



Project no.  
02/MAC/01/06/001

Техничка помош за изработка на трговски закони  
Technical Assistance to draft Trade Laws  
An EU-funded Project managed by the European Agency for Reconstruction



Consultant: Thalés E&C - Ghelber Law Firm

## HOW TO BEST TRANSPOSE EU DIRECTIVES

Jerome Fanck

Even though the decisions of the ECJ principally concern member states of the European Union and do not at present directly concern Macedonia, it is nonetheless extremely useful to examine the case-law established by the court regarding the transposition of directives as this provides concrete examples and a useful approach setting out the best ways to transpose EU legislation to a national internal legal organisation.

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**Principle** - Article 249, paragraph 3 of the Treaty on the European Community provides that: *“a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”*.

**Characteristics of directives** – Directives have the following characteristics:

- They do not have a general scope and only concern the addressees who are specifically referred to. Private individuals, whether businesses or natural persons may not in principle accordingly derive any prerogative from them;
- They are only mandatory insofar as their objective is concerned however they leave a certain power of discretion as regards the choice of methods applied: laws, decrees, general principles provided that these are binding legal norms and not simply practices (ECJ 6<sup>th</sup> May 1980 – case 102/79, Commission v Belgium, cf infra)
- They are not directly enforceable in themselves insofar as they necessitate in principle national measures of application within a specified period during which national public authorities shall ensure that no contrary provisions are applied (ECJ, 18<sup>th</sup> December 1997, case C 129/79, Commission v Belgium cf infra)



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**Developments** – The practical scope of the directive has largely evolved taking into account the case law of the Court on the subject of direct effect.

The contents of the directives has overall also developed: the community institutions have adopted directives with an increasingly precise contents to the extent of not leaving any margin of appreciation to the national jurisdictions. The directive has become a text which contains a considerable number of articles, excessively detailed and indeed this act is sufficient in itself since the competence of the Member States as regards the form and means is only now limited to a simple transcription.

**Entry into force** – the directives are mandatory as from their entry into force; since the Maastricht Treaty, the directives are published in the Official Journal and enter into force on the date fixed by them or failing such provisions on the 20<sup>th</sup> day following their publication.

The case law of the Court has specified the scope of the obligations incumbent upon the States (I) but has also noted that the directive may produce legal effects in favour of private individuals (II).



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## **I/ Obligations created by the directives incumbent on the Member States**

Even though pursuant to the terms of article 249, paragraph 3, the directive “shall be binding as to the result to be achieved upon each Member State”, it is incorrect to consider the freedom recognised to be held by such Member State as regards the choice of the method of enforcement of its obligation as being absolute.

### **A/ Absolute obligation as regards the achievement of the result**

#### **1/ Obligation of transposition:**

The Court of Justice has specified with force and consistency the binding nature of the directive on Member States.

The directive may specify with more or less precision, the legislative result that it requires.

**Minimum directions** – A directive may for example set out minimum directions. Such expression signifies as referred to by the Court in a number of cases (**ECJ 17<sup>th</sup> December 1988, Societa Italian petroli Spa, case no C 2/97 – ECJ 12<sup>th</sup> November 1996, United Kingdom v Council, case no C 84/94: Rec I p 5755**) that “Member States are authorised to adopt stricter norms than those which are the subject of community intervention”. In such a case, the European Court of Justice limits itself to verifying that the choices adopted by the Member State concerned do not call into question the coherence of the community intervention in the domain in question and that they are applied in a non-discriminatory manner and do not hinder the exercise of the fundamental freedoms guaranteed by the Treaty (**ECJ 17<sup>th</sup> December 1988, Societa Italian petroli Spa** referred to above).



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**Complete directives** – As regards the directives relating to consumer law, most of these are minimal, apart from some which contain full directions: in the latter case, the Member States do not have any possibility of appreciation (for example in matters of security, of product liability and of advertisements).

The directive accordingly sets out a series of “*obligations to achieve a result in a clear and unequivocal manner*”. In such case, to take all measures, which are reasonably possible in order to obtain the result imposed by the directive, cannot be considered as sufficient in order for an effective enforcement of the directive to be ensured (**ECJ, 18<sup>th</sup> June 2002, Commission v France**, case no C – 60/01).

