Direct Effect of Directives
- An Instrument for Uniformity or the Cause of Incoherence?

Josefin Johansson & Lisa Lindström

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Examinatorer: Annina H Persson & Eleonor Kristoffersson
Handledare: Senem Eken
Abstract

Over 40 years have past since the Court of Justice (the Court) established direct effect (of directives). Direct effect enables individuals to invoke – rely on a European Union (EU) directive provision(s) before a national court, presupposed that the directive has direct effect and the national rule(s) is in conflict with this directive. However, the Court has limited direct effect to vertical situations, meaning that an individual can invoke a directive against a Member State (vertical situations), but directives cannot be invoked between two individuals (horizontal situations). The Court has relied on different legal reasoning to exclude horizontal direct effect. However, despite the rule of no-horizontal direct effect, the Court has adopted a broad definition of state and has introduced the doctrines of incidental direct effect and consistent interpretation. Furthermore, the concept of state liability has been established as a form of remedy. One argument for these developments is to maintain (full) effectiveness of EU law. Consequently, the evolutions of the Court is a controversial issue, which has been subject to discussions in the doctrine and is facing criticism/challenges due to the emerged tension between the rule of no-horizontal direct effect and the doctrines created by the Court that impinge this rule. The purpose of the thesis is to examine whether the ‘exceptions’ restraining on the rule of no-horizontal direct effect in fact amounts to horizontal direct effect and consequently affects state sovereignty adversely. According to the Treaty (Art 288 TFEU), the Member States (MS) of the EU enjoy certain amount of discretion as to how they will implement directives, since directives are only binding upon the MS as to the result to be achieved. The thesis examines the legal problem stated above by presenting and analyzing the relevant groundbreaking case law of the Court, in order to show the inconsistent pattern of the Court’s case law, which results in a middle way between effectiveness of EU law and the estoppel argument. The conclusion would be that the Court must create consistent application in this particular field of law. Thus, the Court can head in two directions: either to accept horizontal direct effect and thus aim for a more coherent application of EU law or to preserve the constitutional hierarchical order, and thereby uphold state sovereignty and discretion.
Table of Contents

1 INTRODUCTION .................................................................................................................. 1
   1.1 BACKGROUND ................................................................................................................. 1
   1.2 AIM AND RESEARCH QUESTIONS .................................................................................. 3
   1.3 DELIMITATIONS ............................................................................................................. 4
   1.4 RESEARCH METHOD AND MATERIALS ......................................................................... 4
   1.5 DISPOSITION .................................................................................................................. 6

2 DIRECT EFFECT OF DIRECTIVES ...................................................................................... 7
   2.1 THE CONCEPT OF DIRECT EFFECT .............................................................................. 7
   2.2 VERTICAL DIRECT EFFECT .......................................................................................... 8
   2.3 NO HORIZONTAL DIRECT EFFECT .............................................................................. 12

3 EXCEPTIONS TO THE PRINCIPLE ‘VERTICAL BUT NOT HORIZONTAL DIRECT EFFECT’ .... 15
   3.1 INCIDENTAL DIRECT EFFECT ........................................................................................ 15
   3.2 CONSISTENT INTERPRETATION .................................................................................... 19
      3.2.1 The Development since case Von Colson ................................................................. 19
   3.3 HORIZONTAL DIRECT EFFECT? .................................................................................. 27

4 RELATION BETWEEN DIRECT EFFECT AND SUPREMACY ............................................ 28
   4.1 THE CONCEPT OF SUPREMACY ................................................................................... 28
   4.2 EXCLUSION OR SUBSTITUTION? ................................................................................. 30

5 STATE SOVEREIGNTY ......................................................................................................... 35
   5.1 STATE LIABILITY FOR INADEQUATE IMPLEMENTATION OF DIRECTIVES ............ 35
   5.2 DISCRETION .................................................................................................................. 39
      5.2.1 Discretion in General .............................................................................................. 39
      5.2.2 Discretion in relation Direct Effect .......................................................................... 40

6 CONCLUSION ...................................................................................................................... 42
   6.1 AN INSTRUMENT FOR UNIFORMITY OR THE CAUSE OF INCOHERENCE? ............... 42
   6.2 COHERENCE OF EU LAW - IRRESPECTIVE OF THE CONSEQUENCES? .................. 47
   6.3 FINAL REMARKS .......................................................................................................... 49

TABLE OF CASES ................................................................................................................. 50

TABLE OF LEGISLATION ........................................................................................................ 51
   EU TREATIES ...................................................................................................................... 51
   EU DIRECTIVES ............................................................................................................... 51
   INTERNATIONAL CONVENTIONS .................................................................................... 51

BIBLIOGRAPHY .................................................................................................................... 52
   BOOKS ............................................................................................................................... 52
   ARTICLES ........................................................................................................................... 53
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
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<td>Art</td>
<td>Article</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>European Court of Human Rights</td>
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<td>EU or Union</td>
<td>European Union</td>
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<td>MS or state</td>
<td>All or a Member States of the European Union</td>
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<td>OJ</td>
<td>Official Journal of the European Union</td>
</tr>
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<td>P</td>
<td>Page</td>
</tr>
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<td>EC</td>
<td>Treaty Establishing the European Community</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>The Court</td>
<td>The Court of Justice (Formerly known as the ‘European Court of Justice’/’ECJ’)</td>
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<td>UN</td>
<td>United Nations</td>
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1 Introduction

1.1 Background

The European Union (EU or the Union) is a supranational organization. The Member States (MS) have agreed, as a result of their membership, to ‘confer competences to attain objectives they have in common’.\(^1\) However, the transfer of competence from the MS to the EU is limited with the principle of conferral, the principle of subsidiarity and the principle of proportionality. In other words, those three principles govern the EU’s competence,\(^2\) and relate to the questions of when the EU can act and how the EU should act.\(^3\) Thus, the EU institutions, by complying with those principles, can adopt binding EU acts and conclude international agreements (with third countries) to reach the objectives of the EU. Directives are one of the EU acts that can be adopted by the EU institutions.\(^4\)

With regards to EU acts, directives differ from the other EU acts because the MS must implement the directives and they are binding upon each MS \textit{as to the result to be achieved}. However, the method and/or form to be used by the MS to reach that result envisaged in a directive has been left to the national authorities to choose.\(^5\) As a result, directives leave, in principle, a certain degree of \textit{discretion} to the MS, which enable them to decide on their implementing measures. This aspect in turn allows the MS to choose the most appropriate form/method in accordance with their national legal orders. Discretion left to the MS and implementation support dualism, as it is necessary to preserve the legal pluralism among the MS.\(^6\)

The Treaty and the EU acts adopted by the EU institutions are binding upon the MS. So, the most important question is whether individuals/private persons\(^7\) can benefit from the EU acts. To be more specific, is it possible for an individual to invoke – rely on a Treaty provision or a EU act (before the national courts) when the national rule of a MS is contrary to that Treaty provision in question or the EU act at issue? The answer came from the Court of Justice (the Court).\(^8\) The Court ruled that EU law\(^9\) has direct effect \textit{under certain}\(^1\) Treaty on European Union 2010 O.J. C 83/01 (TEU) Art 1.

\(^2\) Today the Treaty of Lisbon or also referred to as Lisbon Treaty is in force. Therefore, unless otherwise specifically stated, the reference to the term ‘Treaty’ will mean the Lisbon Treaty. The Lisbon Treaty compromises two Treaties: Treaty on the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). Those three principles are regulated in TEU Art 5.

\(^3\) According to the principle of conferral, the Union ‘shall act only within the limits of the competences conferred upon by the Member States in the Treaties’. Thus, ‘competences not conferred upon the Union in the Treaties remain with the Member States.’ According to the principle of subsidiarity, ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’ According to the principle of proportionality, ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’ See TEU Art 5.


\(^5\) TFEU Art 288(3).


\(^7\) The term ‘individuals’ as used in the case law of the Court refers to private natural and legal persons and excludes ’state’ including all organs of the state. In this thesis, the terms ‘individuals’, ‘private parties’ and ‘private persons’ will be used interchangeably. There are Treaty provisions that directly refer to private persons, such as the provisions on EU competition law. However, a vast majority of the provisions refer to the MS and create obligations for them.

\(^8\) It should be mentioned that the Court of Justice of the EU (CJEU) comprises three courts (TEU 19(1)): (1) the Court of Justice (previously known as the European Court of Justice (ECJ)), (2) the General Court (previously...
Thus, direct effect allows the invoke-ability of EU law in the MS. Moreover, the Court has introduced supremacy of EU law, which is twinned with direct effect of EU law. At this point, vertical and horizontal situations must be defined for a better understanding. Vertical direct effect or vertical situation occurs where an individual invokes EU law in a legal dispute against a MS. Horizontal direct effect or horizontal situation occurs where an individual invokes EU law in a legal dispute against another individual. An issue of directives/why there is a problem related to directives, must also be explained. A problem related to directives occurs because either a MS does not implement a directive or a MS implements a directive improperly – poorly. In case of a proper implementation by a MS, there would not be any problem as the result of the directive would be reached and would be protected in the legal order of that MS.

As mentioned above the vertical direct effect of directives enables individuals to rely on direct effect against the MS. At this point another concept inverse vertical direct effect must be explained. Invers direct effect enables the state to rely on direct effect against a private party.

The focus of this thesis is directives and the established rules on the principle of direct effect of directives will therefor be presented in the following. The Court has ruled that directives have vertical direct effect under certain circumstances, while directives do not have horizontal direct effect. Thus, the main principle is the rule of no-horizontal direct effect of directives. This rule will mainly be referred to as the ‘no-horizontal direct effect rule’. This means that the rule is related only to directives, even though it is not explicitly stated throughout the paper, unless otherwise stated. The Court has based its reasoning on different arguments to give vertical direct effect to directives and to maintain the no-horizontal direct effect. One of these arguments is the estoppel argument, which also emphasizes that an individual cannot be held responsible for the failure of a MS. However, despite the rule of no-horizontal direct effect, the Court has adopted a broad definition of ‘state’, which extends the scope of vertical direct effect. Furthermore, the Court has introduced two principles: (i) indirect effect/consistent – harmonious interpretation and (ii) incidental (horizontal) direct effect. As a form of remedy, the Court has also introduced state liability. Those principles adopted/introduced by the Court aim at creating a unified application of the invoke-ability ‘methods’ (of EU law), in order to achieve a coherence in the Union. Two main reasons are presented to support the previous statement: firstly, a unified application of the invoke-ability ‘methods’ will maintain the effectiveness of EU law and will thus create coherence. Secondly, lack of such ‘methods’ would lead to incoherent application

known as the Court of First Instance) and (3) the Specialized Courts. In this thesis, the term ‘Court’ will be used to refer to the Court of Justice.

9 The Treaty and EU acts (directives, decisions and regulations).
11 Judgment of the Court of 15 July 1964, Costa v ENEL, C-6/64, EU:C:1964:66.
12 Judgment of the Court of 4 December 1974, Van Duyn, C-41/74, EU:C:1974:133.
14 To clarify it, the failure is either non-implementation or improper implementation of a directive.
15 See for arguments of the Court Ch 2 (nn 39-127).
of EU rules and this would in turn have negative effects on the Union’s development. However, as explained below, those principles have raised some questions, especially on the rule of no-horizontal direct effect.

1.2 Aim and Research Questions
Directives have an important role in developing the policies of the Union. The Treaty provides mere a framework. Directives are interesting in the way that they are EU law, but must be implemented by the MS on national level. They are binding as to the result to be achieved. This could reveal a general problem of the interrelation between EU law and national law. It is also clear that the Court receives, in relation to direct effect and its interpretation, strikingly more cases on directives than Treaty provisions and EU regulations.

The aim of this thesis is to examine the relationship between direct effect of directives and state sovereignty. As previously stated, directives must be implemented, and directives provide, in principle, a margin of discretion. Nevertheless, such discretion can lead to problems as examined in detail in the following chapters. For example, the margin of discretion can lead to incoherence in the application of the directive as between the MS, since the MS have different legal cultures and legal structures. Directives provide discretion but the discretion can be limited through direct effect.

Furthermore, this thesis examines whether the Court’s leading argument for direct effect of directives, the estoppel argument, has yielded to an effectiveness of EU law argument - in line with one of the Court’s arguments for direct effect, the principle of \textit{effet utile}. The reason for this analyze is that the effectiveness of EU law argument correspond better to the ‘exceptions’ created by the Court, to circumvent (intentionally or not intentionally) the no-horizontal direct effect rule. Therefore, the query is whether the ‘diminished’ estoppel argument in those situations/cases will lead to less state sovereignty and less discretion for the MS. Thus, the thesis attempts to answer three questions: firstly, how does the doctrine of direct effect affect state sovereignty? Secondly, do the exceptions to the no horizontal direct effect rule in fact amount to horizontal direct effect? And, thirdly, how would the recognition of horizontal direct effect make an impact on state sovereignty?

Furthermore, the thesis will present a theoretical theory of exclusion and substitution, found in the doctrine, which tries to explain mainly the incidental direct effect rulings from an angle of supremacy. This theoretical theory suggests that because the incidental direct effect rulings concerned exclusion and indirect consequences for individuals, it does not amount to horizontal direct effect.

Direct effect is a ‘tool’ introduced by the Court that render EU law invoke-able under certain circumstances. By this way, direct effect also creates a link between the Union and national legal systems of the MS. The doctrine of direct effect can provide coherent application of EU law and thus make EU law effective, but this effectiveness argument seem

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21 Lenaerts & Corthaut (n 20).
22 TFEU Art 288.
25 For further discussion text to (n 372).
to trespass on state sovereignty. Consequently, a crucial question arises: to what extent must state sovereignty be sacrificed to yield for the effectiveness of EU law?

1.3 Delimitations

In line with the purpose of this research, the thesis focuses on directives. Thus, the Treaty and other EU acts are examined only to the extent necessary with the aim to analyze and present the research topic with a clear comprehension. The main focus of this thesis is direct and indirect effect of directives, including incidental direct effect. There are a vast number of cases in the Court’s case law on this issue, and therefore the issue is examined in the light of selected groundbreaking case law of the Court. In same vein, the issue of supremacy and state liability are examined and presented with reference to the selected groundbreaking case law of the Court. As the main focus is directives, direct and indirect effect of the Treaty provisions and other EU acts are examined to the extent necessary. Regarding general principles of EU law, certain general principles of EU law which falls within the scope of the research aim are examined in this thesis and to the extent that the research questions require. Thus, the general principles of EU law, which do not fall within the scope of the research aim, are not examined in this thesis. Finally, direct effect of the international Treaties is excluded from the scope of this thesis, as it is not relevant to the research topic.

1.4 Research Method and Materials

The thesis will analyze and investigate the research topic and questions through legal dogmatic method. In order to establish de lege lata, relevant legal sources will be examined together with the legal doctrine and the Court’s case law.

As far as the EU is concerned, legal sources are divided into two categories: (i) primary sources of EU law and (ii) secondary sources of EU law. There is a hierarchy among the sources. For a better understanding, brief information on the sources of EU law will be provided below.

With regard to primary sources of EU law, the most important source is the Treaty. Today the Treaty is the Lisbon Treaty or Treaty of Lisbon. The Treaty is on the top of the hierarchy among the sources. Moreover, annexes and declarations to the Treaty as well as Charter of Fundamental Rights of the European Union are also primary sources. General principles of EU law also belong to this category. The Treaty is a framework and it enables the EU institutions to adopt EU acts and conclude international agreements to reach the objectives of the EU.

With regard to EU acts, they are adopted by the EU institutions and are thus secondary sources of EU law. Art 288 TFEU lists the ‘legal acts’ to be adopted by the EU institutions. According to this article are regulations, directives, decisions, opinions and recommendations the listed acts. While regulations, directives and decisions count as binding EU acts, recommendations and principles are not binding (in principle). Furthermore, there are other

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29 The term Treaty in fact involves all the Treaties of the EU, including the founding ones. However, the Lisbon Treaty or Treaty of Lisbon is in force today.
30 Treaty on the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU).
32 Leanerts & Van Nuffel (n 28).
33 To be correct, it is in fact the EU legislators (EU institutions assigned to legislative powers) that adopt EU acts and conclude international agreements. The EU legislators are the European Commission, the European Parliament and the Council (of Ministers).
forms that can be adopted by the EU institutions that are not listed in Art 288 TFEU. For example communications and White papers, which are sources of soft-law.

Secondary sources cannot be contrary to the primary sources of EU law. This means that international agreements and EU acts must comply with the primary sources.\(^\text{34}\) Case law is of importance and has a very strong place in the EU. The Court (together with the General Court) has the task to interpret EU law and to ensure that the law is observed in the application of EU rules.\(^\text{35}\) As explained in the following chapters, the Court has introduced leading principles of EU law, such as direct effect of EU law and supremacy of EU law. Moreover, the Court has been working towards ensuring a uniform application of EU law in the MS. As regards as the doctrine, even though the case law of the Court does not in principle refer to it, the doctrine has an impact on shaping the Court’s decisions.

