

Direct Effect

EU LAW

Prof: MOHAMMAD MEHMOOD AHMAD

Compiled By: Muhammad Raees Malik

University of London

DIRECT EFFECT

(for Essay of direct effect or direct effect over supremacy of EU law)

STRUCTURE OF CHAPTER

1. Definition, nature and scope.
 2. Vangend case.
 3. Criteria to establish direct effect.(7 to 8 lines on criteria in exam)
 - i. Clear and precise.
 - ii. Unconditional.
 - iii. Not dependent upon further act by the member state.
 4. Direct effect and different community measures.
 - i. Direct effect and treaty.
 - ii. Direct effect and regulations.
 - iii. Direct effect and directives.
 - iv. Direct effect and ECJ decisions.
 - v. Direct effect and international agreements.
 5. Directives
 6. Two types of direct effects
 - i. Horizontal direct effect. (emanation of state to alternatives to enforce directives horizontally)
 - ii. Vertical direct effect.
 - Incidental horizontal effect
 - Indirect effect.
-

1. Definition, nature and scope of direct effect.

EU was founded on economic co-operation and intended to be the strongest regional block. EU is designed for the people by the people and intended to achieve the objectives of uniformity, harmony and effectiveness through the territory. Direct effect means that individuals hold the right to invoke EU law in their domestic courts. It means that subject to certain restrictions and conditions EU law creates certain rights and obligations which individuals may rely and impose in national/domestic courts. The forum of direct effect is the domestic courts and not ECJ, since ECJ has no appellate authority.

This is a peculiar characteristic of EU, since in a conventional international structure the subjects are the states but EU law not only applies to MS but also to individuals residing in the MS. The prime purpose of this doctrine is to provide individual citizens with rights and obligations and enforcement of such rights at national level. By direct effect EU law reaches at individual door steps i.e., grass root level application which helps in attaining a general public opinion in favour of EU law.

European Union is a unique legal entity, a supranational entity. European Court of Justice has leased some general principals to enforce and hold member states accountable.

Definition: Direct effect means individuals holds the right to invoke the EU law in their domestic courts and EU law creates rights and obligations which individuals may rely and enforce in their national courts.

Purpose:

EU was made for economic consolidation and trade harmonization. The direct effect doctrine gives EU a unique feature that EU law is not only applied to member states but to their individual residents. Direct Effect is significant to provide grass root level applicability. This mechanism provides for enforcement of EU law in a uniform pattern throughout the territory. Direct Effect is not laid down in any treaty article, but it is a product of judicial activism.

By direct effect EU law become directly available to individuals and without any further legislation by domestic parliament. Direct effect gives unique feature to EU law since in normal international system/structure laws are applicable to states and not to its individuals. By direct effect EU law is applicable to both member state and its individuals at the same time. Since gross root level application is being given to EU law, it will help the attainment of general public opinion in favour of EU law. Direct effect provides for individual application of EU law and it fulfills the gap between EU and its citizens. The outcome of direct effect may include uniformity, harmony, flexibility, efficiency and enforceability of EU law and makes EU law at par with domestic law.

2. Van Gend Loos case.

Period of Stagnation is a product of judicial activism or ECJ's proactiveness (1957-86). As a result of this case two doctrines were produced; direct effect doctrine and supremacy of EU Law or surrendering of sovereignty. By this case ECJ for the first time originated the doctrine of direct effect and direct effect is not contained in any treaty article.

ECJ Held “The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereignty, albeit within limited fields of economic matters and subjects of which compromise not only the member states but also the individual residing in the member states”. Two outcomes

3. Criteria to establish/implement direct effect.(7 TO 8 LINES IN EXAM)

- i. **Clear and precise:** Law should be unambiguous, certain, detailed, precise and with clear interpretation. En Van Gend stated “no custom duties between the member states.” Yet it was held that law was capable of taking direct effect hereby it has shown a liberal approach of ECJ in reference to this requirement. Even if a law is not clear the court will make it clear for you.
- ii. **Unconditional:** this means right should not be left upon member state discretion and there should be no terms attached upon EU law implementation. However by attaching exception to law does not mean that law has become conditional. As long as a claim falls under general rule it will take direct effect.
Francovich v Italy As long as your claim does not fall on one of the exceptions, it will be a right and to that extent it will take direct effect.
- iii. **Van Colson** Exceptions and Derogations of law will not prevent it from taking direct effect. Provided that the claim does not fall under the exceptions. Thereby, Article 141 EC Treaty was given direct effect.
Van Duyn v Home Office Article 45 TFEU provides for free movement persons was under question because it was subjected to public health exception. Direct Effect was given since the claim did not fall under exception.
- iii. **Not dependent upon further act by the member state:** the EU law should not require further implementation by a member state. Citizens’ rights should not be left at member state’s discretion, but must be directly available to individuals.