**Obligations, which may not be derogated against** – The obligation of transposition, which is incumbent upon addressee Member States, is absolute and the latter may not be exonerated from these. Accordingly, whether or not the activities referred to by the directive exist within the national territory does not at all modify both the obligation to transpose but also to fully transpose the community directive (**ECJ, 16<sup>th</sup> November 2000, Commission v Greece**, case no C-214/98).

## **2/ Obligation of transposition within a limited time period**

**Principle** – The European Court of Justice has stressed the obligation, which is incumbent upon Member States to take all necessary measures within the prescribed time limits in order to comply with the directives (in particular, **European Court of Justice 18<sup>th</sup> September 1984, Commission v/ Italy**, case no 221/83: Rec p 3249 s).

**Impossibility of exoneration from such obligation** – The Court has consistently denied the possibility for a Member State to unilaterally exonerate itself from the obligation to respect the mandatory nature of the time limits for implementation of the directives. In effect, according to the European Court of Justice, the governments of Member States participating “*in the preparatory workings of the directives must be able to develop the*



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*legislative provisions necessary to their implementation within the fixed time limits”* (**European Court of Justice 1<sup>st</sup> March 1983, Commission v Belgium**, case no 301/81: Rec. p 467 s. – **European Court of Justice, 24<sup>th</sup> November 1987, Commission v. Italy**, case no 124/86: Rec p 4661 s).

It has in particular underlined that “*a Member State may not rely on practical provisions or situations affecting its internal organisation in order to justify the non-compliance of the obligations and time periods resulting from the community directives”* (**European Court of Justice, 22<sup>nd</sup> February 1979, Commission v Italy** – case no 163/78: Rec p 771). For example, the argument based on difficulties relating to the federalism of Member States may on no account be relied upon (**European Court of Justice, 28<sup>th</sup> May 1998, Commission v. Spain, case no C-298/97 Rec I, p3301** – **Court of Justice, 21<sup>st</sup> January 1999, Commission v Belgium, case no C-347/97**).

In the event the time period for the implementation of the directive proves to be too short, the only means offered to the States is to obtain the possible extension of this time limit (European Court of Justice 1<sup>st</sup> March 1983, Commission v Belgium, case no 301/81, referred to above).

**Effect of a directive, which has not been transposed within the time limits** – The Member State which has not taken the enforcement measures imposed by the directive, within the time limits, may not rely on such non-enforcement of the obligations contained within the directive as regards private individuals. Accordingly, a national jurisdiction which has to decide on a case brought before it by a party having complied with the provisions of a directive and who requests that a national provision which is incompatible with the said directive which has not been implemented within the time period in the internal legal organisation of a Member State in breach, be set aside, must allow such request if the obligation in question is unconditional and is sufficiently precise (cf infra).



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On the other hand, so long as the time limit fixed as regards the Member States' obligation to introduce the provisions of a directive in their internal legal organisation has not been reached, the directive shall not have a direct effect; such an effect is only produced at the end of the fixed period and in the event of an infringement by the Member State concerned (**European Court of Justice – 5<sup>th</sup> April 1979, *Ministere public v. Ratti***, case no 148.78: Rec p 1629 s).

**Fate of national measures contrary to a directive during the time period for transposition** – Such question was settled by the **Inter-environment Wallonie judgement of the 18<sup>th</sup> December 1997** (European Court of Justice, 18<sup>th</sup> December 1997, Inter-Environment Wallonie, case law C 129/96). The question was considered as to what margin of manoeuvre was available to Member States as regards the contents of the provisions drawn up by them prior to the expiry of the time limit for transposition and the consequences, which may be drawn. On this point, the Court held that *“although the Member States are not obliged to adopt measures of transposition prior to the expiry of the time limit for transposition, it results from the combined application of articles 5, 2<sup>nd</sup> paragraph and 189 third paragraph of the treaty that, during such time period, they may not take any provisions of a nature to seriously compromise the result prescribed by the directive. It is for the national jurisdiction to decide whether this is the case as regards the national provisions, the legality of which it has to examine”*.

