applying national rule recognized as incompatible with the Treaty’;¹⁷⁰ and we could extend this to cases where the inconsistency of national law has been clearly established by a preliminary ruling of the ECJ. On the one hand, it would seem more problematic to require national administrative authorities to identify such inconsistencies themselves, without a prior European Court ruling, and set aside national law which they think to be in breach of EC law. However, there is one good reason why the ‘*Costanzo* mandate’, despite its constitutional enormity, should be taken seriously even in the later case: administrative authorities may thus avoid a ‘manifest and serious breach’ of EC law giving rise to state liability in the sense of the *Brasserie du Pêcheur/Factortame III* judgment.¹⁷¹ Let’s see the reasoning of scholar John Temple Lang:

“If a national court has a duty under Community law to protect a Community law right against a national authority, that authority should have protected the right on its own initiative. The authority has a duty of its own. It does not need to wait until it is ordered by a court to carry it out.

National law, constitutional or administrative, determines who does what in each Member State. Community law has no thing to say on that subject. The

¹⁶⁸ D. Curtin & Mortelmans, *Application and Enforcement Community law by Member States: Actor in Search of a Third Generation Script*, in *The Institutional Dynamics of European Integration*, Liber Amicorum Henry G. Schermens – Martinus Nijhoff, 1994.

¹⁶⁹ Brunno De Witte, *supra* note 40, p. 192.

¹⁷⁰ Case 48/71 *Commission v. Italy* [1972] ECR 527; Joined Cases 24, 97/80R *Commission v. France* [1980] ECR 1319, 1333.

¹⁷¹ Brunno De Witte, *supra* note 40, p. 193

duties which Community law imposes on national authorities apply to all of them, whenever the duties are relevant to what each authority is doing. Except for specific provisions like Article 177 (now 234), the Treaties do not distinguish between courts and other authorities. They are, after all, a spectrum of quasi-judicial and regulatory bodies and tribunals, which cannot easily be classified: Community law for most purposes does not need to distinguish between them.”¹⁷²

The above-mentioned reasoning should be understood that, the duty to set aside national legislation which is inconsistent with EC law might not only be imposed on national courts but also national administrations, if it is necessary to protect a Community law right. This seems to be a reasonable way to ensure the uniform application of Community law by all Member State authorities, thus create advantageous conditions for the European integration. However, the idea should be stated explicitly and elaborated by the European Court or EC legislation to trace the way for the Member States to follow.

¹⁷² John Temple Lang, *The Duties of National Authorities under Constitutional Law*, 23 *ELRev.*, 1998, 110.

4 National Law and the Acceptance of Community Principles

The two principles of direct effect and supremacy adopted by the ECJ naturally favor Community law. In order to achieve the greatest effectiveness of Community law, Member States and their competent organs must accept the Community mandate. The ECJ has stated that ‘the success of Community law in embedding itself so thoroughly in the legal life of the Member States is due to its having been perceived, interpreted and applied by the nationals, the administrations and the courts, and tribunals of all the Member States as a uniform body of rules upon which individuals may rely in their national courts.’¹⁷³ By this statement the Court has accepted that the crucial element for the effective application of the principle of direct effect and supremacy is the attitude of national courts and authorities.¹⁷⁴ As a result, there is a second dimension to the relationship between EC law and National law, which is decisive for determining whether the Court’s doctrines have an impact on legal reality: the attitude of National authorities. In this part, we shall briefly consider the acceptance of Member States of the Community’s principles.

4.1 The Acceptance of the Direct Effect Doctrine

Despite the status of *unwritten principle of law*,¹⁷⁵ direct effect has been easily accepted in most of the Member States, though there were some resistance. The first resistance displayed by the intervening governments in *Van Gen en Loos* was not mirrored by the attitudes of national courts in the following years.¹⁷⁶ In 1967, the German *Bundesfinanzhof* reacted critically to the *Lütticke*¹⁷⁷ Judgment of the ECJ which had recognized the direct effect of Article 95 (now 90) EC Treaty, and referred the issue to the ECJ for reconsideration. The Financial Supreme Court complaint about the thousands of cases with which the German financial courts had been faced as a result of *Lütticke*, and argued that both *Van Gen en Loos* and *Lütticke* were utterly unconvincing ‘political’ decisions.¹⁷⁸ However, the ECJ did not consider its early views¹⁷⁹ and the dispute

¹⁷³ *Report of the ECJ on Certain Aspects of the Application of the Treaty on European Union*, May 1995, 2.