The title of the thesis already discloses that the main focus will be on secondary sources of EU law since directives, as well as regulations, are part of this category of Union law.\(^\text{36}\) Different directives will serve as examples to illustrate how direct effect has been invoked and analyzed in different cases, and the Court’s supplementary case law will inevitable serve as the basis for analysis and identification of \textit{de lege lata}. The thesis will make no reference to specific regulations as part of the secondary sources of EU law. However, it will discuss regulations to the extent necessary to compare regulations with directives, in order to present their different features as laid down by the Treaty, as well as to present the special character of directives. Certain provisions of the TEU and TFEU will be referred in the thesis in order to provide a better comprehension of the constitutional hierarchy between the Union and its MS, and to explain the issue of division of competence that has emerged with the Court’s judgments on direct effect of directives. Some reference will be made also to the EC Treaty since that was the Treaty in force when the Court delivered some of the leading relevant judgments.

General principles of EU law have more recently been in the hearth of the discussions as to whether general principles of EU law themselves have (horizontal) direct effect or not. This issue affects the doctrine of direct effect and the thesis will thus address this area of EU law.\(^\text{37}\) The legal doctrine on direct effect is almost endless, but the authors of this thesis have tried to carefully select the literature, articles, opinions by legal scholars and AG in order reflect the complex situation of direct effect. The selection has been made with the due consideration to present the disputable situation of direct effect of directives in its early days as a \textit{doctrine}, but also to reflect the controversial situation as of today. In the same vein and with the same purpose explained above, will the groundbreaking case law of the Court be presented and analyzed. Even though the opinions of the AGs are not binding for the Court, some opinions will be presented as they do explain the problematic aspects of the research topic in clear terms.

Finally, it should be mentioned that hitherto, the Court’s case law in respect of direct effect of directives has been rather confusing. This is because the evolutions of the Court reveal a tension between the rule of no-horizontal direct effect and the doctrines created by the Court that impinges this rule. By processing and analyzing the relevant sources of EU law some suggestions will be made, even though they may not be considered novel. Thus, some parts of the discussion will be concerned with the challenges faced by \textit{de lege ferenda}.

\(^{34}\) There is also a hierarchy among the secondary sources. However, this issue will not be explained as it is not relevant to the research topic of this thesis.

\(^{35}\) TEU 19 (1).

\(^{36}\) Leanerts & Van Nuffel (n 28).

\(^{37}\) Leanerts & Van Nuffel (n 28).
1.5 Disposition
In order to provide for an understanding of the legal dilemma the necessary background must firstly be presented. Thus Ch 2 will initially address the concept of direct effect of directives. The chapter will present the reasons behind the introduction of direct effect of directives, followed by an explanation of the main rule, which entails that directives can only have vertical direct effect. Thus, the underlying reasons for the no-horizontal direct effect rule will be stressed under the same chapter. The Court has created several exceptions that neutralize the no-horizontal direct effect rule, and those are briefly mentioned. Furthermore, Ch 2 will also analyze the concepts of direct applicability and direct effect since these two concepts needs to be clarified for a better understanding in regard to direct effect of directives.

Ch 3 will highlight the exceptions of incidental direct effect and the duty of consistent interpretation, since their peculiarities are the main reason for the tension between the no horizontal direct effect rule and the exceptions. Section 1 of Ch 3 addresses incidental direct effect and section 2 is dedicated to the duty of consistent interpretation. Followed by a analyze of the general principles of EU law and their relation to consistent interpretation and direct effect. Thereafter, section 3 of Ch 3 clarifies and describes the clash that emerges between the original idea behind the main rule and the exceptions refraining from it.

With the hope that the previous chapters will provide the necessary knowledge that will enable a reader to understand the legal dilemma that has emerged because of the tension between the no-horizontal direct effect rule and the exceptions created to neutralize it. Ch 4 will concentrate on the relationship between direct effect and supremacy. The significant aspects of the concept of supremacy will initially be presented. Thereafter its relation to exclusionary or substitutionary effects will be discussed, an issue which is highly complex.

In Ch 5 the issue of state sovereignty will be presented as an aspect to the research topic. Section 1 of Ch 5 will briefly touches upon state liability for inadequate implementation of directives. State liability is not one of the exceptions, but a remedy created as a last resort, and it is of importance for the thesis because it deals with the issue of discretion. This in turn leads to the important discussion of discretion in section 2 of Ch 5. Discretion preserves state sovereignty while striving for coherent application of Union law with the aim to satisfy both the Union and the MS. There are two different kinds of discretion in relation to directives and direct effect: the first one is connected to the legislator and the executive, and the other associated with the judiciary. Consequently, these will be thoroughly discussed under this chapter.

Finally, Ch 6 include the conclusion and will firstly provide for a discussion on the presented legal questions and analyze whether the Court has pushed the Treaty too far. The discussion concerns whether the Court, by introducing the exceptions that countervail the no-horizontal direct effect rule, diminish the significance of discretion and thus, trespasses on the state sovereignty of the MS. The discussion attempts to address both the benefits of a coherent application of EU law and a unified Union, and the importance of preserving state sovereignty, without take side with the former or the latter.

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2 Direct Effect of Directives

2.1 The Concept of Direct Effect
After the Court established direct effect of Treaty provisions in the leading case *Van Gend en Loos*, the question became whether a provision or provisions of a directive also could have direct effect. The affirmative answer came with case *Van Duyn* where the Court laid down the prerequisite for direct effect of directive provisions. Direct effect is a complex doctrine, which has an ambiguous history. Moreover, there is no uniform terminology to describe the doctrine’s special character. However the authors of this thesis will, in the following parts, examine this doctrine and will present its most distinguishing features. With this aim, the first issue to be presented is the distinction between direct effect and direct applicability, as this distinction is crucial for the discussions on direct effect of directives.

Art 288(2) TFEU emphasizes the fact that regulations are directly applicable in the MS, meanwhile directives are only binding as to the result to be achieved, and implementation is required until the end of the time period set by the directive. It would not be wrong to state that this feature of directives indicates that directives are not directly applicable until the implementation period expires. Moreover, in Art 288 TFEU the term direct applicability is mentioned and the EU legal acts that have direct applicability are enumerated. On the other hand, neither the term direct effect is mentioned in the Treaty, nor is direct effect of the EU legal acts touched upon in any Treaty article. From this very formalistic approach, it should be stated that the two notions should employ different meanings/functions. In the doctrine, the opinions on whether these two notions should be separated should employ different meanings. Nevertheless, from our point of view, the concept of direct applicability must be differentiated from the concept of direct effect. There are two main arguments that could support our opinion. Firstly, direct effect of a EU norm suggests enforce-ability of the norm in question while direct applicability relates to the question of whether a EU norm automatically becomes part of the national legal order or not. Thus, a EU norm, which enjoys direct applicability, will not necessarily and automatically qualify to have direct effect. However, a EU norm, which has direct effect, will always have direct applicability. Secondly, as Winter’s frequently cited thesis on the distinction between direct applicability and direct effect suggests: direct applicability is used in Art 288(2) TFEU, to illustrate that as far as regulations are concerned there is no need for implementation, since

41 Judgment of the Court of 4 December 1974, C-41/74, EU:C:1974:133.
42 As also underlined in TFEU Art 291(1), implementation is in principle realized by the MS. While implementing a directive, the MS are free to choose the form and method for the implementation of a directive (TFEU Art 288(3)).
43 It should be stated that directives still have legal effects before the implementation period expires. E.g Judgment of the Court of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628.
44 Direct effect and direct applicability.
46 Cf. TFEU Art 288 and *Van Gend en Loos* (n 39).
the MS have agreed as a result of their membership, that the Union shall adopt regulations which are directly applicable in the legal systems of the MS.\textsuperscript{48} Thus, implementation of regulations is in principle prohibited.

As regards the Court’s approach, the Court has not been drawing any attention to the distinction between these two concepts. For example, in case \textit{Van Duyn}, the Court held that regulations are directly applicable and can therefore have direct effect. However, as stated above, just because they are directly applicable does not \textit{ipso facto} mean that they have direct effect – it means that direct applicability \textit{may} lead to direct effect.\textsuperscript{49} This view is rightly supported by AG Warner, maintained in case \textit{Santillo} with these words ‘every provision of every regulation is directly applicable … but not every provision of every regulation has direct effect’.\textsuperscript{50} If some criteria are satisfied, a provision of a regulation will have direct effect. The same conclusion stands true for directives. Thus, provision(s) of a directive might under \textit{certain circumstances} also have direct effect. However, which provision and under which circumstances can depend \textit{in concerto}, which is examined in the latter chapters of this thesis. As a starting point, the criteria for direct effect of directives are examined in the following sections.

\subsection*{2.2 Vertical Direct Effect}

In case \textit{Van Duyn} the Court relied partly on the criteria for direct effect as laid down in case \textit{Van Gend Loos},\textsuperscript{51} but it did not provide \textit{clear} guidelines as for how the criteria should be applied in more general circumstances.\textsuperscript{52} In case \textit{Van Duyn}, the Court made a distinction between the obligation to achieve a result and the possibility for the MS to choose the most appropriate method for implementation measures. This possibility is also referred to as \textit{discretion}\textsuperscript{53} left to the MS – discretion on ‘how to implement a directive’ to explain it in very simple terms. The MS generally choose the most appropriate method in line with the legal systems of the MS - presupposed that the directive in question allows for such an option.\textsuperscript{54} In case \textit{Van Duyn}, the directive provision concerned did not leave any \textit{discretion} for the MS on how to implement it; hence the possibility to choose a method for implementation did not exist. The provision unambiguously prescribed the result to be achieved and the provision had therefore direct effect.\textsuperscript{55} In case \textit{Ratti}, the two elements known as \textit{the test or criteria} for direct effect of directives, clearly appeared.\textsuperscript{56} The two elements require a directive provision(s), in order to have direct effect, to be unconditional and (sufficiently) precise.\textsuperscript{57}

The precondition for a provision to be (sufficiently) precise is primarily concerned with the wording of the provision in question.\textsuperscript{58} If the Court finds the provision to be unambiguous, it is (sufficiently) precise.\textsuperscript{59} This can be clarified with an example: a judge must be able to understand a provision in order to be able to apply the provision in question in a case before it. Ambiguous provisions are however not \textit{per se} incapable of providing direct effect.\textsuperscript{60} The lack of clarity can, through \textit{interpretation by national courts}, be ‘solved’ to give effect to the

\textsuperscript{48} TFEU Art 288.
\textsuperscript{49} \textit{Van Duyn} (n 41).
\textsuperscript{51} \textit{Van Gend en Loos} (n 39).
\textsuperscript{52} \textit{Van Gend en Loos} (n 39).
\textsuperscript{53} See discussion under section 5.2 (nn 369-396).
\textsuperscript{54} See discussion under section 5.1(nn 331-368).
\textsuperscript{55} \textit{Van Duyn} (n 41) para 15.
\textsuperscript{56} Judgment of the Court of 5 April 1979, C-148/78, EU:C:1979:110.
\textsuperscript{57} \textit{Ratti} (n 56) para 23-24.
\textsuperscript{58} Prechal, \textit{Directives in EC Law} (n 40) 244.
\textsuperscript{60} Prechal, \textit{Directives in EC Law} (n 40) 244.
ambiguous provision concerned, and if necessary, by the Court in a preliminary ruling.\textsuperscript{61} On the contrary, if the provisions are \textit{too vague} and \textit{general} for the national courts to interpret without adoption of further measures, they will not be able to apply such provisions, since it would be beyond their limits of judicial function.\textsuperscript{62}

The second element for direct effect of directives requires the provisions to be \textit{unconditional}. Directives are by their nature conditional since they require implementation and in principle leave discretion to the MS.\textsuperscript{63} Thus, the time limit for implementation must have expired in order for a provision to have direct effect and consequently for national courts to apply the provision.\textsuperscript{64} Moreover, directives allow the MS a certain period of time (\textit{deadline}) for implementation, which can vary depending on the directive in question.\textsuperscript{65} The time limit for implementation is usually uniform for all addressees, but directives may sometimes have different deadlines for certain MS.\textsuperscript{66} The possibility to invoke a provision of a directive can also be dependent on the adoption of certain further implementation measures. Consequently, the legislative and other measures period can be significantly shorter than the period for achievement of the provisions in question.\textsuperscript{67} If the necessary measures have been adopted, the provision can no longer be considered as \textit{conditional} and may therefore have direct effect. If a provision prescribes further implementation measures, the result does not have to be that the application of another provision of the directive automatically is conditional as well.\textsuperscript{68} Moreover, the time limit (deadline) for implementation must have expired in order for a provision to have direct effect and consequently for national courts to apply the provision, and could thus be seen as a third requirement for direct effect.\textsuperscript{69}

It would not be wrong to state that whether a provision is sufficiently precise and unconditional is related to the level \textit{discretion} left for the MS.\textsuperscript{70} Henceforth, the element of (un)-conditionality of the relevant provision concerns, for instance, derogations, exceptions and reservations. Derogations can be laid down as obligations or options for the MS.\textsuperscript{71} Discretion is further explicated under section 5.2 of the thesis but it should be stated here that options give the MS a wider discretion than obligations.\textsuperscript{72}

Direct effect of directives divided the ‘legal world’ into two camps. Those who denied the possibility of direct effect of directives base their arguments on the wording of Art 249 EC, now Art 288 TFEU, and note that directives are only binding upon the MS and with respect to the result to be achieved. Hence, the effect for individuals could only arise from the implementing measures. To allow direct effect of directives would result in legal uncertainty, affect the principle of special powers and upset the legal system of EU law as laid down by the Treaty, since the distinction between regulations and directives would be blurred.\textsuperscript{73} Directives did not have to be published in the past and direct effect would therefore depend on the awareness of the individual who wishes to invoke a provision. As a result, equality before

\begin{itemize}
\item \textit{Van Duyn} (n 41) para 14.
\item Prechal, \textit{Directives in EC Law} (n 40) 244.
\item Prechal, \textit{Directives in EC Law} (n 40) 245.
\item \textit{Ratti} (n 56).
\item Prechal, \textit{Directives in EC Law} (n 40) 18.
\item Prechal, \textit{Directives in EC Law} (n 40) 246.
\item \textit{Ratti} (n 56).
\item Prechal, \textit{Directives in EC Law} (n 40) 247.
\item Prechal, \textit{Directives in EC Law} (n 40) 246.
\end{itemize}
the law and again legal certainty would be compromised. However, publication is now a requirement under the Treaty. Thus, the argument is no longer of relevance. On the other hand, those who are in favor of direct effect of directives argued that just because Art 249 EC, now Art 288 TFEU defines regulations as directly applicable, it does not preclude directives from having direct effect. Thus, the separation between direct applicability and direct effect seems to have been of more importance for those in favor of direct effect. Moreover, according to those in favor, the acceptance of direct effect of directives would both strengthen the legal protection of individuals and promote integration.

With regard to the Court, its first two legal arguments on which it based itself to give direct effect to directives, are as follow: (i) the binding effect attributed to directives in Art 288(3) TFEU - the bindingness upon the result to be achieved and; (ii) the useful effect (effet utile) of directives. The Court added the effet utile argument in case Van Duyn. The ‘principle of useful effect’ is considered as a basis for direct effect of directives and is merely an interpretation rule, rather than a substantive principle. The principle should be understood as giving the rule its fullest effect and maximum value. The effet utile argument has been recalled in some cases, while the argument of the binding nature of directives has been the predominant in other cases, and yet both arguments have appeared in some cases. Furthermore, the Court held in McDermott and Cotter I that the probability for individuals to rely on a directive:

is based on the fact that directives are binding on the Member States and on the principle that a Member State which has not taken measures to implement the directive within the prescribed period may not, as against individuals, plead its own failure to fulfill such obligations.