Despite the novelty of such a position, this is however similar in a certain manner to that resulting from the *Kolpinghuis Nijmegen* case law. According to this case law, a directive may not be relied upon as such against a person before a national jurisdiction where the transposition has not already taken place, whether the time limit for such transposition has expired or not (**European Court of Justice – 8<sup>th</sup> October 1987, *Kolpinghuis Nijmegen***, case no 80/86: Rec. p 3982).

### **3/ Obligation to interpret the national law with regard to the directive**



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National jurisdictions are obliged to interpret their national law with regard to the directive and its purpose in order to achieve the result referred to by article 249, paragraph 3 of the EC Treaty (**European Court of Justice 10<sup>th</sup> April 1984, von Colson and Kamann v Land Nordheim-Westfalen**, case no 14/83: Rec. p 1891 s, in particular p 1906 s).

National jurisdictions must comply with this obligation of interpretation even with respect to a case opposing two private individuals (**European Court of Justice 13<sup>th</sup> November 1990, case law C 106/89, Marleasing SA v La Comercial International de Alimentacion SA**: Rec European Court of Justice I p 4156). In the case in question, two private individuals were in dispute, one party invoking a community directive, the other party its non-transposition; the national judge queried whether the national law should be interpreted with regard to the Directive; the Court underlined that although a non transposed directive may not result in an obligation for an individual, the national judge must interpret the national law with regard to the directive insofar as possible.

This case law accordingly underlines the principle of compliant interpretation, according to which it is incumbent on national jurisdictions to interpret the provisions of internal law, whether preceding or subsequent to the entry into force of a directive, with regard to the latter. This case law has been confirmed on several occasions (**European Court of Justice, 16<sup>th</sup> December 1993, Miret, case no C 334/92: Rec I p 6911 – European Court of Justice, 14<sup>th</sup> July 1994, Faccini Dori, case no C 91/92 – European Court of Justice, 24<sup>th</sup> September 1998, W Togel, case no C 76/97**).

#### **4/ Obligation of application**

Once the transposition of the directive has been effected, the Member State must effectively apply it within the time limits set out by the said directive or in the event that a mandatory time period is not specified, as soon as possible. The Court has been asked to decide upon the terms “as soon as possible”. It has specified that this expression “*must be interpreted in the sense that it sets out in principle a reasonable time period for the*



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*enforcement of a particular obligation by the national authorities, such time period being independent from that provided for the transposition of the said directive” (European Court of Justice, 2<sup>nd</sup> May 2002, Commission v. France, case no C 292/99).*

A Member State may not rely on internal difficulties, in order to justify the non-observance of obligations resulting from community law (**European Court of Justice, 4<sup>th</sup> July 2000, Commission v Greece, case C-387/97: Rec I p 5047** - European Court of Justice, 2<sup>nd</sup> May 2002 Commission v France referred to above).

#### **5/ Obligation of non –alteration**

The national jurisdictions are under an obligation to verify whether the national authorities have changed the demands formulated by a directive.

Accordingly, an individual may be able to rely on “*a provision of a directive before the national jurisdiction in order to verify that the transposition by the competent national authorities, pursuant to the exercise of their power granted to them as regards the form and the methods for the implementation of the directive, has remained within the limits of appreciation of the latter” (European Court of Justice 1<sup>st</sup> February 1977, Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten, case no 51/76: Rec p 113, in particular p 2327 s).*

#### **B/ Relative freedom of choice of methods.**

Even though the directive entails an obligation to achieve a result as regards the Member States, this is not limited to the contents of the measures which it is incumbent upon them to provide for but also covers the methods and forms used. The Court allows itself the right to control the use of this dual possibility.

The Court has specified 2 conditions which must be observed by the Member States:





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- the measures of application must be legally binding
- the measures of application must be adequate as regards the purpose of each directive.

Moreover, the Court has recognised that the scope of national normative provisions of transposition of directives may be appreciated taking into account the interpretation given to them by internal jurisdictions (**European Court of Justice, 8<sup>th</sup> June 1994, Commission v United Kingdom**, case no C 382/92: Rec European Court of Justice 1994 I p 2435 – **European Court of Justice, 29<sup>th</sup> May 1997, Commission v United Kingdom**, case no C 300/95: Rec European Court of Justice 1997, I, p 2649).