¹⁷⁴ Brunno De Witte, *supra* note 40, p. 193

¹⁷⁵ We all know that the Treaties do not precisely mention the two principles. See Brunno De Witte, *Direct effect, Supremacy, and The Nature of Legal Order*, in - *The Evolution of EU Law*, Craig & De Búrca, Oxford University Press, 1998, p. 194.

¹⁷⁶ Brunno De Witte, *supra* note 40, p. 195.

¹⁷⁷ Case 57/65, *Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205.

¹⁷⁸ *Bundesfinanzhof*, judgment of 18 July 1967 [1967] *Europarecht* 360.

petered out. The further reaction against this principle was only with respect to one particular of Community acts, namely Directives. The direct effect of Directives was not smoothly accepted by the Member States as those of Treaty provisions and Regulations. In *Cohn-Bendit*¹⁸⁰ and *Kloppenburg*,¹⁸¹ the French *Conseil d'Etat* and the German *Bundesfinanzhof* were unwilling to accept that Directives could give rise to rights justiciable at the instance of individuals. The national courts' reasoning in all these cases ran on the similar line that Article 189 (now 249) expressly distinguished between Regulations and Directives. Only regulations are described as directly applicable; directives are intended to take effect within the national order by means of national implementing measures. However, the effectiveness argument advanced by the ECJ is compelling. Moreover, the controversy on the direct effect of directives seemed to be balanced by the Court's refusal to recognize the horizontal direct effect of Directives, though not much convincing.¹⁸² Apart from these early and short-lived 'rebellion', the principle that Community law can have direct effect has not been contested anywhere.¹⁸³ Now, the direct effect of EC law has developed from an "infant disease" to be recognized as a part of the "new legal order" of the Community that confers rights on individuals.

4.2 The Acceptance of the Principle of Supremacy

A little bit different from direct effect, supremacy was more slowly and reluctantly accepted, even in the founder Member States.¹⁸⁴ The very reason for this is that supremacy of EC law may affect the principle of national sovereignty and the guarantees of fundamental human rights. Among original six, no special efforts were required from the courts in the Netherlands and Luxembourg, where the supremacy of international treaty provisions over national legislation was accepted prior to 1957. Of the other four countries, the courts in Belgium reacted most promptly and loyally to the ECJ's injunctions. Although the Belgium Constitution was silent on the domestic effect of international or European law, the Supreme court adopted the principle of primacy as it had been formulated in *Costa*, and based it on the nature of international law and of EC law. The other Belgian courts soon followed the same line.

¹⁷⁹ Case 28/67 *Mökerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn* [1968] ECR 143.

¹⁸⁰ Case *Interior v. Cohn-Bendit* [1980] 1 CMLR 543.

¹⁸¹ Case *Kolppenburg v. Finanzamt Leer* [1989] 1 CMLR 873.

¹⁸² See the arguments of A.G. Jacobs in Case C-316/93 *Vaneetveld*, he argued that the granting of horizontal direct effect to directives would not "blur the distinction" between regulations and directives, because they "will remain different instruments, appropriate in different situations and achieving their aims by different means".

¹⁸³ Brunno De Witte, *supra* note 40, p. 196.

¹⁸⁴ Tamara K. Hervey, *Enforcing European Community Law in the Member States*, in Phillippe Barbour (ed.): *The European Union Handbook*, Fitzroy Dearborn Publisher 1996, p. 229.

In France, although the text of Article 55 of the Constitution recognized the priority of international treaties even over later French laws, the courts were surprisingly slow to accept that this constitutional provision could actually be used as a conflict rule in real cases and controversies. The French judicial system is divided between the administrative courts and the ordinary courts. The *Cour de Cassation*, taking the lead of all ordinary courts, decided to cross the Rubicon in the 1975 *Cafés Jacques Vabre* judgment¹⁸⁵, in which the supremacy of Community law over French law was accepted. The *Conseil d'Etat*, the Supreme Administrative Court, followed suit much later with the *Nicolo* decision (1989), after what must have been a very painful revision of established truths.¹⁸⁶ Since this decision, the *Conseil d'Etat* has recognized the priority of both Community regulations and directives over French statutes, without discussing the theoretical basis for that supremacy, and the French Constitution has been amended to give effect to changes made by the TEU, so that 'the Community is now placed on a clearer constitutional footing in France'.¹⁸⁷