The Court further relied on the same reasoning in cases Marshall I and in Faccini Dori, where the Court explicitly held that the case law on direct effect of directives ‘seeks to prevent “the State from taking advantage of its own failure to comply with Union law”’. This is known as the estoppel argument/principle, a third legal argument, which has become the main – strongest legal argument to uphold (vertical) direct effect of directives. Thus, the estoppel principle creates right for individuals in vertical situations as it aims to prevent the MS from taking advantages of their failure, which would result from either non-implementation of a directive or after the implementation period expires. Consequently, the estoppel principle would prevent the recognition of horizontal direct effect because it would

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74 Prechal, Directives in EC Law (n 40) 217.
75 TFEU Art 297.
76 TFEU Art 297(2).
77 Prechal, Directives in EC Law (n 40) 217.
78 Prechal, Directives in EC Law (n 40) 217.
79 See vertical situation under Ch 1 (nn 1-38).
80 Prechal, Directives in EC Law (n 40) 218.
81 Van Duyn (n 41).
82 Prechal, Directives in EC Law (n 40) 219.
87 Marshall I (n 84).
89 Faccini Dori (n 88) (emphasis added).
90 See Ch 1 for definition of horizontal situation (nn 1-38).
mean that if an individual were to be held responsible for the MS’ failure if horizontal direct effect would have been recognized.\(^91\)

The estoppel principle has been criticized as a main legal ‘basis’ for direct effect of directives. The major critique against the principle concerns the fact that it does not fit under the system of EU law.\(^92\) Directives are part of EU law and therefore integrated in the national legal order of the MS from their entry into force.\(^93\) The estoppel principle indicates that the MS must have failed in its obligation to comply with EU law before the directive in question can have any legal consequences. To clarify: there can be no failure before the time period for implementation has expired. However, it can be argued that directives have legal effects also before the time period for implementation has expired. This suggestion is supported by the Court’s reasoning in case Inter-Environnement Wallone,\(^94\) where it held that ‘[a]lthough the Member States are not obliged to adopt … measures before the end of the period prescribed for transposition … they must refrain [during that period] from taking any measures liable seriously to compromise the result prescribed’.\(^95\)

To elucidate, a directive has legal effect with respect to the MS to which it is addressed from the moment of its notification/entry into force. Since the purpose of the transposition period is, in particular, to give the MS the necessary time to adopt transposition measures, they cannot be faulted for not transposing the directive into their national legal order before the expiry of that period. Furthermore, it is during the transposition period that the MS must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period. The MS are not obliged to adopt measures before the end of the prescribed transposition period. Still the Court is of the opinion that it follows from Art 4(3) TEU (sincere cooperation) and the directive itself, as stated in case Inter-Environnement Wallone, that the MS must refrain from taking any measures liable to seriously compromise the result to be achieved by the imminent directive during that time.\(^96\) Thus, the binding effect attributed to directives in Art 288(3) TFEU as to the result to be achieved is not the only practical effect directives seem to have in the legal orders of the MS.

Another objection against the estoppel principle is the fact that the legislator, or sometimes the executive has the primary responsibility to implement the directive. Thus, the directive as such can never be relied upon against the, for example legislator, but will be relied upon against other bodies. But the other authorities as such should not be held responsible for the non-implementation of the directive.\(^97\) However, the Court ruled in case Costanzo that:

\[\text{[i]t 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.}\(^98\)

Consequently, other authorities than the legislator and executive can in fact be held responsible for the non-implementation. It must also be underlined that the Court has also

\(^91\) Prechal, Directives in EC Law (n 40) 223.
\(^95\) Inter-Environnement Wallone (n 95) para 45.
\(^96\) Inter-Environnement Wallone (n 95) para 35: 40-49.
\(^97\) Prechal, Directives in EC Law (n 40) 226.
expanded the concept of ‘state’ in case British Gas, where it held that provisions of a directive could be relied on against:

… a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. 99

To conclude, the Court’s main argument – the estoppel argument – is in our opinion the strongest and most important one since the whole concept to implement directives otherwise would be without legal consequences. This thesis would not exist if unimplemented or improperly implemented directives in the MS did not result in legal consequences. Thus, if there were no ‘pressure’ at all on the MS to implement directives – why implement them? The estoppel principle as such is a way to rationalize EU law. Thus, the estoppel principle is in our view a logical sequel of the effet utile argument. 100

2.3 No Horizontal Direct Effect

As a starting, it should be stated that directives have no horizontal direct effect as confirmed by the Court in case Faccini Dori. 101 In other words, a directive, which fulfills the criteria for direct effect cannot be enforced against an individual. The arguments, which have led to this consequence, are presented below.

As directives are binding upon the MS and not upon individuals, they cannot impose obligations on the latter. The Court ruled in favor of this textual argument in case Marshall I. 102 Thus, there is no horizontal direct effect of directives. 103 Another argument against the recognition of horizontal direct effect is the difference between regulations and directives. As mentioned above, only regulations are capable of direct applicability and may therefore impose obligations on individuals. 104 By recognizing horizontal direct effect, the distinction between regulations and directives would be blurred. 105

The debate concerning the no-horizontal direct effect rule discloses the tension between two objectives. The first one is to give Union law its fullest, possible effect and uniform application in all the MS (the effectiveness objective). The second objective concerns directives’ special character, as intended by Art 288(3) TFEU, which needs to be preserved and differentiated from regulations direct applicability (the specific identity objective). 106 The recognition of horizontal direct effect would imply ‘to recognize a power in the Union to enact obligations for individuals with immediate effect’, even though the Union’s competence to do so is only empowered through the adoption of regulations. 107 This argument of constitutional character was used by the Court in case Faccini Dori, and is an expression for the rule of law and the principle of legality. 108 Additionally, horizontal direct effect would

99 Foster v. British Gas (n 83) para 20 (emphasis added).
100 This is further developed under Ch 3 (nn 128-268).
101 Faccini Dori (n 88).
102 Marshall I (n 84).
103 Marshall I (n 84).
107 Faccini Dori (n 88) para 25 (emphasis added).
108 Prechal, Directives in EC Law (n 40) 256.
have jeopardized the principle of legal certainty, as there was no legal requirement to publish directives. As stated above, directives must be published today but the fact that directives now are subject to publication does not mean that the principle of legal certainty is out of the discussion or not of relevance anymore. The Court has held that ‘the principle of legal certainty prevents directives from creating obligations for individuals’, because such a situation would be legally insecure since individuals must be able to rely on national law. As Prechal puts it, the principle of legal certainty is still relevant for the discussion and the author successfully shows two ‘conflicting’ angels about horizontal direct effect of directives within the context of legal certainty:

[...] in the one hand there is the legal uncertainty for those who are entitled to expect that their position as safeguarded by the directive will be protected. On the other hand there is the legal certainty for those who would be confronted with an obligation, which is not laid down in national law.

Thus, while the no-horizontal direct effect rule could upset the ‘rights’ of individuals protected in a directive, it would also protect individuals by not placing an obligation, which does not arise from national law, on them. Furthermore, the estoppel principle has already been yet another argument to support the no-horizontal direct effect rule by aiming to secure that the MS should not be able to rely on or take advantages of its own failure against individuals.

The main argument that supports the recognition of horizontal direct effect should also be mentioned. To recognize horizontal direct effect could increase the effectiveness of directives. Horizontal direct effect would push the MS to implement the directives within the time limit and, as far as possible, safeguard the uniform application of EU law and also individual rights which derive from it. Individual rights deriving from Union law can be – and have already been – compromised and subjected to discrimination as a result from the denial of horizontal direct effect.

Case Van Duyn is the starting point of the discussion about direct effect of directives. Thus, ‘the cases following Van Duyn ... concentrated excessively on creating a parallelism between directives and regulations’. The debate in doctrine has been concerned with this parallelism between vertical and horizontal direct effect, and whether it can be upheld with the ‘evolutions’ created by the Court, which undermines the no-horizontal direct effect rule. Furthermore, several AGs’ have advocated the abandonment of this distinction, since it should be considered out of date. However, despite the ‘pressure’ from the doctrine and some AGs’, the Court has reiterated the prohibition of horizontal direct effect in very strong

109 Prechal, Directives in EC Law (n 40) 257.
110 Judgment of the Court (Fifth Chamber), 7 January 2004, Wells, C-201/02, EU:C:2004:12 para 56.
111 Prechal, Directives in EC Law (n 40) 257.
112 Prechal, Directives in EC Law (n 40) 257.
113 Prechal, Directives in EC Law (n 40) 258.
116 E.g Opinion of Mr Advocate General Lenz delivered on 9 February 1994, Faccini Dori, C-91/92 para 73.
terms in the Marshall I\textsuperscript{117} case, and confirmed and applied the rule in those strong terms in the Faccini Dori\textsuperscript{118} case. Moreover, the rule has since then been that:

\[\text{[E]ven a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.}\textsuperscript{119}\]

However, there has been some ‘evolutions’ introduced by the Court, which could easily be interpreted as ‘exceptions’ that undermine the no-horizontal direct effect rule. The first evolution is, as previously stated above, \textit{broad definition of state} – the Court’s broad understanding of what constitutes a ‘state’. Firstly, such a broad definition of state, which allows private persons to be considered as an \textit{emanation of the state} under certain circumstances, has blurred the distinction between vertical and horizontal direct effect in fact by broadening the scope of \textit{vertical} direct effect.\textsuperscript{120} British Gas is a clear example of how the Court has broadened the scope of \textit{vertical} direct effect to include a ‘private company’ that carries out state functions.\textsuperscript{121} Secondly, it would not be wrong to state that this approach of the Court has undermined the estoppel principle, as a company, which was private at the time of the case, was held responsible for the non-implementation by the state of the directive at issue. This first evaluation or solution to neutralize the prohibition against horizontal direct effect seems to have been developed in the Court’s case law with the aim of preserving a balance between the tensions of giving full effect to EU law and maintain the special character of directives as indirect legislation.\textsuperscript{122} The second evolution is \textit{incidental direct effect}, which is examined in the following chapter. The third evolution introduced by the Court is the obligation of \textit{consistent interpretation},\textsuperscript{123} which is examined in the following chapters of this thesis. Briefly, the duty of consistent interpretation forces national courts to act loyal within their competence in order to give EU law its fullest possible effect.\textsuperscript{124} And consistent interpretation sometimes amounts to the existence of horizontal direct effect even though consistent interpretation has its limits.\textsuperscript{125} On that point, it should be stated that the Court has introduced \textit{state liability} as a remedy for breach of EU law. Thus, the MS can under certain conditions become liable for damages suffered by an individual due to the non-implementation or even an improper implementation of a directive.\textsuperscript{126} It appears to exist a desire from the Court’s side, that national courts should give not only the most effective protection to individual rights, which steam from EU law,\textsuperscript{127} but also the most effective remedies for breach of EU law by the MS.

The principles of \textit{incidental direct effect} and \textit{consistent interpretation}, which undermine or ‘soften’ the no-horizontal direct effect of directives rule are discussed in the following chapter 3.

\textsuperscript{117} Marshall I (n 84).
\textsuperscript{118} Faccini Dori (n 88).para 19 - 25.
\textsuperscript{119} Judgment of the Court (Grand Chamber) of 5 October 2004, Pfeiffer, Joined Cases C-397 to 403/01, EU:C:2004:584 para 109.
\textsuperscript{121} Foster v. British Gas (n 83).
\textsuperscript{122} Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 106) 82-90.
\textsuperscript{123} Also known as ‘harmonious interpretation’ or ‘indirect effect’.
\textsuperscript{125} Prechal, Directives in EC Law (n 40) 259.
\textsuperscript{126} This is discussed under section 5.1; see Judgment of the Court of 19 November 1991, Francovich and Bonifaci v Republic of Italy, Joint Cases C- 6 and 9/90, EU:C:1991:428.
\textsuperscript{127} Prechal, Directives in EC Law (n 40) 250.
3 Exceptions to the Principle ‘Vertical but not Horizontal Direct Effect’

3.1 Incidental Direct Effect

In case *Marshall I,* later confirmed in case *Faccini Dori,* the Court has adopted the position that unimplemented directives are not capable of having horizontal direct effect. However, this basic rule has been subject to constant resentment in the doctrine. Perhaps the Court introduced so-called incidental direct effect of directives because of the pressure put on it from the doctrine. The term *incidental direct effect* is used in the doctrine to describe the Court’s analysis of certain problematic cases. The cases are problematic because a private party has been allowed by the Court to rely on the provision(s) of a directive in a horizontal situation, which will adverse the legal situation of another private party.

The first group of cases concerns disputes, which are *prima facie* horizontal, but after a careful legal consideration appears to be *vertical* in character, due to the presence of a public element. *Wells* may illustrate the situation. Ms. Wells challenged a permission given to another private party in accordance with the national law because the permission was given without due consideration to an obligation imposed on the MS in the directive. The permission was withdrawn, which subsequently affected the legal situation of the other private party. As the MS deprived the private party its right’s, it could seem that the situation amounted to inverse direct effect. However, the Court held that Ms. Wells was entitled to invoke and rely on the directive concerned, despite the ‘adverse repercussions’ on the other private party, and it rejected the argument of inverse direct effect.

The second group of cases has allowed private parties to invoke a provision(s) of a directive in order to set aside the incompatible national measures and consequently the private parties have acquired legal advantage in a horizontal dispute. According to Dougan, it is possible to divide this second group of the judgments that has led to incidental effect into two categories. The first one concern unimplemented directives, which includes remedial provisions. For example, in case *Draehmpaehl,* which concerned a reparation claim against a private party based on different in treatment prohibited by Directive 76/207, the Court held that the provision in the directive invoked precluded the application of domestic rules, since the domestic rules prevented the award of an effective sanction against the defaulting

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132 Also known as ‘triangular’ direct effect.
133 See Ch 1 (nn 1-38).
136 Judgment of the Court (Fifth Chamber), 7 January 2004, C-201/02 *Wells*, EU:C:2004:12.
137 See Ch 1 (nn 1-38).
138 *Wells* (n 136).
procedure for the provision of technical standards and regulations of consistent interpretation ([Judgment 26 relating to self-supremacy] [2007] 44 CML Rev, 931, 936.

...leaves several cases, which involves substantive provisions of directives. For example, in case Bellone the Court held that the Italian national law was inconsistent with the aim of the Directive 86/653 [147] with respect to self-employed commercial agents. However, the Court made no reference to the fact that this was a dispute between two private actors. What the Court should have done, in AG Cosmas opinion, was to apply the doctrine of consistent interpretation instead. [149] Notwithstanding, the Court once again allowed the private individual to invoke and rely on a provision of a directive in order to have the incompatible national measures disregarded. The legal status quo resulted in significant advantage for the individual in a horizontal dispute with another private party. [150] There are several previous cases, which are similar to case Bellone, where the Court unambiguously ruled out the possibility of horizontal direct effect, but applied incidental direct effect. Consequently, this leaves several cases, which involves substantive provisions of a directive, with no reference to the latent possibility of consistent interpretation. [152] For example in case CIA Security, which concerned a dispute between two rival manufactures of burglar alarms, the plaintiff alleged that the defendant’s alarm products failed to comply with the Belgian technical standards. Thus, the defendant should be restrained from marketing its alarm systems. However, the defendant countered claimed that the Belgian national rules were in breach of the relevant directive, which obliged the MS to notify the Commission of their national rules

143 Draehmpaehl (n 142).
145 Judgment of the Court of 10 April 1984, Von Colson v Land Nordrhein-Westfalen, C-14/83, EU:C:1984:153, see section 3.2 for facts of the case.
146 This is thoroughly discussed under Ch 4 (nn 269-330).
149 Opinion of AG Cosmas delivered on 29 January 1998, Bellone v Yokohama, C-215/97, EU:C:1998:36 paras 26-28:38. This is further discussed under the next section.
150 Bellone v Yokohama (n 148).
152 Dougan, "The "Disguised" Vertical Direct Effect of Directives?" (n 140) 594. See also section 3.2 on the duty of consistent interpretation (n 175-209).
concerning technical standards. The Court held that the obligation to notify was indeed (sufficiently) precise and unconditional and thus enabled the individual to rely upon the directive before the national court. Intrinsically, these technical national rules, which were not informed of and consequently breached the directive, could not be enforced against a private party.\(^{155}\)

The concept of incidental direct effect was further discussed in case Unilever Italia. Unilever had supplied Central Food with a quantity of olive oil. Central Food rejected the delivery on the ground that the labeling did not meet the requirements for olive oil, as laid down by the Italian legislation. The Italian legislation had been notified to the Commission, but the Italian government had not observed the ‘standstill’ obligation, which required the MS to wait a defined period before the law could enter into force.\(^{156}\) The Court stated that:

> [the] national court is required, in civil proceedings between two individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation, which was adopted during a period of postponement of adoption prescribed in … [the] directive.\(^{157}\)

Thus, the directive in question did not impose substantive obligations on the private parties, but mere procedural requirements on the MS. Although the situation should be subject to the no-horizontal direct effect rule, the national legislation could not be applied in the dispute between the private parties since the Italian authorities had not observed the ‘standstill’ period. Hence, reliance on the directive can be seen as the indirect enforcement of an obligation on which the authorities had defaulted.\(^{158}\) The nature of the substantive obligation imposed by the directive at issue decided the operations of the no-horizontal direct effect rule. This was strongly objected by AG Jacobs, because he believed that ‘such effects would be difficult to justify in the light of the principle of legal certainty’.\(^{159}\)

Yet another example to put in comparison is the directive\(^{160}\) in case Faccini Dori,\(^{161}\) which was intended to create rights and obligations on private parties. If Ms. Dori had been able to rely on the ‘standstill’ period expressed in the directive, in the absence of implementation by the Italian authorities, the result would have been a right enforced by Ms. Dori and a duty imposed on the seller. According to Dashwood, this is what distinguished the situation in case Faccini Dori from the situation in case Unilever Italia: the directive in the Unilever Italia case imposed duties on the MS and thus reliance on the directive may have imposed an indirect obligation – but reliance on the directive in the Faccini Dori case would have imposed a direct obligation.\(^{162}\) This logic holds true in case Wells as well.\(^{163}\) Reliance on the directive in question by Ms. Wells did not entail any enforcement of obligations on the other

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\(^{157}\) Unilever Italia SpA v. Central Food (n 156) para 52.