In Van Gend court also laid down a fourth condition that is EU law must lay down a negative prohibition rather than positive obligation. However this condition was dropped in **Alfonse GMBH case**.

4. Direct effect and different community measures.

Sources of EU law and direct effect:

- **Primary source:**
 - i. **Direct effect and treaty.** In the light of Van Gend since treaty article was involved, so it stands as an authority for the proposition that treaty article will take direct effect. **Authorities for Vertical direct effect is Van Gend and for horizontal Direct affect Deference vs Sabena.**
- **Secondary Source: defined in article 288 TEFU.**
 - i. **Direct effect and regulations (strict form of EU law):** in order for regulations to take direct effect they have to be clear, precise and requiring any further action by a member state. However under article 288 of TFEU since regulations are directly applicable they will take direct effect. Regulations are defined by Article 288 TFEU as directly and generally applicable to all member states binding in their entirety. In regulations no discretions are left in the hands of the member states. It is regarded as strict form of EU law. Any further action by a member state to implement a regulation is mere waste of time.

Azizenda Agricola In order for a regulation to take direct effect it must satisfy Van Gend criteria. **Analysis** ECJ has clarified on several occasion that other forms of EU law are also capable of taking direct effect provided they satisfy the criteria.

Commission v Italy any act done by a member states to implement a regulation is of no effect and a mere waste of time. –

Regulation 1463/70 In which member states were given relaxation in order to apply it so it had no direct effect since it was dependent upon member states. Commission vs UK (dachographs) Practical difficulties which appear at the stage when a community measure is put into effect cannot permit a member state unilaterally to opt out of fulfilling its obligation.

Amsterdam vs Bulb Any national measures which are supplementing a regulation would be valid but member state cannot change the subject matter of the regulation.

ii. **Direct effect and directives (flexible form of EU law)** in directives an ultimate purpose is prescribed but how to achieve that law is left up to member state discretion. A directive will take direct effect once a time limit for implementation has expired. Binding as to end and has specific application, as per article 288 of TFEU it is addressed to member states as time is given to member states for implementation. Dependent upon further action by member states and it is binding as to result/outcome. Since Van Gend case involved Article 12 EC Treaty thereby it stands as a president to the proposition that treaty articles take direct effect. Directives are dependent upon further action by member states. Article 288 TFEU provides that directives are binding only as to the result to be achieved but choice of method is left to member states this means result is uniform on member states, but legislation will vary 70%. European Union law by directive are provided with element of discretion and flexibility. It must be remembered that implementing EU is not a choice of member states, but the mode or procedure is the choice of member states completely. Due to the demands of practicality and enforcements. Directives are provided with direct effect, even though Van Gend criteria have not been followed.

Issue: for any EU law to take direct effect it should not be dependent upon further action by a member state, however directives are addressed to states and dependent upon further action by a member state thereby will they take direct effect?

Van Duyn. V Home Office this case stands as an authority for the principle that directives take direct effect.

Issue: issue was that whether directives are capable of taking direct effect:

Held: as a matter of policy directive were given direct effect, since if directive do not have direct effect then member states would abuse their discretion and individuals would attempt to take their claims to the ECJ. A member state will be estopped from relying upon their own failure to implement a directive. Once a directive is within the time limit given for implementation it is dependent upon further action by a member state, however once that dead line expires it is no more dependent upon further action by a member state and from that time onward it will take direct effect.

A directive is capable of taking direct effect due to policy consideration floodgates, estoppel after expiry of deadline and clear, precise and unconditional) as a greater portion of EU law is made through directive so if a directive will not take direct effect, then practical applicability would be offended. As a result of it attempts would be made by the citizens to take their minor claims to the ECJ. By the concept of estoppel member states will be estopped from relying upon its own failure to implement a directive. Directive must be clear, precise and

unconditional. Directive will take direct effect on expiry of deadline for as long as directive is within the period it is dependent upon further action. Therefore, incapable of taking direct effect. However, when the deadline expires it is not dependent further action. From that time forward it will take direct effect.

Analysis: ECJ gave following reasons of direct effect of directives:

- i. Directives are binding as a community measure.
- ii. Directives would be more effectively endorsed if given direct effect.
- iii. Directives are capable of being invoked in domestic courts.