#### **1/ The measures of application must have a binding nature**

The Court of Justice has first of all stressed the necessity of carrying out the transposition of the directives in internal law under conditions in conformity with demands of legal security and certitude.

According to consistent case law of the Court, the measures putting the directives into effect in internal law must be legally “binding” (**European Court of Justice 2<sup>nd</sup> December 1986, Commission v Kingdom of Belgium** case no 239/85: Rec p 365 s). Accordingly “*simple administrative practices, which are by their nature modifiable according to the authority’s wishes and deprived of adequate publicity may not be considered as constituting a valid enforcement of the obligation which is incumbent on Member States to which a directive is addressed*” pursuant to article 249 (**European Court of Justice Commission v Italy, 15<sup>th</sup> March 1983**, case no 145/82: Rec p 711 s in particular p 718 – **European Court of Justice 16<sup>th</sup> November 2000, Commission v Greece**, case no C 214/98 Rec European Court of Justice I p 10250).

Similarly, a simple administrative circular may not be considered as ensuring that a transposition is adequate (**European Court of Justice 9<sup>th</sup> June 1993, Commission v The Republic of Italy**, case no C 95/92 Rec European Court of Justice I p 3119 – **European**



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**Court of Justice 17<sup>th</sup> May 2001, Commission v Italy** case no C 159/99 Rec European Court of Justice I p 4007).

Not only national authorities but also judicial authorities, within the context of their competence, are obliged to take all general or particular measures in order to ensure the obligation of enforcement attached to the directive pursuant to article 249 of the EC Treaty (**European Court of Justice, 26<sup>th</sup> September 1996, Arcaro case C 168/95: Rec I p 4705**).

The transposition of a directive does not however necessarily require a legislative action to be undertaken in each Member State. In particular, the existence of general principles of constitutional or administrative law may render the transposition by way of legislative or regulatory measures superfluous provided that:

- these principles effectively guarantee the application of the directive by the national authority,
- the legal situation resulting from these principles is sufficiently precise and clear,
- the beneficiaries are in a position to be fully aware of their rights and if applicable of their rights to rely on this before the national courts (**European Court of Justice 23<sup>rd</sup> May 1985, Commission v Federal Republic of Germany**, case 29/84, Rec p 1661 s).

The Court later confirmed that Member States should provide for a precise legal framework within the domain in question in order to guarantee the full application of the directives in law and not only in fact (**European Court of Justice 28<sup>th</sup> February 1991 – Commission v Italy** case C 360/87: Rec I p 791). Accordingly, a judgement was held against the United Kingdom for not having ensured the application of a directive in a satisfactory manner based on the grounds that British law did not have a sufficiently precise nature (**European Court of Justice 22<sup>nd</sup> April 1999, Commission v United Kingdom**, case no C 340/96).



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## **2/ The measures of application must be adequate as regards the purpose of each directive**

This principle has been affirmed with particular force in a judgement of the Commission v Belgium. The Belgian government relied on the right to freely determine “the legal techniques pursuant to which the directives are put into force” specifying that these could cover a range “from the law to the simple note of service”. For its part, the Court underlined that the Member States are required to use their freedom in a manner to allow for the realisation of the purpose of the directives (**European Court of Justice 6<sup>th</sup> May 1980, Commission v Belgium**, case no 102/79: Rec p 1473).

Similarly, it was held that “it follows from article 249, paragraph 3 of the treaty that the competence left to the Member States as regards the form and the methods of measures to be taken by the national authorities is dependant upon the result that the Council or the Commission intend to be reached” (**European Court of Justice, 23<sup>rd</sup> November 1977, ENKA**, case no 38/77 Rec p 2212).

In order to comply with such an injunction, the national authorities must take into account the explicit or implicit directions within the directives.

It was for example held that the directive 93/13/EEC of the 5<sup>th</sup> April 1993 concerning unfair terms within contracts entered into with consumers implied that Member States implement adequate and efficient means in order that the use of unfair terms be discontinued, in particular by the possibility for approved consumer associations to bring legal proceedings as soon as such terms are not only used within determined contracts but also where they are merely recommended by professionals or their associations; the Court has specified in this respect that the objective of the directive in question is not only repressive but also preventative (**European Court of Justice, 27<sup>th</sup> June 2000, Oceano**



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**Grupo Editorial et Salvat Editores**, case no C-240/98 to C 244/98 Rec European Court of Justice 2000 I p 4941).