\(^{158}\) Dashwood, 'From Van Duyn to Mangold via Marshall’ (n 134) 97.


\(^{161}\) Faccini Dori (n 129).

\(^{162}\) Dashwood, 'From Van Duyn to Mangold via Marshall’ (n 134) 96-7.

\(^{163}\) Wells (n 136).
private party. In fact, the directive\textsuperscript{164} did not contain such provisions at all. The ‘adverse repercussions’ were merely an incidental consequence as opposed to a direct consequence.\textsuperscript{165}

Besides AG Jacobs critique in case \textit{Unilever Italia}, the case has been severely criticized in the doctrine for being unclear and undermining distinction between vertical and horizontal direct effect.\textsuperscript{166} Analogously, in case \textit{Unilever v Smithkline Beecham}, which concerned Austrian national rules in regard to advertisement of cosmetics products, the Court held that a private actor might be able to rely on a provision of a directive against another private actor on the basis of inconsistent domestic implementation legislation.\textsuperscript{167}

In case \textit{Pafitis} a Greek public authority that exercised its power in relation to financially troubled banks by raising their capitals, failed to comply with the provisions of the Directive \textit{77/91},\textsuperscript{168} specifically the provisions requiring a general meeting for the banks shareholders. One group of shareholders brought an action against the rest, claiming that the rise in the capital was in breach of EU law. The Court ruled that the shareholders could rely on the directive, since it stemmed from a defaulted administrative measure adopted by the MS.\textsuperscript{169} Yet again, this was a dispute between two private parties, but the horizontal situation did not affect the possibility of enforcing a provision of an unimplemented directive before a national court and against another private party.

Regardless of the above-mentioned cases decided by the Court, the same Court has consistently stressed that a directive is incapable of having horizontal direct effect.\textsuperscript{170} This leads to the conclusion that the judgments on incidental direct effect should be treated as ‘mere blips in the otherwise uniform momentum of the Dori rule and would justify accusations that the Court of Justice is pursuing a confusing pattern of inconsistent institutional practice’.\textsuperscript{171}

To conclude, in our opinion, the incidental direct effect rulings presented above amounts to horizontal direct effect. This view is built on the fact that those rulings do not observe the reasons behind the no-horizontal direct effect rule. To clarify, two leading arguments against horizontal direct effect are: firstly individuals should not be held responsible for the MS’ failure to implement a directive,\textsuperscript{172} and secondly directives do not possess the ability to enforce legal effects as between individuals with immediate effect without implementation measures.\textsuperscript{173} Moreover, the incidental direct effect rulings have affected the legal position of private parties due to the MS’ failure to implement the directive. Furthermore, obligations have been indirectly enforced and thus created immediate effect as between individuals.\textsuperscript{174}

\begin{thebibliography}{9}
\bibitem{165} Dashwood, 'From Van Duyjn to Mangold via Marshall' (n 134) 98.
\bibitem{167} Judgment of the Court (Fifth Chamber) of 28 January 1999, \textit{Unilever v. Smithkline Beecham}, C-77/97, EU:C:1999:30.
\bibitem{168} Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1976] OJ L 26/1.
\bibitem{171} Dougan, ‘The ” Disguised” Vertical Diret Effect of Directives?’ (n 140) 596 (emphasis added).
\bibitem{172} See text to (n 87).
\bibitem{173} See text to (n 108).
\bibitem{174} For further discussion see text to (n 107).
\end{thebibliography}
3.2 Consistent Interpretation

3.2.1 The Development since case *Von Colson*

The duty of consistent interpretation – also known as the principle of harmonious interpretation or indirect effect – appeared for the first time in the vertical situation illustrated in case *Von Colson*. The authors of this thesis will refer to the term *consistent interpretation* because it is, in our opinion, more clear and precise than *indirect effect*.

The directive in case *Von Colson* concerned gender discrimination in regard to access to employment. The Directive required the MS to adopt sanctions sufficiently effective to compensate victims of gender discrimination and efficient enough to discourage gender discrimination. However, the directive did not prescribe any specific sanctions, thus leaving the matter to the MS to choose between the different solutions suitable for achieving its objective. According to the German (implementing) national rule, compensation was to be paid. Though, the amount of compensation covered the losses actually incurred through reliance on an expectation and was as such limited to a purely nominal amount (the amount was limited to the reimbursement of travel expenses incurred for the application). Two female applicants who had applied for a job at a German state men prison were discriminated against males: two less-qualified men were accepted for the job. Subsequently, the two female applicants brought a case and asked for a better compensation. The Court ruled that the directive in question was not directly effective because the directive did not include an unconditional and (sufficiently) precise obligation in regard to the form of sanctions for discrimination. In other words, the directive did not require the MS to provide for specific legal sanctions in respect of a breach of the principle of equal treatment regarding access to employment. Thus, the MS had broad discretion to choose the form and to decide on who would be entitled to compensation.

However, the MS’ obligation arising from a directive to achieve the result envisaged by that directive and their duty under Art 4(3) TEU to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation, is binding on all the authorities of the MS including the national courts. Thus, the Court ruled that in applying the national law and in particular the provisions of a national law specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result. Although, full implementation of the directive does not require any specific form of sanction for discrimination, the aim of the directive does entail that the sanction must guarantee real and effective judicial protection. An analysis of the judgment reveals that achieving the objective of the directive requires that, if a MS chooses to penalize breaches of the prohibition (gender discrimination) by the award of compensation, that MS must ensure that the compensation envisaged is effective and has a deterrent effect. Further, that compensation must, in any event, be adequate in relation to the damage sustained. Thus, a compensation, which was limited to travel expenses incurred by the victims of discrimination did not meet the aim of the directive. The other outcome of the case is that there is an obligation addressed to all national authorities including national courts of the MS to ‘interpret national law’ in the

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175 *Von Colson* (n 145).
178 *Von Colson* (n 145) para 27.
179 *Von Colson* (n 145) para 26.
180 *Von Colson* (n 145) para 18 – 25.
light of the wording and purpose of the directive. This obligation arises when a directive does not have the capacity to have direct effect irrespective of whether the situation is vertical or horizontal. Finally, the ruling of the Court in case Von Colson has also given way for effective national remedies.

According to Dashwood, consistent interpretation is constructed well in order to conciliate the effectiveness objective with the specific identity objective and in the same time enable the principle of legal certainty to balance evenly; at least in situations where competing individual interests bear the risk of being affected by the MS failure to properly implement a directive.\(^\text{181}\)

The duty of consistent interpretation is explained by the Court as the application of the general principle of sincere cooperation, which is binding on all authorities of the MS including the courts.\(^\text{182}\) Meaning that national courts must interpret national provisions, whether adopted before or after the directive in question, ‘as far as possible, in the light of the wording and purpose of the directive’, to reach the result sought by the directive concerned and which should be achieved in accordance with Art 288(3) TFEU.\(^\text{183}\) Thus, the requirement envisaged by consistent interpretation is that the national authorities (including national courts) of the MS are expected to take all appropriate measures, whether general or particular, in order to fulfill the obligations arising from the relevant directive.\(^\text{184}\) Case law suggests that this requirement imposed on the national authorities and national courts is ‘inherent in the system of the Treaty, since it permits the national court … to ensure the full effectiveness of Union law when it determines the dispute before it’.\(^\text{185}\)

While case Von Colson\(^\text{186}\) could correctly be seen as vertical, the groundbreaking case that concerned a horizontal dispute is case Marleasing.\(^\text{187}\) The case concerned a dispute between Marleasing SA and La Comercial Internacional de Alimentación SA (La Comercial) in Spain. The defendant was established in the form of a public limited company, which was a private company. Marleasing claimed that the founder’s contract establishing La Comercial was void on the ground that the establishment of the company ‘lacked cause’ because it was a sham transaction and was carried out in order to defraud the creditors. Consequently, Marleasing asked for nullification of declaration of La Comercial. According to the Spanish Civil Code, contracts without cause or whose cause was unlawful had no legal effect, they could be declared ‘void’. However, the Union directive\(^\text{188}\) did not provide ‘contract without cause or whose cause is unlawful’ as a ground for nullity. Spain had not implemented the directive, even though the implementation period had expired, and thus La Comercial claimed that declaration for nullity was impossible in the light of the directive. The Court ruled, in the light of the case Von Colson,\(^\text{189}\) that the MS are obliged to interpret their national rules, regardless of implementation or not, as far as possible in order comply with the purpose of the directive.\(^\text{190}\) As the Court stated:

\(^\text{181}\) Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 134) 94.
\(^\text{183}\) Von Colson (n 145) para 26.
\(^\text{184}\) Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 134) 90.
\(^\text{185}\) Judgment of the Court (Fifth Chamber) of 15 May 2003, Mau, C-160/01, EU:C:2003:280 para 34: Judgment of the Court (Grand Chamber) of 5 October 2004, Pfeiffer: Joined Cases C-397 to 403/01, EU:C:2004:584 para 114 (emphasis added).
\(^\text{186}\) Von Colson (n 145).
\(^\text{187}\) Marleasing (n 182).
\(^\text{188}\) First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1990] OJ L 65.
\(^\text{189}\) Von Colson (n 145)
\(^\text{190}\) Marleasing (n 182).
It follows that the requirement that national law must be interpreted in conformity with provision of Directive...precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in the provision of the directive in question.\(^{191}\)

This means that even if the directive provision concerned did not involve a ground for nullity but the Spanish national rules did, the national courts are still obliged to interpret their national laws in line with the purpose of the directive concerned.

In the recent case \(^{192}\) Dominguez the Court confirmed its line of reasoning in regard to consistent interpretation.\(^{192}\) Case Dominguez concerned the right to paid annual leave benefits. A worker had been home on sick leave over a year due to an accident and was denied paid annual leave because the French national rule required that an employee had worked at least 10 days the present year. This was contrary to the Directive 2003/88\(^{193}\), which required that all employees were entitled to at least 4 weeks of vacation. The Court held that the national courts are obliged to interpret the whole body of national law in the light of the directive and thus abide by the principle of consistent interpretation.\(^{194}\)

However, the obligation for the national judge to interpret national law has its limits though. The first limitation is that the national judge must interpret national law in the light of the wording and purpose of the directive as far as possible. The broadness of as far as possible is not clear in the case law of the Court; however, the case law clearly prohibits interpretation contra legem of the national rule.\(^{195}\) This limitation finds its support in guaranteeing the principle of legal expectations (including the non-retroactivity principle).\(^{196}\) Noteworthy is that in case \(^{197}\) Marleasing,\(^{197}\) to interpret the national rule in the light of the wording and purpose of the directive seemed to amount to a contra legem interpretation. Therefore, in our opinion, such an interpretation have been limited with respect to the principle of legal expectations.

Further, the second limitation on the duty of consistent interpretation is that the obligation arises only after the time period for the implementation of the directive in question has expired.\(^{198}\) The third limitation on the duty of consistent interpretation is that, as far as vertical situations are concerned, it applies only if an individual wishes to benefit from a MS default and not for the authorities to benefit against the individual – the duty does not compensate for the absence of reverse vertical direct effect.\(^{199}\)

Consistent interpretation ensures that the result prescribed by the directive is achieved and is therefore a secondary method, which must only be considered if there is no direct effect of the directive.\(^{200}\) Moreover, in case \(^{201}\) Johnston, the Court stated that the situation could be solved both by means of consistent interpretation and by means of direct effect, depending on whether the claim was directed against the state or a private employer.\(^{201}\) If the directive lacks

191 Marleasing (n 182 para 9 (emphasis added)).
192 Judgment of the Court (Grand Chamber) of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33.
194 Dominguez (n 192) para 28-29.
196 Michael Dougan, 'When World’s Collide!' (n 1449 947).
197 Marleasing (n 182).
198 Judgment of the Court (Grand Chamber) of 4 July 2006, Adeneler and Others v ELOG, C-212/04 EU:C:2006:443.
199 Dashwood, 'From Van Duyn to Mangold via Marshall' (n 134) 92.
200 Dashwood, 'From Van Duyn to Mangold via Marshall' (n 134) 93.
direct effect and consequently requires consistent interpretation, the national judge is obliged, as held in for example the *Dominguez*\(^{202}\) case, which was presented above, ‘to consider national law as a whole’, in order to identify the existence of any ‘interpretative method’ which can solve the conflicts between national rules.\(^{203}\) National courts should not, when complying with the duty of consistent interpretation, focus on the incompatible provision of its legal system. Instead, the national courts must focus on finding a method of interpretation, which enables it to set aside the incompatible provision and to replace it with another, so as to produce the result prescribed by the directive in question.\(^{204}\)

According to the authors of this thesis the duty of consistent interpretation undermine the no-horizontal direct effect rule. In our view, generally the outcome of the cases concerned with the duty of consistent interpretation is not notably less beneficial for the applicant than it would have been if horizontal direct effect would be recognized. Furthermore, the outcome could be less beneficial for the applicant in cases concerned with the duty of consistent interpretation if any limitation were to be applied. However, when the Court does not seem to observe the limitations, the difference between no-horizontal direct effect and the duty of consistent interpretation becomes vague.

In EU law, the approach of the Court is that secondary law must *as far as possible* be construed in conformity with primary law. Thus, interpretation must be made in accordance *not only* with the Treaty,\(^{205}\) but also in accordance with the general principles of EU law.\(^{206}\) The same stands true for fundamental rights (human rights) protected by EU law\(^ {207}\) as well as for provisions of international law.\(^{208}\) In the aftermath of the development of consistent interpretation and incidental direct effect, general principles of EU law came to construe another possible way around the prohibition of horizontal direct effect of directives.\(^{209}\) In the following section, direct effect of general principles of EU law, which has been a debated issue in the doctrine, is examined.

### 3.2.1 General Principles of EU Law

General principles of EU law have multiple functions:\(^{210}\) (i) they can be used by the Court to fill gaps (un)intentionally left by the EU legislator, (ii) they can serve as a tool for interpretation since both EU law and national law must be interpret in the light of general principles, and (iii) they can be relied upon as judicial review. Thus, general principles serve to create autonomy and coherence throughout the EU legal system.\(^{211}\) In case *Kolpinghuis* the Court added that general principles of EU law are possible limitations to consistent interpretation.\(^{212}\) The Court held that:

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\(^{202}\) *Dominguez* (n 192).

\(^{203}\) Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 134) 93.

\(^{204}\) Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 134) 93.


\(^{212}\) See text to (n 195-199) E.g principles of legal certainty and non-retro-activity.
[the] obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Union law and in particular the principles of legal certainty and non-retroactivity.213

In the first groundbreaking case Mangold, which concerned a claim of discrimination on grounds of age, the Court ‘discovered’ a new general principle of EU law.214 Mr. Mangold was subjected to treatment (age-discrimination) contrary to Directive 2000/78, which establishes a general framework for equal treatment in employment.215 Mr. Mangold alleged discrimination was the result of an amendment to the national legislation, which implemented the provisions of the directive. The amendment in question allowed for exceptions to the working-conditions for people over the age of 52, an age which had previously been 58. Mr. Mangold was 56 at the time of the dispute and thus fell within the scope of the exceptions envisaged by the amendment. As the MS in question prolonged time period for implementation, he would be over the age of 58 when the time period expired.216

The directive concerned allows for some differential treatment if it is objectively and reasonably justified. According to the MS in question, the national legislation promoted employment of older workers and permitted differential treatment based on age. However, the national legislation failed to pass the Court’s strict proportionality test, and the MS could not justify it.

The two strong objections raised by the MS in dispute, in respect of the invoked directive, were: (i) the dispute was horizontal (between an employee and his private sector employer), and (ii) the time limit for implementation had not expired (the national authorities had extended the implementation period, which was made in accordance with the directive in question). This should mean that the directive could not be invoked even in a vertical situation before the national court. However, the Court did not agree with these objections and the Court’s judgment provided two different reasoning’s to circumvent the objections.217

The Court held that Mr. Mangold should be able to rely on the directive, even before the end of the prescribed period, because it would otherwise be impossible for individuals in his situation to benefit from the result to be achieved by the directive. The decision was justified in the light of the Inter-Environnement Wallone218 case (the judgment that has set the principle that the MS must refrain from taking any measures that will seriously compromise the achievement of the prescribed result in a directive even before the time for implementation of that directive expires).219 What the Court missed in its judgment ruled in case Mangold is that the previous case law of the same Court suggests that individuals cannot rely, as against the state, on the directive before national courts ‘in order to have a pre-
existing national rule ... disapplied," during the period for implementation. If directives do not have horizontal direct effect and the principle recognized in case Inter-Environnement Wallone" was recognized in a vertical situation – it is unclear how the Court could reach to that conclusion in case Mangold (the individual was able to rely on the directive to have the national legislation disapplied and to benefit from the directive). AG Tizzano rejected the Court’s conclusion on the subject matter as the decision was in fact contrary to the no-horizontal direct effect rule in his opinion.