In Italy and Germany, the acceptance of the supremacy of EC law is not easy, since their Constitutions have given significantly more protection to fundamental human rights than those of the other Member States.¹⁸⁸ Fundamental rights are higher legal norms than all others applicable in the national legal systems and so provisions of law conflicting with fundamental rights provision may be set aside as unconstitutional. This position is potentially in conflict with the principle of supremacy of Community law, since a national court finding that a directly applicable measure of Community law infringed a national constitutional fundamental rights provision would be obliged to set aside the Community law. Therefore, the actual duties imposed on national courts by *Costa* went well beyond what the mainstream constitutional doctrine, at that time, was prepared to accept in term of the domestic force of international treaty law.¹⁸⁹

In Germany, the *Bundesverfassungsgericht* (Constitutional Court) originally adopted a position that where there is a conflict between guarantees of fundamental rights in the Constitution and in Community law, the fundamental rights prevail, so long as the European institutions have not resolved the conflict.¹⁹⁰ The ECJ responded to this position with the assurance that fundamental rights were already protected in Community law as general principles of law.¹⁹¹ So, the *Bundesverfassungsgericht* has subsequently modified its position by confirming that so long as the European institutions, and in particular the ECJ in its case law, generally ensure effective protection of fundamental rights

¹⁸⁵ Decision 24 May 1975, *Administration des Douanes v. Société 'Cafés Jacques Vabre' et SARL Weigel et Cie* [1975] 2 CMLR 336.

¹⁸⁶ Raoul Georges Nicolo [1990] 1 CMLR 173.

¹⁸⁷ See P. Oliver, *The French Constitution and the Treaty of Maastricht*, 1994, 43 ICLQ 1, 10.

¹⁸⁸ T.C. Hartley, *supra* note 4, p. 242.

¹⁸⁹ Brunno De Witte, *supra* note 40, p. 197.

¹⁹⁰ *Solange I* [1974] 2 CMLR 540.

¹⁹¹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

similar to that guaranteed under German Constitution, then it will no longer examine the compatibility of Community legislation with fundamental rights.¹⁹²

In Italy, the message, in *Costa*, was primarily addressed to the Italian Constitutional Court. This Court although has gradually come to recognize the supremacy of Community law over national legislation, but still had some reservations towards the concept of supremacy of Community law, in particular supremacy over national fundamental rights provision. In *Frontini*,¹⁹³ the *Corte Costituzionale* (Italian Constitutional Court) while confirming that, in general, provisions of Community law have 'full compulsory efficacy and direct application' in Italy, held that if a Community provision should violate fundamental constitutional or human rights principles the *Corte Costituzionale* would ensure that Community law was compatible with those principles. In the more recent case of *Granital*,¹⁹⁴ the *Corte Costituzionale* expressly affirmed the principle of supremacy of EC law, but still reiterated its caveat from *Frontini* concerning review of Community provisions in terms of their consistency with fundamental rights protections.

For the nine countries joined the European Community after *Costa*, the situation was rather different. For them, supremacy and direct effect did not require *ex post* constitutional creativity but was a matter of voluntary acceptance as *acquis communautaire*. Greece and Ireland, when they joined had put their constitutions in order. Article 28 of the Greek Constitution, adopted prior to accession, recognizes the primacy of international conventions over any national legislation. In Ireland, given the inability of the dualist constitutional tradition to cope with the demands of membership, a special EC law was added to the Constitution vouchsafing the direct effect and primacy of Community law. In *Pigs and Bacon Commission*,¹⁹⁵ it was held that Community law takes legal effect in the Irish system in the manner in which Community law itself provides. So, since Community law provides for supremacy of Community provisions, Irish courts must give effect to that rule.

In the United Kingdom, the reluctance of the courts to alter their long-standing deference the doctrine of the sovereignty of Parliament inevitably led to difficulty with UK compliance with Community law. In fact, the question of supremacy floated around for many years until the *Factortame II* judgment,¹⁹⁶ where the House of Lords for the first time disapply the later Act of Parliament for being inconsistent with the EEC Treaty. It is still discussed whether the House of Lords decided on the basis of sophisticated statutory construction or recognized a

¹⁹² *Solange II* [1987] 3 CMLR 225.