Accordingly, a judgement was made against Italy by the European Court of Justice for an insufficient transposition of the directive: the national provisions of transposition did not provide a guarantee as regards the dual objective of the directive as they limited themselves to ensuring the dissuasive objective of the directive and did not consider its repressive side (**European Court of Justice, 24<sup>th</sup> January 2002, Commission v Italy, case no C 372/99**).

The Court when considering a dispute concerning the same directive imposed a power of the national judge to correct *ex officio* unfair terms notwithstanding the period of foreclosure set out by national law. It in effect specified that “*the power of the judge to examine ex officio the unfair nature of a term constitutes a method to achieve at the same time both the result set out at article 6 of the directive, namely to prevent that an individual consumer be bound by an unfair term and to contribute to the realisation of the objective referred to in its article 7, wherever such a review may have a dissuasive effect aiming to discontinue the use of unfair terms in contracts entered into with consumers by a professional*” (**European Court of Justice, 21<sup>st</sup> November 2002, Cofidis SA v JL Fredout, case no C 473/00**).

### **C/ Penalties for the non-observance of the obligation of transposition**

**The impossibility to rely on the non-observance of its obligations as against an individual** – The failure of a State which is in breach of its obligation incumbent upon it by virtue of article 249, paragraph 3 of the EC Treaty is penalised by the prohibition for this State to “rely on its non-observance of the obligations incumbent upon it as regards private individuals” (European Court of Justice 5<sup>th</sup> April 1979 – Ratti referred to above). The Court has specified that the binding nature of a directive only existing as regards



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every addressee Member State, the latter may not rely on its own non-observance of the obligations which the directive imposes upon it as against an individual (**European Court of Justice, 26<sup>th</sup> February 1986 Marshall case no 152/84: Rec p 723**).

Hence, for example, the 1990 directive confers on the consumer the right to obtain non-pecuniary damages resulting from the non-enforcement or the incorrect enforcement of services constituting a package holiday. Yet, Austrian law did not provide for the liability for damages of such a nature. The Court of Justice then held that notwithstanding this non-transposition, the national judge must fully apply the directive and this fully allows the consumer the right to obtain non-pecuniary damages (**European Court of Justice, 12<sup>th</sup> March 2002, Leitner v TUI case C 168/00**).

Furthermore, a question concerning the binding nature of time limits of foreclosure of proceedings regarding the recovery of amounts unjustly paid, in the case of taxes having been received in violation of a directive which was not or which was incorrectly transposed in national law was brought before the Court. In a judgement Emmott of the 25<sup>th</sup> July 1991 (**European Court of Justice, 25<sup>th</sup> July 1991, Emmott, case C 208/90: Rec I p 4269**), the Court considered that “up until the time of the correct transposition of the directive, the deficient Member State may not rely on the tardiness of legal proceedings against it brought by an individual in view of the protection of rights resulting from the provisions of the directive and that a time limit for legal proceedings under national law may only commence as from that time”.

This case law was however called into question by a subsequent judgement in which the Court underlined that “the solution reached by the Emmott judgement was justified by circumstances particular to that case, in which foreclosure led to deprive the claimant from the principle of the possibility to claim its right to equality of treatment by virtue of a community directive”. The Court accordingly accepts that a Member State which has not correctly transposed a directive may rely on a national provision if the latter complies



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with the principles of effectiveness and equivalence (**European Court of Justice, 2<sup>nd</sup> December 1997, Fantask, case no C 188/95**). This judgement may be criticised in particular in that it allows a Member State to take advantage from its own non-transposition.