The Court’s second reasoning suggested that it is unnecessary for individuals such as Mr. Mangold to rely on the directive provisions since it ‘does not itself lay down the principle of equal treatment in the field of employment and occupation’. Based on the ruling in case Marshall I, the Court stated that ‘a directive may not of itself impose obligations on an individual’. And the Court surprisingly underlined that general principles of EU law may under certain circumstances impose obligations on individuals, and such obligations can be embodied in directives.

In the case at hand, the Court ‘discovered’ that the principle of non-discrimination based on age was in fact a general principle of EU law expressed in the directive. Thus, the principle of non-discrimination was applicable independently of the entry into force of the directive. The Court concluded that:

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\text{it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Union law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.}
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This suggests that directives per se cannot have horizontal direct effect, but general principles of EU law may have horizontal direct effect. Another issue, which was stressed by Dashwood, which certainly needed clarification, is the requirement that, for general principles of EU law to apply, the situation must fall within the scope of EU law. Mangold past the test since the national legislation concerned was adopted as an implementing measure, but what if the case concerned discrimination based on age with respect to a national provision, adopted by a MS autonomously. Undoubtedly this issue requires further clarification by the Court.

In the light of the equivocal decision in case Mangold, clarifications were needed as to whether general principles of EU law themselves can have direct effect. The judgment was welcomed in a sense, but yet criticized in the doctrine for being far from compelling. In the
second groundbreaking case Kucukdevici,233 the Court was referred two questions by a preliminary ruling – the first one being of importance for this essay, and the second question will therefor be left outside.234 The first question (the relevant question) was whether a piece of national legislation, such as that in the case, constituted a difference in treatment on grounds of age prohibited by EU primary law or Directive 2000/78.235 According to the Court, the case had been assessed on the basis of the principle of non-discrimination on grounds of age, since the Directive 2000/78 simply gave an expression to this principle.236 The national court was found to be under the obligation to dis-apply the national provision contrary to the principle of non-discrimination.237

An interesting aspect is that the general principle of non-discrimination based on age was in fact ‘discovered’ by the Court in case Mangold.238 The Court’s finding of such a principle was based on its recognition in different international instruments and in the constitutional traditions common to the MS. Questionable foundations since the preamble of the directive includes several fundamental conventions, but only one of them explicitly refers to age as a basis for discrimination - although in a very specific context.239 In regard to the constitutional consensus among the MS, only two had recognized the principle at the time of the judgment.240 The long transitional period of the directive also indicated that there was no consensus on the prohibition of discrimination based on age before.

The factual situation in case Kucukdevici was considered by the Court to fall within the scope of EU law because the national provision in question concerned a matter that falls within the ambit of the directive.241 However, national measures have traditionally been reviewed for compatibility with general principles of EU law if: (i) they directly implemented EU law, or (ii) where they relied upon derogation permitted under EU law.242 But according to the judgment in case Kucukdevici, general principles of EU law apply to a case in concreto if it concerns a directive and the time limit for the transposition has expired, as long as the national measure falls within the material scope of the directive.243

Case Kucukdevici confirms that directives do not have horizontal direct effect and clarifies that the principle of non-discrimination based on the ground of age is capable of having such effect. The Court seems to have attacked the issue by avoiding the difference between vertical and horizontal situations and instead addressed the problem from the angle of supremacy of EU law. Hence, if the national legislation had to be set aside, it was because of the incompatibility with the general principle of non-discrimination on the grounds of age, and


234 The second question was whether, in hearing proceedings between individuals, in order to dis-apply a national provision that is considered to be contrary to EU law, a national jurisdiction must first, to ensure protection of the legitimate expectations of persons subject to the law, make a reference to the Court under Article 267 TFEU, so that the Court can confirm that the legislation is incompatible with EU law. See Judgment of the Court (Grand Chamber) of 19 January 2010, Kucukdevici, C-555/07 EU:C:2010:21.


236 Kucukdevici (n 233) paras 19-22.

237 Kucukdevici (n 233) para 51.

238 Mangold (n 214).


241 Kucukdevici (n 233) para 25.

not because of the incompatibility with the Directive 2000/78. The directive only gave expression to the general principle of EU law.

Thus, the Court adhered to the fact that directives have no horizontal direct effect, but expanded the applicability of EU law to horizontal situations, which can be considered to fall within the material scope of a directive. Thus, did the Court in fact introduce horizontal direct effect of general principles of EU law? The result seems to be the same, national law will not be applicable because it is not in conformity with EU law. Furthermore, does this mean that general principles of EU law are capable of producing legal effect on their own? The question still remain after the Kücükdevici judgment. The authors of this thesis believe that, from a formalistic approach, general principles of EU law should be capable of producing legal effects on their own, since they are primary sources of EU law and thus, higher than regulations in the hierarchical order.

Schiek is of the opinion that the Court did not acknowledge any autonomous effect of the general principle of non-discrimination on the grounds of age itself. The Court used Directive 2000/78 to bring the case within the scope of EU law, but the Court also stressed that the directive was an expression of the principle of non-discrimination irrespective of age and it thus used the directive to set the limits of the principle and possible justifications. Hence:

… the Court did not acknowledge autonomous effect of a clause in the Charter between private parties, which would possibly contradict Article 51 of the Charter itself. Neither did it endorse direct effect of a general principle of EU law.

General principles of EU law cannot provide horizontal direct effect unless the case in question is concerned with an existing EU legislation that specifies – gives expression to a general principle. To conclude, general principles of EU law can provide horizontal direct effect if the material scope is covered by the directive in question, which has been confirmed in more recent cases such as case Danosa. Ms. Danosa was a member of the Board of Directors in a capital company when she was dismissed on grounds preliminary related to her pregnancy. The dismissal was done in accordance with the MS national law, however the Court stated in its preliminary ruling that the removal of Ms. Danosa was contrary to the principle of equal treatment. In such a situation, when national rules are contrary to the general principle, the former must be set aside. As in Kücükdevici, the judgments seem to entail consequences originating from supremacy of EU law – as affirmed in the Court’s ruling in cases Costa v ENEL and Simmenthal.

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247 See Ch. 1 (nn 1-38).
248 Schiek, 'Constitutional Principles and Horizontal Effect' (n 245) 373.
249 Schiek, 'Constitutional Principles and Horizontal Effect' (n 245) 373.
250 Schiek, 'Constitutional Principles and Horizontal Effect' (n 245) 373.
252 Judgment of the Court (Second Chamber) of 11 November 2010, C- 232/09, EU:C:2010:674,
253 Danosa (n 252) para 73-4. The right of equal treatment is a general principle of EU law. The principle is embodied in more than one directive and it remained a mystery which directive that should apply in the case at hand.
255 Judgment of the Court of 28 June 1978, Simmenthal, C-106/77 EU:C:1978:139. This is discussed under section 4.1 (n 269-284).
3.3 Horizontal Direct Effect?

As presented above, the Court seems to be very determined to adhere to the no-horizontal direct effect rule on paper, but it is circumventing it in practice through the several exceptions introduced by the Court itself. Those exceptions amount to horizontal direct effect of directives. The main argument against horizontal direct effect of directives is that directives are secondary legislation, which imposes obligations on the MS. Thus, to allow for horizontal direct effect of directives would jeopardize the legal certainty of individuals who would be imposed on obligations, which are not laid down by national rules. However, the legal certainty of individuals who expect to have their legal position (their rights) safeguarded by the directive would be better covered. The Court has made some effort to protect the latter group of obligation holders through its exceptions, but not without consequences on the former – even though those consequences are ‘only’ indirect in character.

Directives have imposed on the MS the obligation to ‘pursue a particular course of conduct’, with the aim to create coherence in the Union. On the contrary, with several exceptions (resembling horizontal direct effect) created by the Court, the situation does not reflect coherence in the Union and uniform application of EU law.

Today the protection of fundamental rights has become an issue of concern in the Union, and still the areas of security, freedom and justice are facing difficulties in the protection of such fundamental rights. It can be argued that the no-horizontal direct effect rule discourage the development in safeguarding fundamental rights for the reasons, as putting it in Dougan’s words: there is now a difference between the rights of citizens working for the public authority or for the private sector; citizens in the Union have different rights depending on the varying degrees of centralization or privatization, which distinguish the infrastructure of public service provisions as between the MS.

Furthermore, due to the evolutions in the Court’s case law, Prechal suggests that direct effect does not fulfill the same function anymore as it used to do because the concept has become so wide and diluted. The conceptual approach that the concept implies make the value of the classical conditions limited and thus, the traditional consideration behind the doctrine is eroding. One solution would be to simply accept horizontal direct effect of directives. The effectiveness of EU law is the main argument for why directives should have direct effect – but effectiveness of EU law should not, on the other hand, infringe on the MS’ constitutional protection and sovereignty. The effectiveness of EU law infringe on the MS’ sovereignty because it does not reflect the allocation of competence as provided for in the Treaty.

It has been underlined that the Court missed its possibility to opt clearly and firmly either the objective of directives special character, or the objective of effectiveness of the direct effect (of directives), at the time of the Marshall I ruling. To opt for the latter would have resulted in very limited direct effect of directives and would have prevented the MS from behaving oppressively. This would maybe have been more in line with the separations of

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256 Prechal, Directives in EC Law (n 176) 257.
259 Dougan, ‘The "Disguised" Vertical Diret Effect of Directives?’ (n 140) 610-11.
262 TEU Art 1, 4-5, TFEU Art 288 see further discussion under Ch 6 (nn 397-442).
263 Marshall I (n 225).
powers between the Union and the MS as provided for in the Treaty. To opt for the latter objective would have resulted in directives’ full invoke-ability by individuals, which would in turn have enhanced the judicial review and the functioning of the EU order. It seems that the compromised solutions that has involved the no-horizontal direct effect rule are consistent interpretation, broad notion of the ‘state’ and incidental direct effect. The state liability doctrine, which is examined below, has become a remedy by ways of damages, which is treated as a last resort in the Court’s case law.264

Another interesting aspect is when incidental direct effect gives a private party legal advantage in a case where the other party is also a private person. The advantage is given on the basis that the MS has failed its obligation under the directive. Because the MS deprives the private party of their rights, it could seem that the situation amounts to inverse direct effect – which is prohibited.265 However, the Court has rejected this argument in case Wells.266 When a MS fails to implement a directive within the prescribed time limit in a vertical situation, the reliance on the directive is always based on that failure. The same holds true for incidental direct effect to be applicable; the MS must have failed to (properly) implement a directive, hence the underlying nature in those horizontal situations is the same as in vertical. Could this imply that one can always rely on the MS’ failure in horizontal situations?267 With this development:

[...] one might rightly query whether it is possible to maintain any meaningful distinction between ‘imposing an obligation on a private party’ and ‘enforcing an obligation against the Member State which happens to have a detrimental impact on a private party’.268

4 Relation between Direct Effect and Supremacy

4.1 The Concept of Supremacy

In practical terms, the doctrine of direct effect together with the principle of supremacy is the mechanism that makes EU law the ‘law of the land’. To enable private actors to rely on EU law before the national courts has de facto and conclusively contributed to the requirement that national courts must apply EU law.269

To structure the relationship between national law and EU law, two twin doctrines have been developed: the principle of pre-emption and the principle of supremacy.270 The terms supremacy and primacy have been frequently used interchangeable in the doctrine to describe the latter principle, and therefore the authors of this thesis have chosen to use the term supremacy in order to create a uniform approach, even though it is claimed that these two terms have a different meaning in relation to the EU and the MS’ shared competence.271 This issue is further analyzed in the next section.272 The relation between the principle of pre-emption and the principle of supremacy has been described by European constitutionalism as:

265 For an explanation of inverse direct effect see Ch 1 (nn 1-38).
266 Wells (n 136).
267 Dougan, ‘The ”Disguised” Vertical Diret Effect of Directives?’ (n 140) 605.
268 Dougan, ‘The ”Disguised” Vertical Diret Effect of Directives?’ (n 140) 605.
272 Avbelj, (n 271) 774.
The problem of pre-emption consists of in determining whether there exists a conflict between a national measure and the rule of Union law. The problem of primacy concerns the manner in which such a conflict, if it is found to exist, will be resolved.273

In other words, the principle of pre-emption decides on whether there is a conflict between national law and EU law. According to Schütze this principle can be divided into three different types: filed pre-emption, rule pre-emption and obstacle pre-emption.274 Firstly, the field pre-emption enables the Court to exclude any national legislation without any further investigation on whether there exists a material normative conflict between national legislation and EU law. This occurs in the fields where the Union has exclusive competence,275 as it is only the EU that can act and adopt binding acts in those fields. Thus, the EU acts automatically empties national rules falling within the scope of these fields. Secondly the obstacle pre-emption needs, contrary to the field pre-emption, some material conflict between national legislation and EU law. Even though the burden of proof is still relatively light (meaning that the probability that the national provision take precedence over the EU provision is very small), the Court needs to advocate that the content of a national rule conflicts with the objective of EU law.276 Finally, the rule pre-emption, which is the most concrete, is engaged when national law is contrary to a specific EU rule and compliance with both sets of rules is thus impossible.277 Notably these types of pre-emptions are not always easy to pinpoint since they can intertwine and be hard to distinguish from each other.

To resolve the (legislative) conflict between national rules and EU law, the Court has established supremacy vis-à-vis the hierarchical order between the national system and EU law.278 The principle of supremacy was established in case Costa v ENEL.279 The dualistic MS treated implemented EU law as national legislation and thus derogated from EU law in order for national law to prevail in accordance with the principle of lex posterior. This was done by the MS because they had a perception that EU law and national law were on the same hierarchical level. The Court held that the EU Treaty was not an ordinary Treaty and stated that:

[the integration into the laws of each Member State of provisions which derive from the Union, 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

274 Schütze, (n 270) 1038.
278 Schütze, (n 270) 1024.
279 Judgment of the Court of 15 July 1964, C-6/64, EU:C:1964:66.
By the means of this judgment the Court established that the Treaty takes precedence over national law, but it was not until case *Internationale Handelsgesellschaft* that the Court was asked to address the relationship between national law and EU secondary law. The Court held in that case that EU law ‘cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Union law and without the legal basis of the Union itself being called into question’. Thus, the Court upheld supremacy of EU secondary law and even over constitutional values of the MS.

In case *Simmenthal II* the Court established yet another rule in respect of supremacy. According to the Italian constitutional law, national legislation could only be amended through an act of parliament or a decision by the Supreme Court. The lower instances thus used national law while waiting for such an act or decision, meaning that EU law in conflict with national law could not be invoked before these courts during this time. The Court held that this was contrary to supremacy of EU law and national courts were thus under the direct obligation to apply EU law immediately. Private parties can invoke EU law in a case before a national court through *inter alia* direct effect and direct effect is complemented with supremacy. If supremacy of EU law did not exist, direct effect could never exist - or its existence would not have a beneficial consequence, especially for the private actors. With respect to horizontal situations, theories have been developed in the doctrine with an attempt to try to explain the Court’s exceptions to the no-horizontal direct effect rule, making private parties invoke-ability dependent on exclusion or substitution.

### 4.2 Exclusion or Substitution?

The Court’s case law has shown a strong tendency to favor the *effectiveness* of directives, rather than its main argument for direct effect of directives – the estoppel principle. This conclusion can be drawn from the introduction of consistent interpretation and incidental effect.

The theory of exclusion or substitution, which has been resisted by the Court, suggests a distinction between *substitution effect* and *exclusionary effect* of EU law norms. Those who are in favor such a distinction believes that the only implication of the no-horizontal direct effect rule is to prevent the provision of a directive from being substituted with a national provision in a dispute between private parties. It is though argued that the no-horizontal direct effect rule does not prevent a directive from rendering an incompatible national provision inapplicable (even in horizontal disputes) if this mean that the legal situation can be adjudicated on another national provision, which is compatible with the directive.