Pubblico v Ratti A directive will only be directly available after the lapse of time given for its application.

iii. Direct effect and ECJ decisions.

Direct effect & ECJ decisions Decisions are binding in entirety only to those whom they are addressed if a decision is made for a member states or an individual then it shall have a direct effect in that respect but not otherwise.

Grad V Finanzamt A national of member state to which decision has been addressed could refer to that decision in the national court because it would increase the utility of the community measure.

iv. Direct effect and international agreements.

International Fruit Company /No.3] Direct Effect of international agreements was disallowed since the spirit and general scheme of agreement were different those in the EEC Treaty and not sufficiently unconditional and precise.

5. Two types of direct effects

Vertical Direct Effect A mechanism that enables a citizen to invoke rights protected under EU law against the member state.

Horizontal Direct Effect A mechanism that allows a citizen to invoke rights protected under EU law against another citizen of the member state.

For treaties and regulations they have both horizontal and vertical direct effect while Directives have only vertical direct effect due to the reason that by the virtue of article 288 TFEU directives are addressed to member states and not individuals residing in member states. Thereby, individuals are not to blame for a non-implementation of a directive. There is a vacuum of horizontal direct effect of directives.

Marshall v Southampton Directives have been addressed to member states and they do not impose obligations upon individuals. Hence, they do not possess horizontal direct effect.

Faccini Dori Full bench of ECJ affirmed Marshall reasoning, it was maintained that they possibility of relying on directive against state is based upon the fact, that directives are addressed to each member states. In order to prevent a state from taking advantage of its own failure to comply with community law.

Emanation of a state within the preamble of Vertical Direct Effect, an aggrieved party can not only sue the state but also emanation of a state has widened the scope of directive.

Vertical direct effect, in order to explain the dimensions of vertical direct effect the emanation of a state.

Farrell Case, for emanation of a state the organization concerned must be subject to the control of the state and must possess special power beyond those of normal rules.

Werner mangold vs Helm, court looked at other way to implement EU law horizontally by maintaining that it was the responsibilities of national courts to guarantee full effectiveness of EU law by setting aside any domestic legislation.

Foster Criteria, (*Foster vs British Gas*), in order to qualify as emanation of a state, four condition must be fulfilled:

Foster v British Gas ECJ laid down four a limb criterion to establish emanation of a state:

- Does it perform a public service?
- Pursuant to a measure adopted by a state (act of parliament)
- Under the control of a state
- Possess and exercise powers beyond that of normal understanding.

British gas was held to be an emanation of a state.

National Union of Teachers v Governing body of St. Mary's School

State actor/ function/ product (dependent)

Held: Emanation of a state also included governing body of St. Mary Church of England Junior School.

Fratelli Costanzo This case applied Foster case.

Analysis: The absence of horizontal direct effect of directives may lead to inequality because permitting a claim depends upon nature of defendant. If defendant is a private individual, then claim may not be allowed. However, such claims would be allowed if defendant is a state. This may urge to find alternatives.

Comment: FACCINI DORI, AG Slynn suggested to give directives horizontal direct effect. However, it would totally blur a distinction between directives and regulations.

Two Alternative to fill the vacuum of horizontal direct effect of directives

• Incidental horizontal direct effect-Discrimination

Example: A (employer-defendant) --> B (employee-claimant), assumed that employer has discriminated against employee, and this right is contained under the directive.

B as employee will go to court against A, for the breach of that directive. A will come up with an excuse that directive is not addressed to them at first place and state is to be blame for the non-implementation of the directive by the state. In that case, court will call the state and order them to pay damages to the aggrieved party (employee). However, the employer would not be imposed with any penalty and it would be said that action would be brought against them incidental to this case, if they discriminate against the employee. However, the unimplemented directive would be implemented by this case an excuse by the employer of non-implementation of directives may be taken away.

Under incidental horizontal effect court seems to be willing to give incidental horizontal effect where on both sides private parties are concerned but no obligation is placed upon defendant. Incidental horizontal effect is based upon a fiction and does not give any enforceable rights to the claimant. However, one merit of this procedure is that the unimplemented directives would be implemented following this procedure.

CIS Securities v Signalson The IHE is not giving claimant any enforceable rights in case non-implementation of a directive by Belgium was pleaded by claimant in Horizontal proceedings to relieved

him of an obligation without imposing an obligation upon defendant under the directive. The advantages are that the defendant resulted that unimplemented directive implemented, and claimant got damages.