***Recours en manquement (Proceedings for breach)*** – The Commission which has the responsibility for ensuring that the Treaty of Rome as well as the provisions taken by virtue of the latter are applied (article 211 EC) verifies that, at the end of the specified time period, the internal law of the Member States is in conformity with the provisions of the directive. This control is facilitated by the obligation, generally imposed on Member States by the directive, to inform the Commission, at the end of this time period of the measures taken and to communicate to it, if applicable, the text of the adopted provisions. This information must be “clear and precise” (European Court of Justice, 25<sup>th</sup> May 1982, Commission v The Netherlands case no 96/81, Rec European Court of Justice p 1791 and p 1819).

In the event that a Member State has not transposed the directive within the required time limits or if it has done so in an incorrect or incomplete manner, the Commission shall bring an action for breach of its obligation before the European Court of Justice. The Member State against which the judgement has been made shall then be obliged to comply with the judgement of the Court and to perform its obligations; in the event it does not do so it shall be liable for large pecuniary penalties (article 228 of the EC Treaty).

Hence, for example, certain Member States have had judgements entered against them due to the incomplete transposition of a directive relating to the protection of the environment (European Court of Justice, 5<sup>th</sup> December 2002, Commission v Belgium case no C 324/01 – European Court of Justice, 6<sup>th</sup> April 2000, Commission v France, case no C 256/98).



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**Liability as regards nationals** – Furthermore, pursuant to the **Francovich and Bonifaci v Republic of Italy judgement of the 19<sup>th</sup> November 1991** (case no C6 and C 9/90: Rec I p 5357), the Court of Justice stated that a Member State could be liable as regards nationals for the non-transposition of the provisions of a directive. This case law was the subject of an explicit but restrictive illustration with the British Telecom judgement of the 26<sup>th</sup> March 1996 (**European Court of Justice, 26<sup>th</sup> March 1996, case no C 392/93, British Telecom: Rec European Court of Justice I**). In this judgement, the Court considered that a breach of community law pursuant to a legislative intervention of a Member State, which was supposed to transpose a directive, was only constituted if the State did not recognise “in a manifest and serious manner the limitations imposed regarding the exercise of its powers”. In practice therefore, as regards the directives, the more the community rules are obscure or imprecise, the more the competence of interpretation of the State will be wide, and the less the breach of community law may be determined and following on from that any liability retained. However, in a subsequent case, the Court recognised that a simple infringement of community law is sufficient to establish the existence of a defined breach (European Court of Justice 8<sup>th</sup> October 1996, case jtes C-178/94, C-179/94, C 188 to 190/94, Dillenkofer: Rec European Court of Justice I p 4845).

The Court has specified that proceedings for damages on the grounds of the non-transposition of a directive are subject to 3 conditions (**European Court of Justice, 25<sup>th</sup> February 1999, A Carbonari e a case C 131/97**):

- the breached rule of law must have as its purpose the conferring of rights upon private individuals, the contents of which may be identified,
- a direct causal link must exist between the breach of the community obligations of the Member State in question and the loss suffered by the persons involved,
- the breach must be sufficiently defined.



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In the event that the Member State is liable, the latter shall have to compensate the loss caused by the non-transposition of the community directives in due time, subject to the 3 afore-mentioned conditions being observed.

## **II/ Rights resulting from the directive as regards private individuals**

### **1/ Direct vertical effect of the directives: possibility for an individual to invoke a non-transposed directive against a Member State**

**Principle** – Even though pursuant to the terms of article 249, paragraph 3 of the EC Treaty, the directive only has a mandatory effect as regards Member States, it cannot be stated that it cannot produce other legal effects as regards private individuals.

The doctrine on this matter was originally fundamentally divided: certain authors denied it any aptitude to produce legal effects whereas others privileging the contents of the legal obligation of the directive did not exclude such possibility. This latter view has been confirmed by the Court of Justice.

The European Court of Justice has accordingly specified that “ even though by virtue of the provisions of article 189, regulations are directly applicable and consequently able by their nature to produce direct effects, this does not mean that other categories of acts referred to in this article may never result in analogous effects” (**European Court of Justice 4<sup>th</sup> December 1974, Van Duyn**, case no 41/74 Rec p 1348 s). This formula is consistently referred to in the judgements of the Court (in particular see **European Court of Justice 1<sup>st</sup> February 1977, Verbond van Nederlandse Ondernemingen**, case no 51/76 referred to above, **European Court of Justice 23<sup>rd</sup> November 1977 Enka**, case no 21/78 Rec p 2212).