The rationale behind the theory is based on the principle of supremacy of EU law and has been explained by AG Saggio in the *Océano Grupo Editorial* case:

> Ultimately, the national court’s function as a Union court of ordinary law entails entrusting it with the delicate task of guaranteeing the primacy of Union law over national law. The need to prevent the harmonising action of the Union

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280 *Costa v. ENEL* (n 279) para 3 (2) (emphasis added).
282 *Internationale Handelsgesellschaft* (n 281) para 3 (emphasis added).
284 *Simmenthal II* (n 283).
286 Dashwood, 'From Van Duyn to Mangold via Marshall' (n 285) 100-1.
directives from being compromised by Member States’ unilateral behavior, whether through omission (failure to implement a directive within the prescribed period) or action (adoption of incompatible national rules), implies that the application of incompatible legal provisions is in any event excluded. In order to be able to achieve its results, this ‘exclusionary effect’ must occur whenever the national rule comes into consideration for the purpose of resolving a dispute, irrespective of the public or private status of the parties concerned.\footnote{Opinion of Mr Advocate General Saggio delivered on 16 December 1999, Joined Cases C-240 to 244/98 EU:C:1999:620 para 37.}

As far as the incidental direct effect rulings are concerned, some commentators have argued that the Court merely created \textit{ad hoc} exceptions to the no-horizontal direct effect rule. Others believe that the rulings are refinement of the entire case law on direct effect of unimplemented directives.\footnote{Michael Dougan, ‘When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy’, [2007] 44 CML Rev 931, 931.} It seems that the incomprehension stems from opposing understandings of the relationship between supremacy and direct effect – the main two tools by which EU law produces independent effects over/within national legal systems of the MS. Dougan refers to these competing visions as the \textit{primacy model} and the \textit{trigger model}.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 932.}

As regards the \textit{primacy model}, it treats supremacy as a constitutional fundamental of the EU.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 932.} Supremacy can produce legal effects in national legal systems, independently of the principle of direct effect. Thus, a EU norm does not have to satisfy the criteria to be met for direct effect in order to have supremacy. Supremacy is capable of setting aside the national rules, which are incompatible with EU law and it is therefore capable of producing \textit{exclusionary effects}. Thus, supremacy has a hierarchical character and can render national rules subject to judicial review.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 933.}

However, supremacy is not capable of \textit{substitutionary effects}, meaning that it cannot substitute the national provision that conflicts EU law. Instead, direct effect decides whether the national provision that conflicts with EU law shall be substituted with EU law or not, presupposed that the criteria to be met for direct effect, unconditional and (sufficiently) precise, are satisfied.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 933.} Thus, the primacy model relates supremacy with notions of invokability and judicial review, rather than the validity of laws. The creation and enforcement of subjective individual rights are closely associated with the principle of direct effect.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 934.}

With regard to the \textit{trigger model}, direct effect covers not only the creation and enforcement of subjective individual rights. It also extends to any situation in which EU law produces independent effects in the national legal systems. As long as private parties can successfully invoke and rely on a EU norm, this norm is directly effective, if it has been rendered cognizable to the national court through the criteria to be met for direct effect.\footnote{Dougan, ‘When Worlds Collide!’ (n 288), 934.} The criteria to be met for direct effect acts as a trigger, and thus a necessary precondition, for the principle of supremacy. Contrary to the primacy model, in which the principle of supremacy is freestanding. Furthermore, to clarify, in regard to the trigger model the doctrine of direct effect decides whether EU law is justiciable before domestic courts or not.\footnote{Dougan, ‘When Worlds Collide!’ (n 288) 935.}
The trigger model supports the no-horizontal direct effect rule. Private parties can never successfully invoke and rely on a EU norm in a directive in a horizontal dispute because that EU norm has not, due to the lack of direct effect, been made cognizable to the national court.\textsuperscript{296} Those in favor of the trigger model treat rulings of the Court based on the incidental direct effect as \textit{ad hoc} exceptions. The primacy model suggests that the criteria to be met for direct effect prevent EU law from imposing obligations on individuals in the event of substitution. The unimplemented directive must fulfill the criteria to be met for direct for EU law to take precedence and thus substitute the national law. However, if the situation is concerned with exclusion, the principle of supremacy can independently demand the domestic court to set aside the national provision that is incompatible with EU law – the principle of supremacy is in this sense freestanding. Moreover, this can in fact incidentally affect the legal situation between to private individuals.\textsuperscript{297} The obligations imposed on the private party in for example cases \textit{CIA Security},\textsuperscript{298} and \textit{Unilever Italia},\textsuperscript{299} were mere incidental effects resulting from the exclusion of a national measure due to the principle of supremacy, those private litigations did not amount to an \textit{illegitimate} horizontal direct effect.\textsuperscript{300}

Legal vacuum is the underlying reason for the distinction between substitution and exclusion under the primacy model. The criteria to be met for direct effect serves as a test to ensure that the relevant EU law provision is apt to fill the regulatory gap in case of substitution. When the principle of supremacy \textit{instead} leads to the exclusion of an inconsistent national provision, the gap will be filled with another provision derived from the national legal system.\textsuperscript{301} On the one hand, if the principle of supremacy demands exclusion of a national provision because of its incompatibility with EU law, and that national provision is \textit{contra legem} to the provision of the unimplemented directive, the situation cannot be settled by applying the duty of consistent interpretation since reliance on this principle is limited by \textit{contra legem} interpretation. On the other hand, the national court must consider the national system as a whole when complying with its duty of consistent interpretation and thus, it will probably look for a national provision, which does not fall within the \textit{contra legem} limitation. This could be considered to amount to substitution.\textsuperscript{302}

The primacy model considers the duty of consistent interpretation as the result or the consequence of the principle of supremacy itself.\textsuperscript{303} Since general principles of EU law can limit the duty of consistent interpretation, they act as a counter-balance to the full effect of the principle of supremacy.\textsuperscript{304} The rationale behind the \textit{contra legem} limitation is a mystery in the primacy model approach in relation to supremacy and consistent interpretation.\textsuperscript{305}

According to the trigger model, the duty of consistent interpretation is not an autonomous linkage between the EU and the national legal system - only the principle of direct effect can enjoy such status. The duty of consistent interpretation is a substantive obligation imposed on judges of the MS as a result of the principle of direct effect and; the duty of consistent interpretation rather shares it kinship with general principles of EU law.\textsuperscript{306}

\begin{flushright}
\parbox{14.5cm}{\footnotesize\textsuperscript{296}Dougan, 'When Worlds Collide!' (n 288) 935. \\
\textsuperscript{297}Dougan, 'When Worlds Collide!' (n 288) 934-5. \\
\textsuperscript{300}Dougan, 'When Worlds Collide!' (n 288) 938. \\
\textsuperscript{301}Text to n 204. See also Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' [2007] 44 CML Rev, 931, 939-40, 947. \\
\textsuperscript{303}Dougan, 'When Worlds Collide!' (n 288) 946-7. \\
\textsuperscript{304}Dougan, 'When Worlds Collide!' (n 288) 947. \\
\textsuperscript{305}Dougan, 'When Worlds Collide!' (n 288) 946. }
\end{flushright}
The primacy model is, in terms of the relationship between supremacy and direct effect, contradictive. If the EU and the national legal systems are so integrated, why is there a need to cognizable EU law to the national courts? The principle of supremacy should be able to ensure the enforcement of EU law independently. The primacy model’s answer is that direct effect is needed because the criteria to be met for direct effect explains whether the Union norms are suitable to create new rights and obligations in the event of substitution. By contrast, according to the trigger model, the two principles do not operate in parallel but in sequence. Their distinctive characters are easier to identify as direct effect creates cognizable conflict of laws, and supremacy resolves it in favor of the relevant EU norm.

The issue with the trigger model in regard to cases CIA Security and Unilever Italia is that despite significant academic effort – no one has yet found a method to describe the cases as legitimate manifestation of direct effect. If one can describe the cases as a legitimate manifestation of direct effect without overstepping the prohibition of horizontal direct effect of directives, then the criteria to be met for direct effect can be deemed satisfied.

According to Avbelj, ‘the principle of primacy or supremacy is marked by its four defining features: etymology of the principle, its nature, scope and consequences’. These features can be combined in different ways - creating three different structural models to the relationship between EU law and national law: the hierarchical model, the conditionally hierarchical model and the heterarchical model. These models reflect different opinions on the role of supremacy in the Union and can be seen as a complementary view to Dougan’s distinction between the primacy model and the trigger model. Avbelj describes the hierarchical model as being ‘… conceived as an all-encompassing, absolute, unconditional, hierarchical and inherent face of integration’. This definition means that EU law in its entirety is regarded as a supreme body of law, which prevails over all national legislation, regardless of their hierachical position and renders it invalid. Similarly, the primacy model sees EU law as a supreme body of law that prevails over all national legislation as long as exclusionary effects are concerned. In regard to direct effect, with the hierarchical model’s concept of supremacy, all EU law and not only the directly effective provisions, becomes part of the MS’ national legal orders. Thus, the function of direct effect becomes redundant. The same holds true for the primacy model - the purpose of the principle of direct effect becomes redundant in relation to the exclusion of national law.

The conditional hierarchical model is less unconditional, but at the same time less comprehensible. The terms of supremacy and primacy are used intertwined in the conditional hierarchical model, and have the same meaning: primacy remains supremacy. Still the term supremacy seems to require some limitation. Firstly, EU law only enjoys its supremacy within the scope of its competence, and in respect of the principles of proportionality and subsidiarity. Secondly, the conditionally hierarchical model is a limited in respect of the MS’

307 Dougan, ‘When Worlds Collide!’ (n 288) 947.
308 Dougan, ‘When Worlds Collide!’ (n 288) 947.
309 Dougan, ‘When Worlds Collide!’ (n 288) 947.
310 Dougan, ‘When Worlds Collide!’ (n 288) 958.
311 Avbelj, (n 271) 745.
312 Avbelj, (n 271) 746.
314 E.g J.H.H Weiler, Constitution for Europe (OUP 1999) 22.
318 Avbelj, (n 271) 748.
identities, and the obligations stemming from the agreements between the MS. Supremacy reflects only the superior status of EU law in a judicial conflict, within the conditional hierarchical model. Thus, the scope of pre-emption falls within the principle of supremacy. With such a broad concept of supremacy, the impact of direct effect is quite limited.

In the heterarchical model the principle of supremacy is called primacy, and thus excluding any recognition of the term supremacy. According to Avbelj, this is because of the reason that the two terms stand for different concepts, where supremacy features the supreme act in a MS or the EU legal order, and primacy regulates the relationship between the autonomous legal orders. In the heterarchical model the role of direct effect is of a major importance, since it acts as a trigger model for the primacy of EU law. It enables individuals to rely on EU norms before a national court. Furthermore, pursuant to Avbelj, direct effect affects the norm-making powers in the EU institutions, since it is a mean to affect the relation between the MS and the EU.

Similar to the conditionally hierarchical model, under the trigger model EU law enjoys supremacy within its competence, and the competence can be decided through the criteria to be met for direct effect. Like the heterarchical model, the role of direct effect is of importance because it determines whether EU law enjoys primacy or not. The trigger model and the heterarchical model uses direct effect as a linkage between two parallel legal systems, and direct effect is the medium through which the linkage can be opened. Meanwhile, the primacy model is of the assumption that there is only one legal system that holds both the national legal system and the EU legal order.

It should be remembered that the trigger and the primacy model are only trying to explain the Court’s case law while upholding their own conceptual views. The underlying problem is, as mentioned above, that the Court has rejected the distinction between substitution and exclusion. The Court has dithered significantly about its own vision of the relationship between supremacy and direct effect. Some rulings tend towards the primacy model, and others towards the trigger model and as emphasized by Dougan, maybe the national legal tradition is decisive in this respect. It might be easier for lawyers from monistic states to understand the underlying reason of the primacy model, and the underlying reasons for the trigger model might seem more straightforward for lawyers originating from dualistic states. If the Court would recognize horizontal direct effect of directives, then the debated exceptions to the no-horizontal direct effect rule would find themselves within a describable context. However, would there be any need for the distinction between monistic and dualistic MS?

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319 TEU Art 4(2).
320 TFEU Art 351.
321 Schütze, (n 270) 1033-4.
322 Avbelj, (n 271) 750.
323 Avbelj, (n 271) 750-1.
325 Avbelj, (n 271) 754.
326 Dougan, ‘When Worlds Collide!’ (n 288) 942-3.
327 Dougan, ‘When Worlds Collide!’ (n 288) 963.
328 Dashwood, ‘From Van Duyn to Mangold via Marshall’ (n 285) 100-1.
329 Dougan, ‘When Worlds Collide!’ (n 288) 963.
330 Dougan, ‘When Worlds Collide!’ (n 288) 963.
5 State Sovereignty

5.1 State Liability for Inadequate Implementation of Directives

As has been presented and analyzed in the previous chapters, the Court has introduced supremacy and direct effect of EU law to guarantee effectiveness and effective enforcement of EU law and to enable persons to benefit from EU law (to provide a full and effective protection of rights based on EU law). Moreover, the Court has limited national procedural autonomy of the MS by two principles: the principle of effectiveness and the principle of equivalence. Nevertheless, the means introduced by the Court and other means provided for in the Treaty are not adequate and efficient to guarantee the above-mentioned concerns. To illustrate such concerns, the authors of this thesis will use the facts of the Francovich case. The case concerned a MS that did not implement a directive, which require payment of unpaid wages of the employees in case their employer goes insolvent. There are two problems in the case. The first problem is that the directive does not state which party is under obligation to pay the wages and therefore does not satisfy the criteria for direct effect. While implementing such a directive, a MS may render one authority responsible for payment and another MS may subject another entity for payment obligation. The second problem occurs if a MS does not implement the directive. Even though the directive concerned lacks direct effect in regard to the body responsible for payment, the MS are still under obligation to implement directives. A MS can find the most appropriate solution to this problem during the time period set by the directive in question for implementation. However, in case of non-implementation, there will not be any guarantee for payment of such wages. Additionally, if other means (such as indirect effect) are not suitable to solve the issue, the crucial question arises: how will the right (being entitled to receive unpaid wages) of the employees based on EU law be protected? It was again the Court that had to solve the problem, and the ‘solution’ came with the introduction of state liability. The solution was welcomed since there has been a consensus in the doctrine that the traditional means of enforcement, especially the principle of direct effect, was inefficient. Thus, state liability is a remedy that provides for the right to reparation for damages caused by the MS breach of EU law.

Thus, the concept of state liability, in relation the principle ubi jus ibi remedium, is regarded as a private mechanism of enforcement of EU law and was first introduced in case


332 In principle, national procedural rules of the MS apply to the claims based on EU law, such as access to the court and remedies. This is national procedural autonomy in simple terms. However, the Court has limited national procedural autonomy of the MS by two principles: the principle of effectiveness and the principle of equivalence. Principle of effectiveness: national procedural rules and conditions of remedies should not make enforcement of EU law impossible or excessively difficult in practice. Principle of equivalence: national procedural rules and remedies for the enforcement of EU rights cannot be less favorable than those relating to similar actions of a domestic nature. When applying the EU law, national courts must act as if they were applying national law. National procedural rules and remedies cannot discriminate between national and European rights. ‘Remedies provided for by national courts for the enforcement of Union law cannot be less favorable than those relating to similar actions of a domestic nature’. E.g see Judgment of the Court of 16 December 1976, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, C-33-76, EU:C:1976:188.

333 E.g TFEU Art 258 allows the European Commission to start infringement procedure against the MS that are in breach of EU law, such as in case of national rules that are in conflict with EU law.


335 See discussion regarding discretion in section 5.2 (nn 381-396).

The Court based its reasoning on the fact that the principle of state liability is ‘inherent in the system of the Treaty’. Furthermore Art 4(3) TEU, together with the principle of full effectiveness of EU law, as well as the duty to act in good faith, can create an obligation on the MS to be ‘liable for loss and damages caused to individuals as a result of breaches of Union law [of which the state can be held responsible].’ The Court gave state liability dual purposes: a mechanism that renders an effective remedy possible for private actors and to guarantee full effectiveness of EU law.

However, to obtain reparation from a MS, certain criteria must be satisfied. The criteria to be met are: (i) the infringed provision must have intended to confer rights on individuals; (ii) the breach of EU law must be sufficiently serious, and (iii) there must be a direct link between the breach of the MS in question and the damaged sustained by the injured party.

In case Factortame I, an amended British national rule required that, if a vessel was not registered in the vessel registry, that vessel could not fish within British waters. Furthermore, in order for a vessel to be registered in the vessel registry it had to be British owned. Factortame, a Spanish owned company, could thus not re-register its vessel in the UK after the amendment and could therefore not fish within British waters. Factortame then brought a case before the national court and asked for ‘interim relief’. Factortame also brought another case claiming that this rule was contrary to freedom of establishment, the case known as Factortame II. Interim relief would result in suspension of application of that national rule temporarily until the court decided on the substance of the national rules in case Factortame II. The problem was that according to the British national rules, domestic courts did not have jurisdiction to suspend application of a national rule. Therefore, the domestic court referred the case to the Court and asked whether it (the national court) could still grant interim relief, contrary to the British national legal order. The Court ruled that the national court should grant the interim relief by stating that:

… any legislative, administrative or judicial practice which might impair the effectiveness of Union 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, Union rules from having full force and effect are incompatible with those requirements, which are the very essence of Union law.