¹⁹³ *Case Frontini v. Ministero delle Finanze* [1974] 2 CLMR 372.

¹⁹⁴ *Case Granital* [1984] 21 CMLR 765.

¹⁹⁵ Judgment 30 June 1978 [1978] Journal of the Irish Society of European Law 87.

¹⁹⁶ *Case C-221/89 R v. Secretary of State of Transport, ex parte Factortame Ltd.* [1991] ECR I-3905.

genuinely new constructional rule, giving priority to Community law over any type of national law, but the later view seems more convincing, also in the light of later UK case law.¹⁹⁷ Nevertheless, the judgment of Lord Bridge that “it has always been clear that it was the duty of a United Kingdom court... to override any rule of national law found to be in conflict with any directly enforceable rule of Community law”¹⁹⁸, is evidence that, in some circumstances, the UK courts will now recognize the supremacy of Community law explicitly and directly. And now, we can affirm that, supremacy of Community law over national legislation and sources of national law lower in rank than legislation,¹⁹⁹ seems to be accepted in most of the Member States.²⁰⁰ Supremacy and direct effect were to be recognized because the EC Treaty was unlike other international treaties. And, EC law is now often presented as being unique because it is endowed with direct effect and supremacy.²⁰¹ However, direct effect and supremacy of EC law have not been completed. In 1950, while writing about the domestic status of international treaties, Morgenstern stated: ‘only the full integration of international society, by giving international law the means of enforcing its authority directly within the state, can establish the supremacy of international law in its fullest sense’.²⁰² EC law now is only halfway on the road traced by Morgenstern.

¹⁹⁷ See P. P. Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 1991, 11 YEL 221.

¹⁹⁸ *Factortame Ltd v. Secretary of State for Transport* (No. 2) [1991] 1 Appeal case 603. There is also a notable summarized phrase concerning the acceptance of supremacy: “*Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas... national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy*”.

¹⁹⁹ Bruno De Witte described it as “ordinary” Supremacy. Primacy of EC law over National constitution is quite another matter. I do not propose to discuss this matter. For more details, see Bruno De Witte: *Community Law and National Constitutional Values*, (1991) 2 LIEI 1.

²⁰⁰ In case of Denmark, its Constitution contains no rules on the relation between Community law and National law, and the doctrine of primacy of EC law has never expressly been accepted by the courts.

²⁰¹ Bruno De Witte, *supra* note 40, p. 208.

²⁰² See F. Morgenstern, *Judicial Practice and Supremacy of International Law*, (1950) 27 The British Yearbook of International Law, 42.

5 Conclusion

The key to an understanding of the effect of the European Community law in the Member States, and consequently its enforcement at the suit of individuals, is the relationship between Community law and National law. It can hardly be denied that the Community now exercises considerable substantive powers which the Member States no longer exercise or lay claim to exercise – the exceptional cases being so infrequent as to be regarded as major crises. Where Common organizations of the market should exist, national market organizations are no longer specially protected against the rigors of the basic Treaty rules.²⁰³ Over the past forty years, the Community has grown into a unique organization, much of the success of the European integration must be attributed to the ECJ. Nevertheless, due to its singular nature, the Community faces a number of problems when ensuring proper implementation and enforcement of Community rules. The European Court has remedied these problems with its most important judicial creation – the doctrine of direct effect and supremacy. Having been allowed to invoke Community provisions before national courts, individuals have been made a direct participant in the European integration process, thanks, in large part, to the principle of direct effect and supremacy.²⁰⁴

Indeed, in the first decades after *Van Gen en Loos* and *Costa* judgments, one of their main consequences was to transform state duties in the economic sphere into individual rights, thus allowing private parties ‘to drive forward the process of market integration.’²⁰⁵ By this way, the ECJ has also provided an enforcement mechanism in addition to Article 169 (now 226) and 170 (now 227) EC. The limitation of direct effect has also been made up by the ECJ in the doctrine of indirect effect, and therefore, the effectiveness of Community law has been strengthened considerably. In describing the relationship between EC law and Member State law, in which powers once exercised by Member States are now exercised by the Community, it is appropriate to say that sovereignty has been transferred to the Community,²⁰⁶ of course in specific fields. Besides, the principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms.²⁰⁷ As far as other issues of enforcement of Community law, such as indirect effect, status of national procedures and remedies are concerned, the relationship between Community

²⁰³ John Usher, *European Community Law and National Law. The Irreversible Transfer?*, George Allen & Unwin 1981, p. 83.