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**Criteria for direct effect** – A directive does not systematically produce direct effects in the legal relations between Member States and private individuals. It must satisfy the conditions highlighted by the Court in its Van Gend en Loos judgement (**European Court of Justice 5<sup>th</sup> February 1962, Van Gend en Loos v Administration fiscale neerlandaise** case 26/62 Rec p 3 s). According to the Court, a provision of the EC Treaty may produce a direct effect where it results in a “clear”, “precise” and “unconditional” obligation even if the addressee of the obligation is a Member State. In other words, the provision in question must be complete and legally perfect. A provision is unconditional when it allows for the clear identification of the contents of the rights which it grants to private individuals without the Member State being able to rely on a margin of discretionary appreciation in their implementation. A provision which imposes on Member States an obligation not to do something therefore produces a direct effect in the legal relations between Member States and its citizens as such an obligation is both clear and unconditional and does not necessitate any legislative or regulatory intervention for its enforcement on behalf of the addressee Member States or from the community institutions.

The principles set out by the European Court of Justice in its case law relating to the direct effect of the treaties is referred to in the judgements relating to directives. Accordingly in the Ratti (referred to above) and Becker judgements (**European Court of Justice 19<sup>th</sup> January 1982, Becker**, case 8/81 Rec p 53 s), it states that private individuals should be able to rely on the provisions of a directive before the national courts by invoking the deficiencies of the addressee Member State “if the obligation in question is unconditional and precise”.

The Court also held that an individual could invoke a directive which had been incorrectly or not transposed and which was precise and unconditional, against:

- an administration (**European Court of Justice 22<sup>nd</sup> June 1989, Fratelli Constanzo, case no 103/88: Rec p 1839**),



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- “any organisation or entity which is subject to the authority or the control of the State or which is granted exorbitant powers in relation to those resulting from the rules applicable to relations between private individuals (**European Court of Justice, 12<sup>th</sup> July 1990, Foster case C 188/89**)”,
- as against public persons acting in a capacity of employer (**European Court of Justice – 26<sup>th</sup> February 1986, Marshall case 152/84**).

In the same manner, it held that “a national authority may not rely on a legislative or administrative national provision which is not in conformity with a provision of a directive stating an unconditional and sufficiently precise obligation thereby presenting the necessary characteristics in order to be applied by the judge, as against a private individual” (**European Court of Justice 7<sup>th</sup> July 1981, Rewe v Hauptzollamt Kiel**, case no 158/80 Rec p 1805 s – **European Court of Justice 26<sup>th</sup> February 1986 MH Marshall v South West Hampshire Area Health Authority, case 152/84: Rec p 723 s**).

**Justifications regarding direct effect** – The direct effect attributed to community directives is justified by the necessity to ensure the effectiveness of the binding nature of the obligation imposed on the Member States by the directives. Hence in the Van Duyn judgement referred to above, the Court underlines that “particularly in the cases where the community authorities have obliged the Member States to follow a determined behaviour by way of a directive, the useful effect of such an act would be lessened if private individuals were prevented from relying on it in legal proceedings and national jurisdictions prevented from taking it into consideration as an element of community law”.

The Court referred to another reason legitimising the recognition of a direct effect of the directives. It appeared inconceivable to it that “a Member State which has not taken the measures of enforcement imposed by the directive within the required time limits may



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rely on its own non-achievement of the obligations it has as against private individuals” (European Court of Justice 5<sup>th</sup> April 1979, Ratti case no 148/78 referred to above). A Member State may not therefore rely on the non-transposition of a directive in order to refuse its benefits to a private individual. The direct effect therefore acts in such cases as a type of penalty as regards the negligent or recalcitrant Member State.

The direct effect of the directives is designed to palliate the deficiencies of the Member States who have omitted to perform their obligations. The Court of Justice has underlined the particular nature of the direct effect of directives in its judgement of the 6<sup>th</sup> May 1980 Commission v Belgium, referred to above “it is only in particular circumstances, in particular in the case where a Member State may have omitted to take the required measures of enforcement or adopted measures which are not in conformity with a directive that the Court recognised the right for private individuals to rely on a directive in court as against a deficient Member State”.