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337 Tridimas, ‘Liability for Breach of Community Law’ (n 336) 301.
338 Francovich (n 334) para 35.
342 Judgment of the Court of 19 June 1990, The Queen v Secretary of State for Transport, ex parte: Factortame Lid and others ( Factortame I), C-213/89, EU:C:1990:257.
344 Factotrame II (n 343).
345 Factortame I (n 342).para 20 (Emphasis added).
By enabling national courts to set a side national provisions temporarily in order to ensure the effectiveness of EU law, the national courts' jurisdiction was broadened. This in turn can be viewed as limiting the legislators' 'power' in the MS and may even infringe on the MS' separation of powers. \(^{346}\) Moreover, the outcome of the Factortame I case has led to strong criticism from the doctrine claiming that the Court created a new remedy. Finally in case Factortame II, the Court found that the rule was in breach of freedom of establishment. Case Factortame II was followed with another case known as Factortame III where Factortame asked for reparation – compensation for the period that it could not fish. Later, this case joined with a case that arose in Germany. Those two cases merged and are known as Brasserie du Pêcheur and Factotame (Facortame III). \(^{347}\) In this case, the Court took the law forward by holding the MS responsible for any serious breach of EU law under state liability. \(^{348}\) Furthermore, the Court established that if a MS failed to implement a directive within the time period, it would per se amount to a serious breach of EU law. \(^{349}\) If a MS implemented a directive within the time period, but did so unsuccessfully/improperly \(^{350}\) the MS concerned could still be held responsible under certain circumstances. Regarding the second criterion (the decisive test for finding a sufficiently serious breach of Union law), the MS in question must have disregarded its discretion ‘manifestly and gravely’. \(^{351}\) In the following, some factors will be listed. Among these are: the level of discretion left to the MS in a directive, the clarity and precision of the rule breached, whether the breach is intentional or not (good faith), and whether the breach is excusable or not. \(^{352}\) Thus, liability arises only when these above-mentioned conditions are fulfilled, but their function can differ depending on the nature of the breach. \(^{353}\)

Moreover, it is the duty of the national court to determine whether there is a causal link between the breach and the damage sustained by the injured party; meaning that the national court must decide if causation exists de facto. \(^{354}\) Therefore, the national courts have two main functions: they have to handle the state liability cases under their national laws and they have to decide if the criteria are met or not. \(^{355}\) This responsibility imposed on the national court has been criticized in the doctrine as risking ‘national reflexes of legislators and judges in the

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346 See further discussion in section 5.2 and Ch 6 (nn 397-442).
351 Factortame III (n 347) para 55.
352 Factortame III (n 347) para 56-59.
354 Tridimas, ‘Liability for Breach of Community Law’ (n 336) 310.
Member States and thus creating divergence in the EU, since it consists of the MS with different legal mentalities and cultures.

In case Köbler the Court further extended the scope of state liability as to include an manifest infringement of EU law by the judiciary, which in turn can cause liability for the state. According to Lock this expanded state liability ‘helps to compensate for the weaknesses for public enforcement by the European Commission’. In cases Konle and Haim II, the Court had the opportunity to determine to what extent the national authorities are obliged to provide reparation for breaches of EU law. The Court held that the principle of *ubi jus ibi remedium* must be honored regardless of which authority that was responsible for the breach. In case Haim II the Court stated that a MS cannot escape liability by pleading the distribution of power and responsibilities in its legal system, nor can it claim that the specific public authority lacked ‘the necessary power, knowledge, means or resources’. Another obligation steaming from cases Rewe and Comet is that the national procedure and the conditions regarding reparation should be decided in the light of the principles of equivalence and effectiveness. Tridimas has emphasized the difficulties in determining whether an administrative authority in itself is liable of a serious breach. He has advocated the difference between an administrative organ that is bound by legislative rules, and an organ with the power to make discrestional decisions. This distinction may vary in the different MS depending on their legal system. Nevertheless, the Court does not seem to impose any policies in this respect.

359 Lock (n 348) 1676.
363 *Haim II* (n 361) para 28.
5.2 Discretion

5.2.1 Discretion in General

Discretion is a broad term and it describes the choices within a framework of a higher-ranking source of authority that are left to the decision maker in a MS. It is the national courts’ task to control that the legislator or executive powers stays within this framework of discretion. As Caranta has expressed, ‘[d]iscretion is thus a sort of residual concept: discretion is what is left outside judicial control’.\(^\text{369}\) Or as KC Davis puts it ‘[w]here law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness’.\(^\text{371}\) Hence, in terms of judicial review the structure varies between the MS. Different legal traditions has created different tools in order to limit the discretion, thus creating different ideas of the term discretion.\(^\text{372}\) In other words, since discretion is operating in a gray-zone between the two well-established principles of rule of law and separation of powers,\(^\text{373}\) it is hard to create a clear-cut unified solution for all MS within the Union. In the EU, the Court is vested with the ‘power’ to review legislative acts, give preliminary rulings and if necessary establish infringement in regard to both the EU constitution\(^\text{374}\) and the MS,\(^\text{375}\) in order to create uniformity. But so far the Court has failed to unify a coherent methodology of discretion. According to Caranta, this could be intentional ‘since it allows the courts to adjust their decision to the real or perceived idiosyncrasies of each case but [it] leads to unpredictability.\(^\text{376}\) The development of discretion in the EU is thus, dependent on the review on the discretionary powers in each MS, and in turn the national legal systems is highly influenced by EU law.

In the EU, the MS’ margin of discretion is to some extent contradictory to the concept of state liability. As suggested by Tridimas: ‘[t]he less the margin of discretion left to the national authorities by Union rules, the easier it would be to establish that a breach of those rules is serious’.\(^\text{377}\) The Court held in case Hedley Lomas that in situations where the national authorities had no or substantially reduced margin of discretion, a mere infringement of EU law would amount to establish the existents of a serious breach.\(^\text{378}\) As mentioned under section 5.1, the national courts are under the obligation to establish whether a breach is sufficiently serious or not. While analyzing existence of a sufficiently series breach, the national courts also assess the margin of discretion and the margin of discretion is often based on the wording of the provision. According to Lock, the meaning of the wording can vary depending on the languages of the MS. A EU provision can thus have different significances, which makes it hard to establish a unified content of a serious breach. Apart from the non-

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370 Caranta (n 369) 185.
375 TFEU art 258: 234.
376 Caranta (n 369) 187.
377 Tridimas, ‘Liability for Breach of Community Law’ (n 336) 311 (Emphasis added).
378 Tridimas, ‘Liability for Breach of Community Law’ (n 336) 311.
implementation cases,\textsuperscript{379} it can be hard to establish whether a sufficiently serious breach has occurred or not since the amount of discretion can be deduced differently due to different linguistic features in the MS.\textsuperscript{380}

\subsection*{5.2.2 Discretion in relation Direct Effect}

To what extent does the MS have discretion in relation to direct effect of directives? The type of discretion discussed above is related to the division of competence between the Union and the MS and this discretion is, according to Vandamme, different from the one relating to direct effect. The discretion in relation to direct effect relates to the relationship between the national courts and national legislators and executors, rather than the relationship between legislators and executors.\textsuperscript{381}

Discretion is an important element in the criteria to be met for direct effect. The conditions for direct effect (unconditional and sufficiently precise) are strongly connected to the perception of absence of discretion and thus, operate differently than the discretion in the means of justification of maintenance of national democratic safeguards.\textsuperscript{382} If a directive provision fails to satisfy the criteria for direct effect, the MS enjoys a sufficient degree of discretion when transposing the directive concerned into national law and thus the wider discretion enables the MS to contribute to the final shape of the content of the directive.\textsuperscript{383} Consequently, absence of discretion allows for the national courts to apply a directive provision directly, without crossing any division of competence boundary.\textsuperscript{384}

In the opinion of Vandamme, national courts\textsuperscript{385} (and in some cases also the executive) have, in the context of EU law, been enhanced with more power in relation to the legislator when it comes to the ‘power’ to override national provisions and to decide whether provisions of EU law are directly effective or not.\textsuperscript{386} As Prechal states, the assessment of whether a provision is directly effective or not cannot be separated from the concrete case.\textsuperscript{387} Discretion implicates the fact that certain choices can be made by the legislator or by the executive; hence the court cannot make those decisions.\textsuperscript{388} Anyhow, the national courts can control whether the authorities have kept within the limits imposed by EU law. The national courts can review national law in the light of the directive and when necessary, they dis-apply the national provision without having to apply the directive instead. Discretion as such does not provide an obstacle for direct effect, as long as the limits for discretion are explicit to serve as a standard for judicial review.\textsuperscript{389}

\begin{footnote}
\textsuperscript{379} In case non-implementation, the MS have no discretion as to whether implement a directive or not. They must implement directives. Therefore, in principle, non-implementation is sufficiently serious breach. As it is a principle, there are of course exceptions to this principle, depending on the circumstances in a case.
\textsuperscript{380} Lock (n 348), 1700-1.
\textsuperscript{382} Vandamme (n 381) 272-6.
\textsuperscript{384} Vandamme (n 381) 284.
\textsuperscript{385} For a possible exception see Judgment of the Court of 30 September 2003, Köbler, C-224/01, EU:C:2003:513: A national court was subject for proceedings for damages, since it conflicted with EU law.
\textsuperscript{388} E.g. Judgment of the Court (Sixth Chamber) of 5 February 2004, Rieser Internationale Transporte, C-157/02 EU:C:2004:76.
\textsuperscript{389} Prechal, Directives in EC Law (n 387) 250.
\end{footnote}
Depending on what the party, which relies on EU law is seeking the national court can apply the directive or not. If the private party invokes a provision of a directive to assert a positive claim (presupposed that it is sufficiently precise and unconditional), the national court will need ‘more’ of the directive provision and the discretion will block the application. The national court cannot make this choice since it is the legislator’s or the executive’s choice. On the other hand, where a person seeks the annulment of an individual decision, the person might be able to rely on the directive provision (as long as it is sufficiently precise and unconditional) since the national court enjoys more discretion from the provision, than in the case of a positive claim, to proceed to judicial review. If the court annuls the decision, usually it is up for the competent authorities to make a new one. 390

Nonetheless, it is hard to determine to what extent MS have discretion by merely analyzing directives in general. The typography for instance, can act as an indicator on whether the directive entails wide discretion or not a framework directive could for instance indicate a broad margin of discretion, contrary to a directive with the aim for full harmonization in the EU. 391 In case World Wildlife Fund v Autonome Provinz Bozen, the Court held that the national authority had exceeded its margin of discretion because the relevant provision had in fact direct effect. 392 In the same vein, in case Comitato, the national authority had exceeded its discretion simply by asking the wrong legal question. 393 The national court established that the relevant directive provision did not satisfy the criteria for direct effect and thus, the provision did therefor not have direct effect. The Court held that even if the national court enjoyed a margin of discretion, it was under the obligation to act within the framework as to the objective to be achieved. 394 According to Prechal, this reasoning of the Court is a related to the recent development of direct effect. 395 The evolution with the exceptions in the Court’s case law has diminished the significance of the no-horizontal direct effect rule and consequently has resulted in less discretion for the MS. A development on which Prechal has expressed her concern:

The monopoly of a sovereign law-maker, within a sovereign national-state, is broken down. According to some, the process takes us into a new era of legal pluralism. It also takes us beyond the national opposition between monism and dualism, the latter being far removed from today’s realities. 396

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390 Prechal, Directives in EC Law (n 387) 250-51.
391 Vandamme (n 381) 284-9.
392 Judgment of the Court (Sixth Chamber) of 16 September 1999, WWF and Others v Autonome Provinz Bozen, C-435/97, EU:C:1999:418. See also: Judgment of the Court of 24 October 1996, Kraaijeveld, C-72/95, EU:C:1996:404.
394 Comitato (n 393) para 90.
6 Conclusion

6.1 An Instrument for Uniformity or the Cause of Incoherence?

The introduction and development by the Court of direct effect in general, starting with the case *Van Gend en Loos* judgment, and the recognition by the Court of direct effect in particular of directives with the case *Van Duyn* seems to reflect the Court’s aim to provide for (full) effectiveness of EU law. The issue with the controversial doctrine of direct effect of directives is constitutional in character and thus, characterized by the problems arising in relation to the competence allocation between the MS and the Union. According to EU law, only regulations can have both vertical and horizontal direct effect, while directives only can have direct effect in vertical situations. However, the question is whether this distinction in fact has been blurred. The development of direct effect of directives has maybe pushed the Treaty too far in the sense that the distinction between regulations and directives is not that sharp anymore. With the estoppel principle, as an underlying basis for direct effect of directives, only the MS can be held responsible for their own wrong doings and the Union legislator do not bare the risk of creating obligations for individuals with immediate effect through directives. This principle though seems to have yield to effectiveness of EU law, in line with the *effet utile* basis, which now appears to be the Court’s leading argument for direct effect of directives. This effectiveness argument corresponds better with the exceptions, created by the Court, to neutralize the no-horizontal direct effect rule. The estoppel principle coherently makes a distinction between horizontal and vertical cases, but it can create incoherence between EU citizens since their rights are made dependent upon their state’s success or failure in implementing a directive. The critique against the estoppel principle must as such be considered valid according to the authors of this thesis since it only relates to the legislator, or sometimes the executive, and has therefore in a sense already been undermined with the exceptions: the broadened scope of a ‘state’, incidental direct effect and the duty of consistent interpretation. We believe that the exceptions are in fact similar to horizontal direct effect. On the one hand, horizontal direct effect would not be possible under the estoppel principle and therefore the Court seems to have ‘implicitly’ adopted an effectiveness of EU law argument, supported by the *effet utile* argument. On the other hand, the estoppel principle preserves the principle of state sovereignty better than the principle of *effet utile*, which in turn gives MS less discretion. This is thoroughly discussed further down.

Under the legal status quo, the main rule is that directives can have vertical direct effect if the directive provision in question is (sufficiently) precise and unconditional, provided that the directive has not been implemented or has been improperly implemented. This would per se not amount to an intrusion on the MS’ sovereignty, since they relinquished a part of their sovereignty when they entered the EU, and the MS shall act in accordance with the principle of sincere cooperation as laid down in Art 4(3) TEU. If a MS does not transpose a directive within the time limit, it does not act in compliance with the Treaty, and it can therefore not take advantages as against individuals for its own failure. The problem arises with the exceptions and whether they can be considered to amount to an intrusion on state sovereignty, which is beyond the limited fields set by the Treaty. Recognition of horizontal direct effect of directives would certainly blur the distinction between regulations and

400 See discussion under section 2.2 (nn 81-89).
402 See discussion section 2.2 (nn 52-84).
403 See discussion under Ch 2 (nn 39-137).
directives and it would disrupt the competence distribution provided for in the Treaty because in some cases the Union was not given the competence to enact rules that have effects between individuals.404

A case like CIA Security seems \textit{prima facie} to be horizontal in character but due to the presence of a public element (failure by the MS to comply with procedural requirements) turns into a vertical case. The Court framed the case in terms of whether the provision in the directive was (sufficiently) precise and unconditional to be relied upon before a national court, which is in line with traditional vertical direct effect rulings.405 However, the Court’s statement that the directive at hand ‘neither created rights nor obligations for individuals’,406 appeared to reflect not the old estoppel theory - which is independent from the creation of rights or obligations and only concerned with that the state should not benefit from its own wrong - but something different, something the doctrine has tried to explain in terms of exclusion and substitution, and with the principle of supremacy.

The Court itself has neither explicitly relied on the principle of supremacy nor exclusionary- or substitutionary effects in relation to the \textit{incidental direct effect} rulings. Albeit judgments like case \textit{Küçükdeveci}407 suggests that supremacy might have a role to play in relation to direct effect. Schütze’s filed pre-emption theory is vested with the power to exclude any domestic law that is contrary to EU law because the Union has exclusive competence in those matters. In those situations, direct effect is redundant since Union law will always prevail and therefore have effects within the national legal systems.408 For example, as far as directives are concerned, the Union does not have exclusive competence to enact obligations for individuals with immediate effect. Thus, the field pre-emption cannot relate to directives having ‘potential’ horizontal direct effect, as it is not within the Union’s competence and such a situation would amount to serious intrusion on the MS’ sovereignty. The obstacle pre-emption and the rule pre-emption suggest that there is a conflict between national law and EU law that needs to be solved through the principle of supremacy; the former is concerned with some material conflict and the latter is concerned with national legislation that is contrary to Union law.409 When a private individual invokes a directive provision of an unimplemented directive or a directive that has been improperly transposed as against the state, usually the national law is not in line with the directive or contrary to the directive. Hence, the latter two forms of pre-emption suit such situations. To resolve legislative conflicts between national rules and EU law within the pre-emption, the Court must establish supremacy \textit{vis-à-vis} the hierarchical order.410

In cases concerned with direct effect of directives, the Union seems to enjoy the hierarchical superiority, as long as the criteria for direct effect are met. If the situation is horizontal in character, although the criteria for direct effect are met, the result should be that the directive couldn’t be relied upon by individuals against individuals in national courts, in accordance with the main rule. The main rule fits in under Schütze’s constitutional division, but the exceptions do not as they might be considered to amount to horizontal direct effect. Even though the doctrine of direct effect could be considered suitable or comprehensible

406 \textit{CIA Security} (n 405).
409 See discussion under 4.1 (nn 276-278).
410 Schütze, (n 408) 1024.}
under Schütze’s different pre-emption models – the Court has never explicitly discussed supremacy’s role in relations to direct effect, and the debated exceptions will not disappear under this constitutional division. However, the doctrine has indeed tried to describe the mystery behind the exceptions and their relation to the no-horizontal direct effect of directives rule in terms of supremacy.\textsuperscript{411}

The invoke-ability of exclusion derives from the principle of supremacy and exists according to Dougan’s primacy model independently of direct effect. Substitution on the other hand is made dependent on direct effect as the conditions serve as a ground for whether the national legislation should be substituted with EU law or not. The primacy model sees supremacy as freestanding, and direct effect is therefore redundant unless the situation is concerned with substitution.\textsuperscript{412} The question is whether this is soundly since in a situation where the principle of supremacy demands exclusion of a national provision because of its incompatibility with EU law, the excluded provision must be substituted with another piece of national legislation. The national court will probably search for the national provision that is compatible with the directive provision, in accordance with the duty of consistent interpretation. A national provision that is not to be interpreted in accordance with the directive provision would bare the risk of being excluded again. In the end, the directive provision is almost substituted with a national provision that is similar to the former.\textsuperscript{413} There would however, be a problem if the national rule was \textit{contra legem} to the directive provision.