²⁰⁴ Brunno De Witte, *supra* note 40, p. 205.

²⁰⁵ S. Weathrill, *Law and Integration in the European Union*, Oxford University Press 1995, p. 101.

²⁰⁶ John Usher, *supra* note 203.

²⁰⁷ Brunno De Witte, *supra* note 40, p. 210.

law and national law remains very much a live issue.²⁰⁸ Thus, the question of the legal status of norms of European Community law within the legal order of the Member States of the European Union is an evergreen in European legal studies.²⁰⁹ As a result, direct effect, supremacy of Community law, especially the matter of horizontal direct effect of Directives and supremacy of Community law over National constitutions, continue to be a sensitive and controversial issue in academy and practical application of EC law.

²⁰⁸ Tamara K. Hervey, *supra* note 184, p. 236.

²⁰⁹ Brunno De Witte, *supra* note 40, p. 177. Recently, there is a notable discussion on the supremacy of EC law in the context of the adoption of the EU Charter of Fundamental Rights. See Jona Bering Lüsberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, Working Paper under Jean Monnet Chair – Harvard Law School, 2001, <http://www.jeanmonnetprogram.org/papers/01/010401.html>.

Bibliography

Books:

David A O Edward & Robert C. Lane, *European Law – An Introduction*, Butterworths Law of Society of Scotland, 1995.

D. Lasok & J. W. Bridge, *Law and Institutions of the European Communities*, London – Butterworths, 1987.

J. Shaw, *European Community Law*, MacMillan, 1993.

J. Steiner, *TextBook on EC Law*, 5th Ed., Blackstone Press, 1996.

John Usher, *European Community Law and National Law. The Irreversible Transfer*, George Allen and Unwin 1981.

P. Craig and G. De Búrca, *The Evolution of EU Law*, Oxford University Press, 1998.

P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, 2nd Ed., Oxford University Press, 1998.

Phillipe Barbour (ed.): *The European Union Handbook*, 1996

P. J. G. Kapteyn and P. Verloren Van Themaat, *Introduction to The Law of The European Community*, Kluwer International, 1998.

S. Prechal, *Directive in The European Community Law: a Study of Directives and Their Enforcement in National Courts*, Oxford University Press, 1995.

S. Prechal & Noreen Burrows, *Gender Discrimination Law of the European Community*, Dartmouth 1990.

S. Weatherill, *Law and Integration in the European Union*, Oxford University Press, 1995.

T. C. Hartley, *The Foundations of European Community Law*, 4th Ed., Oxford University Press, 1998.

Tom Kenedy, *Learning European Law – a Primer and Vade-mecum*, Sweet & Maxell 1998.

Articles:

Brunno De Witte, *Community Law and National Constitutional Values*, LIEI, 1991, p. 1.

Betlem, G., *The Principle of Indirect Effect of Community Law*, 1995, 3 ERPL 1.

Chris Hilson & Tony Downes, *Making Sense of Rights: Community Rights in EC Law*, ELRev. 1997, p. 121.

C.N. Kakouris, *Do the Member States possess Judicial Procedural “Autonomy”?* CMLRev. 1997, p. 1389.

Curtin D., *Directives: The Effectiveness of Judicial Protection of Individual Rights*, (1990) 27 CML Rev 709

Curtin, D., *The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context*, 1990, 15 ELRev. 195.

Craig, P. P., *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 1992, 12 OJLS 453.

De Búrca, G., *Giving Effect to European Community Directives*, 1992, 55 MLR 215.

Dashwood, *The Principle of Direct Effect in European Community Law*, 1978, 16 JCMS 229.

D. Wyatt, *New Legal Order or Old?*, 7 ELRev. 147.

Eleftheriadis, P., *The Direct Effect of Community Law: Conceptual Issues*, 1996, 16 YEBL 205.

F. Morgenstern, *Judicial Practice and Supremacy of International Law*, (1950) 27 The British Yearbook of International Law, 42.

Himsworth, *Thing Falls Apart: The Harmonization of Community Judicial Procedural Protection Revisited*, 1997, 22 ELRev. 291.

Josephine Steiner, *Direct Applicability in EEC Law – A Chameleon Concept*, 1982, 98 LQR 229.