In the same judgement, it specified that the direct effect that a directive is able to produce “may not serve as a justification for the Member State to exonerate itself from taking adequate application measures for the purpose of each directive in the required time period”.

The supplementary function of the direct effect of directives constitutes a guarantee for community citizens. It allows them to obtain from the national judge the overriding of any national provision, which is incompatible with a directive which has not been or which has been incorrectly introduced within the internal organisation.

A private individual may therefore rely on, as against a Member State:

- a directive which has not been transposed (European Court of Justice 5<sup>th</sup> April 1979, referred to above – European Court of Justice 19<sup>th</sup> January 1982 – Becker



- referred to above – European Court of Justice 26<sup>th</sup> February 1954 Marshall referred to above),
- an incorrectly transposed directive (European Court of Justice, 4<sup>th</sup> December 1997, Helmut Kampelmann and others, case C-253/96 to C-258/96)
  - and also in cases where national measures which correctly transpose the said directive are not applied in a manner to achieve the result which it seeks to achieve (**European Court of Justice, 11<sup>th</sup> July 2002, Marks & Spencer, case C 62/00**).

The faulty application of the directive consequently results in the “wakening” of the latter, which is only “dormant” pursuant to the operation of the transposition. The fact that the Member State has transposed a directive does not therefore prevent the private individual from the possibility of relying on this in order to invoke the rights drawn from these provisions.

## **2/ Absence of direct horizontal effect: impossibility for a private individual to invoke a non-transposed directive as against another private individual**

**Principle** – According to consistent case law, directives cannot create obligations as regards a private individual and consequently cannot be relied on in a dispute between two private individuals (European Court of Justice, 26<sup>th</sup> February 1986, Marshall referred to above).

**Dispute between a tradesperson and a consumer** – In the **Faccini Dori** case dated the 14<sup>th</sup> July 1994 (case no C91/92) the question of reliance on a directive which had not already been transposed in a dispute between a tradesperson and a consumer was considered. The *Avocat general* advocated for the recognition of a horizontal effect of the directives in particular to increase the legal protection of private individuals. In spite



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of this position, the Court rejected any construction seeking to recognise a horizontal effect to directives.

Whilst noting that the provisions of the directive in question were unconditional and sufficiently precise, the Court underlined that the justifications for a direct vertical effect do not in themselves entail the recognition of a possible horizontal direct effect. Indeed, according to it, “to extend this case law to the domain of relations between private individuals would come down to granting the Community the recognition of the power to provide for obligations incumbent upon private individuals with immediate effect whereas it only holds such competence where it is attributed the power to adopt regulations. It follows that, failing transposition measures of the directive within the prescribed time limits, a consumer may not base a right of renunciation on the directive as against the tradespersons with whom they have entered into a contract and to rely on these before a national jurisdiction”.

This categorical rejection of the direct horizontal effect does not however signify that a directive may not be relied upon in a dispute opposing two private individuals due to the obligation incumbent upon national jurisdictions to interpret their national law in the light of the directive (cf supra)

**Exception as regards directives on technical legislation** – The directive of the 28<sup>th</sup> March 1983 makes the adoption of national technical regulations subject to a notification to the Commission. The Court accepted the reliance on the provisions of this directive in a dispute between two economic operators (**European Court of Justice, 26<sup>th</sup> September 2000, Unilever Italia, case C 443/98 Rec I p 7535** – **European Court of Justice, 6<sup>th</sup> June 2002, Sapod Audi and Eco Emballages SA – case C 159/00**)

**Conclusion:**



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In the Teodoro Wagner Miret judgement of the 16<sup>th</sup> December 1993, referred to above, the Court established an especially clear *modus operandi* of the jurisdictional steps to be taken in the cases of contentious dispute on the national application of directives: after having noted the absence, in the case in question of the direct effect of the directive, in other words the absence of any “substitution reliance”, the community judge considers the recourse to an “interpretation reliance” (technique of compliant interpretation), sets it aside in the case in question and finally recommends the solution of damages if none of the previous palliatives is applicable.

Intervention of

Mr. Jerome Franck on Ohrid seminar on consumer protection law