As known by now, the duty of consistent interpretation is limited by general principles of EU law and in such a case there will be a legal vacuum. The primacy models task is not just to describe the exceptions to the no-horizontal direct effect rule while still maintaining the same, it also wants to avoid legal vacuums.\textsuperscript{414} The authors of this thesis is of the understanding that the primacy model supports the effectiveness of EU law argument since the invoke-ability of EU law will cover all situations where the effect is exclusion, including those of horizontal character. On the one hand there is the question of whether this creates immediate effects on individuals through direct effect of directives, contrary to the Union’s empowered competence, and thus creates an intrusion on the MS’ sovereignty beyond the separations of powers provided for in the Treaty. On the other hand, if the doctrine of direct effect covers more situations, it is more likely that the interpretation will be more coherent and subsequently creates more coherent application of EU law in the MS, and in the EU as a whole.

In contrast to the primacy model, where creation and enforcement of individual rights is associated with direct effect, Dougan’s trigger model covers any situation in which EU law produces effects within the national legal systems. The only demand is that the EU provision invoked has been rendered cognizable to the national court, and it is cognizable if the conditions for direct effect are met. Direct effect in horizontal situations can never be possible, hence the trigger model sees the exceptions made by the Court as \textit{ad hoc} rulings.\textsuperscript{415} The fact that the trigger model cannot explain the exceptions is its greatest weakness. The Court’s reasoning behind the exceptions is somewhere in between the outdated estoppel principle basis and the effectiveness of EU law argument in line with the \textit{effet utile} basis, and the uncertainty that exists without a clear explanation or clear guidance makes the situation incoherent. The no-horizontal direct effect rule can \textit{per se} be said to be a coherent rule, but the application of EU law will be more inconsistent. It can be argued that there is now a

\begin{itemize}
  \item \textsuperscript{411} See discussion section 4.2 (nn 285-330).
  \item \textsuperscript{413} See discussion under section 4.2 (nn 301-302).
  \item \textsuperscript{414} Dougan, ‘When Worlds Collide!’ (n 412) 939-40: 947.
  \item \textsuperscript{415} See discussion under section 4.2 (nn 286-297).
\end{itemize}
difference between the rights of workers in the private and the public sector. Citizens’ rights depend on the varying degrees of centralization or privatization.\textsuperscript{416} Despite the incoherent application of EU law under the trigger model, state sovereignty will be better upheld. The trigger model corresponds better to the separation of powers provided for in the Treaty; and the Union legislator will not be able to create obligations for individuals with immediate effect through directives.

According to the Court, the exception of incidental direct effect (as referred to by the doctrine) includes public law elements, which makes them vertical in character with only ‘indirect’ horizontal effects; subsequently, they do not (according to the Court) amount to an interference with the no-horizontal direct effect rule.\textsuperscript{417} If this is to be understood, as ‘incidental horizontal effects’ does not amount to ‘horizontal direct effect’ is hard to tell, however as much as there is a public law element involved, there is also a private law element involved in those cases. The original idea behind the no horizontal direct effect rule was to protect individuals from legal consequences caused by the MS’ failure of implementation.\textsuperscript{418}

In the incidental direct effect rulings, private individuals have been imposed with legal consequences due to the state’s failure in implementing the directive - indirect but albeit imposed. Although the Court firmly adheres to the no-horizontal direct effect rule on paper, the adherence is not as clear with the incidental consequences in reality since they contradict the original idea behind the no-horizontal direct effect rule. The same is true for the duty of consistent interpretation, which can be applied in horizontal situations. In \textit{Faccini Dori}, the applicant could not derive any rights from the directive due to the prohibition of horizontal direct effect, however the national court was obliged to interpret national legislation as far possible in the light of the wording and purpose of the directive, hence, the outcome of the case was not observably less beneficial for the applicant than it would have been if horizontal direct effect was imposed.\textsuperscript{419} The development in cases \textit{Mangold} and \textit{Küçükdeveci} enabled EU general principles to provide horizontal effects.\textsuperscript{420} Despite the no horizontal direct effect rule, if the directive gives expression to a general principle of EU law, that principle is capable of producing horizontal effect - another step towards EU laws invoke-ability in horizontal situations. The first exception that neutralized the prohibition of horizontal direct effect was the expansion of the concept of the ‘state’. To include ‘private’ actors with public functions was \textit{per se} a step towards a more liberalized prohibition.\textsuperscript{421}

State liability can be viewed as a tool for enforcement of EU law, developed under the same conditions as the principle of consistent interpretation. Both are, according to the Court, inherent in the system of the Treaty.\textsuperscript{422} State liability evolved from the consensus that the doctrine of direct effect was not efficient enough. If there has been a breach of a provision of EU law, the victim of that breach must be entitled to remedy.\textsuperscript{423} The development of state liability has to some extent followed the development of direct effect, albeit not in the same pace. This makes sense since, for example, a state organ can be held responsible for a violation of EU law resulting from direct effect; the same state organ can also be held


\textsuperscript{417} Dougan, ‘The ” Disguised” Vertical Diret Effect of Directives?’ (n 416) 596.


\textsuperscript{419} \textit{Faccini Dori} (n 418).


\textsuperscript{423} See discussion under section 5.1 (nn 331-336).
responsible for the reparation caused by the same breach. Noteworthy is that state liability has provided the MS with more discretion, which in turn may result in that the MS influences the Union in a greater extent than the Union influences the states. In cases of state liability, the Court want national courts to have margin of discretion in order to decide the outcome, which is contrary to the margin of discretion the courts of the MS enjoy in relation to judgment concerning direct effect where the *principle in dubio pro direct effect* should guide, according to the Court.

Furthermore, one can wonder why the Court established incidental direct effect rulings when the duty of consistent interpretation already existed. Why create another exception heading towards a more liberalized no-horizontal direct effect rule? Cases like *Bellone* could have been, according to AG Cosmas, solved through the doctrine of consistent interpretation. Could it be that the Court in fact has a secret agenda, which is covered by the principle of *effet utile*? Full invoke-ability of EU law would enhanced the effectiveness of EU law and create a more coherent Union. As the primacy model advocates: the legal systems of the MS and the Union would be rather one system, instead of several. But such coherence would come with a price – a new constitutional order between the MS and the EU. Explicitly recognizing horizontal direct effect will give the exceptions an explanation. As it is now, the authors have found two situations that will not fit in under any already existing exception that could be explained through the recognition of horizontal direct effect: if direct effect of a directive is not possible due to the no-horizontal direct effect rule and the national rule is *contra legem* to the directive provision in question, then the duty of consistent interpretations cannot be applied; or if there is no national rule to interpret in the light of the directive, thus both situations constitute legal vacuums. The first one can maybe be circumvented because it can be argued that the *contra legem* limitation does not have to be observed, and national courts are obliged to consider the national legal system as a whole when trying to identify an interpretation method to solve the issue; the second situation however, can be stuck in a legal vacuum, resulting in that individuals’ rights are jeopardized when the same rights are upheld in another MS, which has implemented the directive.

The Court’s recognition of horizontal direct effect would undermine the distinction between dualistic and monistic states and thus, create a new constitutional order that would reallocate the separation of powers and affect the MS sovereignty. Such an order would place itself under Avbelj’s hierarchical model, where all EU law would prevail in all situations and direct effect of directives would thus be redundant. It is doubtful that dualistic MS would accept such an approach. Within the conditional hierarchical model, EU law enjoys supremacy only within its competence and in respect of the principle of proportionality and subsidiarity. Supremacy is only engaged if there is a conflict between EU law and national law. In the heterarchical model direct effect of directives serves as a trigger for supremacy *vis-à-vis* prevail of EU law. These two latter models harmonizes better with the view of dualistic states since the identity of the states is preserved, but it has been trespassed with the exceptions to the no-horizontal direct effect rule. In summary, the exceptions create not just

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427 Dashwood, 'From Van Duyn to Mangold via Marshall’ (n 404) 93.
429 Avbelj, (n 428) 748.
uncertainty and incoherence, but they also seem to push the Treaty too far, creating issues of constitutional character. The MS relinquished part of their sovereignty for the Union, but the question is whether they realized how big that part was to become. Directives are supposed to be binding upon the MS as to the result to be achieved – they give dualistic MS margin of discretion in means and method to reach the result. The distinction between dualistic and monistic states should matter in respect of directives – but does it really?

### 6.2 Coherence of EU Law - Irrespective of the Consequences?

There are similarities between on the one hand the twin constitutional doctrines of pre-emption and supremacy, and on the other hand, rules that establish national and international federal legal systems. The role of the constitutional court is to establish guidelines and clarity for lower courts and thus create coherence. If the Court wants the MS to comply with in dubio pro direct effect, the case law must provide clarity and guidance. However, the Court’s case law in this particular field of law has been criticized for being inconsistent and it seems like it is heading towards a status qua situation. Because the Court has developed several ways to circumvent the no-horizontal direct effect rule, it appears to have two different options in order to create coherence in the incoherent chaos: either by accepting that directives can indeed have horizontal direct effect, or by expanding the scope of supremacy and thus make it stronger. Both ways will limit the scope of the MS’ discretion and intrude on their sovereignty. When MS implement a directive, it falls within the scope of their discretion to decide to some extent, how a directive provision will affect private parties within their jurisdiction. Therefore, an approval of horizontal direct effect would per se limit the MS’ margin of discretion since a directive provision could in such situation always affect privat parties, regardless of the national implementation. Noteworthy is that horizontal direct effect would only limit the MS’ discretion in situations where the provision in question passed the criteria for direct effect. Thus, the whole directive would not become directly applicable in the same manner as regulations. Even though the distinction between regulations and directives would be blurred in case of horizontal direct effect, the distinction between direct applicability and direct effect would still exist. Meanwhile a broadened scope of supremacy would also widen the Union’s exclusive competence and thus limit state sovereignty – extended field pre-emption vis-à-vis the hierarchical model. In such a situation the distinction between direct applicability and direct effect would be blurred, since direct effect would be redundant.

The authors believe that the current situation of uncertainty (due to the exceptions) requires national courts to either abide by the principle of in dubio pro direct effect or they must ask the Court for a preliminary ruling, in order to create some coherence. The national court’s judgments would otherwise bare the risk of being affected by national legal culture and legal values, as is the case with state liability. Despite the promised discretion to the MS in implementation of the directive and the discretion given to the national courts to decide on direct effect, in reality this discretion is inefficient. The principle of acte clair is a recognized principle in the Union, however it cannot be relied upon by the national courts since the situation of direct effect is far from clear. On the contrary, if national courts were to abide the principle of in dubio pro direct effect, the Court would not receive as much preliminary rulings. The Court is in fact co-dependent on preliminary rulings from the MS in order to

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433 See discussion under Ch 4 (nn 269-330).
further develop the exceptions.\(^{434}\) A coherent and well-defined case law on direct effect would not only facilitate the national courts in their judicial activities, but it would also enhance the legal certainty for the citizens in the Union who are entitled to expect that their legal position is safeguarded and protected by the directive. On the other hand, the legal certainty for those who would be confronted with an obligation, which is not laid down by national law, would be jeopardized.\(^{435}\) The question is whether their legal certainty already is jeopardized with incidental direct effect rulings? Direct effect is an instrument which enables private parties to enjoy the rights and freedoms contributed by the EU in front of their national courts (if the conditions for direct effect are satisfied), and therefore it is important that the EU legislation is relevant, easy to understand and accessible. It can be argued that recognition of horizontal direct effect could in fact contribute to clarity in the field of direct effect of directives. The acceptance of horizontal direct effect would enable the creation of rights and obligations with immediate effect for individuals, which could be challenged with pushing the Treaty too far, but it would also contribute to a more ‘easy to understand’ case-law. On the contrary, it can be argued that recognition of horizontal direct effect could in fact transpose obligations that belong to the discretionary powers of the state onto private actors since they would have to interpret the situation in the light of the unimplemented directive in question,\(^{436}\) which may result in an infringement to states *trias politica*.

In relation to direct effect, there is a distinction between the discretion enjoyed by the judiciary and the discretion enjoyed by legislator and the executive.\(^{437}\) The discretion in relation to the judiciary has been developed to be wider than the discretion linked to the legislator or the executive,\(^{438}\) but as presented above, the judiciary’s discretion is in fact inefficient. In regard to the legislator and the executive, the discretion is what distinguishes monistic states from dualistic states in relation to implementation of directives. However, the development of the direct effect doctrine has resulted in that dualistic MS only enjoys their margin of discretion when the directive in question has been transposed correctly and within the time limit. The consequence of direct effect is that the enforcement EU law, as the Union intended it to be enforced, prevails if the MS used it discretion improperly and did not implement the directive within the time limit, or if the MS improperly transposed the directive. Hence, the margin of discretion for dualistic MS only exists within a very limited field of EU law. The authors are prepared to agree with Prechal in the sense that, the present case law ‘takes us into a new area of legal pluralism [and] takes us beyond the national opposition between monism and dualism, the latter being far removed from today’s reality’.\(^{439}\) Noteworthy is that, since the Union is an organ of monistic character in relation to international law, it could be suggested that this understanding should also reflect the relation between the EU and its MS.\(^{440}\) Dualism would from this perspective be redundant anyway.

State sovereignty must be sacrificed for unity and a more coherent Union. However, what is the value of discretion? Discretion is a tool for MS to stamp its authority and preserve its


\(^{435}\) Prechal, *Directives in EC Law* (n 399) 257.


\(^{437}\) Vandamme, (n 431) 276.


identity by making EU law more compatible with its national law, and thus, preserving its legal culture. Discretion can harmonize legal systems through EU law, while still preserving legal pluralism; hence it should not be eradicated. On the other hand, discretion gives states more margin, which enables them to give space for moral values no matter the consequences; and ‘[w]here law ends discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness’.

Both the maintenance of state sovereignty and the creation of total coherence in the EU have its advantages. To uphold state sovereignty would encourage membership, as the peculiarities of different legal traditions will be better preserved. However, effectiveness of EU law and uniform application of EU law promotes coherence and safeguards individual rights better. Then again, state sovereignty and uniform application of Union law must not necessary be dichotomy as they can cooperate. In order for them to cooperate there needs to be a consensus between the Union and the MS on which direction the case law should take.

6.3 Final Remarks

The relationship between direct effect and state sovereignty can roughly be explained through two directions: the direction in the light of the effectiveness of EU law argument, and the direction of the estoppel argument. The effectiveness of EU law argument advocates the recognition of horizontal direct effect. This would in turn lead to less discretion for the MS on how to implement directives, as they would be vested with the power to enact obligations for individuals with immediate effect in the national legal systems. It would maybe be to push the Treaty too far, but then again, it would create more coherence and uniform application of EU law in the MS. This would in turn make the distinction between dualistic and monistic states redundant and the distinction between regulations and directives would be blurred, and contribute to a different hierarchical order.

Recognition of horizontal direct effect would not be possible with the estoppel argument since only the MS can be held responsible for their own wrong. This would in turn lead to more, or preserved, state sovereignty, but more inconsistency in the application of EU law. With such an approach, dualistic states would still have its value because the MS could still mark its authority in order for the directive to have effects between individuals. Directives and regulations would have its significances according to the wording of the Treaty, and thus the Union and the MS would be separated legal systems with direct effect as a linkage between them.

The current case law seems to put the Court in a position in between those roughly extreme arguments. Moreover, these two arguments as basis for the principle of direct effect answer the question on how direct effect influences on/affect state sovereignty. As to the question on whether the exceptions to the no-horizontal direct effect rule in fact amounts to horizontal direct effect depends on how the original idea behind the no-horizontal direct effect rule should be understood. If the original meaning is still the valid one, then the exceptions can in fact be described as horizontal direct effect in disguise. Furthermore, the answer to the last question on how horizontal direct effect would impact on state sovereignty is dependent on how the no-horizontal direct effect rule should be understood. With horizontal direct effect, the impact on the MS would be less discretion, as the Union would be able to create obligations with immediate effect for individuals through directives, and not just through regulations.

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441 See discussion under section 5.2.1 (nn 369-380).
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