J. Weiler, “*The community System: the dual character of Supranationalism*” (1981) 1 YBEL 267

J. Weiler, *The Transformation of Europe*, 100 YALE L. J. 1991, 2403.

Grainne de Búrca, *Giving Effect to European Community Directives*, (1992) MLR 215

M. Hoskins, *Tilting the Balance: Supremacy and National Procedural rules*, ELRev, 1996.

Mead, P., *The Obligation to Apply European Law: is Duke Dead?*, 1991, 16 ELRev 490.

Pescatore, P., *The Doctrine of Direct Effect: An Infant Disease in Community Law*, 1983, 8 ELRev.155.

P. Oliver, *The French Constitution and the Treaty of Maastricht*, 1994, 43 ICLQ 1, 10.

Ruffert, M., *Rights and Remedies in European Community Law: A Comparative View*, 1997, 34 CMLRev. 307.

Ross, “*Beyond Francovich*” (1993) 56 MLR 55

Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 1993, 56 MLRev. 19.

Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, (1990) 27 CMLRev 645

Temple Lang, *The Duties of National Authorities under Constitutional Law*, 23 ELRev., 1998, 110.

T. Tridimas, *Horizontal effect of Directives: A Missed Opportunity?* 19(1994) ELRev 621

W. van Gerven, *Bridging the Gap between Community and National laws: Towards the Principle of Homogeneity in the Field of Legal Remedies*, CMLRev. 1995, p.679.

Table of Cases

- Case 26/62 - *Van Gend en Loos v. Nederlandse tariefcommissie* [1962] ECR 1, [1963] CMLR 105.
- Case 6/64 *Costa v. Enel* [1964] ECR 585.
- Case 57/65, *Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205.
- Case 27/67 *Firma Fink – Fruchht GmbH v. Hauptzollamt Muchen Landsbergertan* [1968] ECR 223.
- Case 28/67 – *Firma Molkerei - Zentrale Westfalen Lippe GmbH v. Hauptzollamt Paderborn* [1968] ECR 143.
- Case 13/68 – *SPA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453.
- Case 14/68 *Wilhelm et al. v. Bundeskartellamt* [1969] ECR 1.
- Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825.
- Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
- Case 41/71 *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1.
- Case 43/71 *Paloti S.A.S v. Ministry of Finance of Italian Republic* [1971] ECR 1039.
- Case 39/72 *Commission v. Italy* [1973] ECR 101.
- Case 51/76 – *Verbond Van Nederlandse Ondernemingen v. Inspecteur Des Invoerrechten Accijnzen* [1977] ECR 113.
- Case 106/77 *Amministrazione delle Finanze dello stato v. Simmenthal SpA* [1978] ECR 629.
- Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1269.
- Case 131/79 *R. v. Secretary of State for Home Affairs, ex parte Santillo* [1980] ECR 15.
- Case 104/81 *Kupferberg* [1982] ECR 3641.
- Case 14/83 – *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.
- Case 16/83 *Prantl* [1984] ECR 1229.
- Case 294/83 *Parti Ecologiste 'Lesverts' v. Parliament* [1986] ECR 1339, [1987] 2 CMLR 343.
- Case 152/84 *Marshall v. Southampton & South West Hampshire Area Health Authority* [1986] ECR 723.
- Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.
- Case 12/86 *Demirel* [1987] ECR 2719.
- Case 14/86 *Pretore de salò v. X* [1987] ECR 2545.
- Case 80/86 *Officier van Justitie v. Kolpinghuis Nijmegen* [1987] ECR 3969.
- Case 103/88 *Fratelli Costanzo v. Milano* [1989] ECR 1839.
- Case 106/89 *Marleasing S.A v. La Commercial International De Alimentacion S. A.* [1990] ECR 4135; [1992] CMLR 305.

Case C-213/89 *R v. Secretary of State of Transport, ex parte Factortame Ltd.* [1990] ECR I-3313.

Case C-6, 9/90 *Francovich v. Italian State* [1992] ECR I-5357.

Case C-18/90 *Kziber* [1991] ECR I-3719.

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

Case C-46/93 *Brasserie du Pêcheur v. Germany* [1996] ECR I-1029.

Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207.

Case C-168/95 *Arcaro* [1997] ECR I-4705.

Case C-197/96 *Commission v. France* [1997] ECR I-1489.