Ruiz Bernaldez C A case to implement directive took place, the defendant was relying on national law for the deadline of the implementation of directive, had passed. When a claim was limitation against a state. The defense of national law invoked by defendant was defeated. Thereby, IHE was witnessed.

Panagis Pafitis where CIA Securities was applied.

Criticism to IHE: IHE is based on fiction and fail to give claimant any enforceable rights. Such a mechanism has the tendency of bringing legal uncertainty and courts would face difficulties in choosing what effect is to be given.

Indirect Effect(2 paragraph of 200 words)

It is referred as direct effect by “back door”, based on rules of interpretation. Article 4(3) TEU 1992, ‘interpret EU law as far as possible with EU law that delegates responsibility upon judiciary. By Indirect Effect domestic courts use the provisions of directives, and the “back doors” allow them to have direct effect. It is largely based on the rules of interpretation that is domestic courts must interpret domestic law and bring them in line with EU law. Indirect Effect is not a product of judicial activism, but this doctrine traces its development from Article 4(3) TEU, by which member states are required to take appropriate measures so far as possible to ensure fulfillment of their obligations under the treaties. Indirect effect is based on judicial interpretative conformity.

By indirect effect, domestic courts use the provisions of a directive and by the back door allow them to have direct effect. It is largely based upon the rules of interpretation. It is based upon Article 4(3) TEU 1992 by which member state are required appropriate measures to ensure fulfilment of their obligation under the treaty. Indirect effect operates within the preamble of direct effect by which is imposed on national courts to interpret national law in light of wording and purpose of EU law in order to make it compatible with EU law.

Von Colson It is for national courts to interpret and apply national legislation with conformity of requirement of community law. (Unconditional requirement [Van Gend])

Mar Leasing ECJ extended the principle of Von Colson to apply to national legislation passed before the directives and national law had to be interpreted in line with EU law, ignoring the extent of interpretation allowed.

This decision was widely criticized as taking one to retrospective effect and challenges parliamentary supremacy. This precedent is a threat to balance of powers.

Webb v Emo Cargo UK clearly refused Marling reasoning by stating that ECJ is under no authority to direct domestic courts to interpret domestic laws that were passed before the directive and interpretative duty will only apply to those laws which are capable of interpretation and it is up to UK courts to decide what rules of interpretation they would adopt.

Konstantinos The national courts are bound to interpret national law as far as possible in light of wording and purpose of directive concerned with a view of achieving compatibility with EU law.

Imposition of Civil Liability & Criminal Liability through Indirect Effect?

European Union is blind towards public, penal and fiscal laws of a member state. Thus, indirect effect could not impose criminal liability, so interpretation of domestic law in light of EU law would not result in aggravation or imposition of criminal liability. The imposition and aggravation of civil liability is possible by the virtue of indirect effect.

Criminal Line of Cases

Arcaro Case The indirect effect would not be applicable where interpretation results in hardship for individuals in criminal cases.

Berlusconi An EU measure cannot separate itself and independently of national law adopted by member state for its implementation have the effects of determining or increasing the criminal liability of accused persons.

Civil Line of Cases

Centrosteal v Adipol – same decision was made in Coote vs Granada hospital

The duty to interpret domestic law in light of wording and purpose of community law applied even if this would impose civil liability on private parties.

Pupino The indirect effect of directives extends to police and judicial co-operations in criminal cases.

Quintero ECJ maintained that there was no obligation to set aside a national law, and courts are not bound to decline jurisdiction in this situation but should only consider national law in light of EU law as far as possible.

Conclusion: Directives are strictly considered to have direct effect in vertical manner only. The courts are not willing to extend this impact any further. In order to achieve horizontal effect of directive, alternatives are resorted, but such alternative mechanisms are left with uncertainties and complexities.

Journal Articles: S.R.Oliver maintained that direct effect remained a powerful instrument through which EU law penetrates into the national legal system a role has been assigned to national courts, under New Legal Order. For example, to protect individual rights conferred by EU law.

IDE's limitation

1. IDE only operates when national law on particular subject area exists.
2. UK courts take IDE as literal approach, while European courts take purposive approach to it. By the use of the words as far as possible the extent of interpretations is not prescribed, what if EU law and domestic law are controversial among each other than how will conformity in interpretation be achieved.
3. The parameter and extent of interpretation is not described at maybe a threat to balance of powers.

4. EU court has a binding implementation on UKSC if they ask for preliminary reference which is optional on conflicted matters by the virtue of Article 267 TFEU. Issues arise when matter is taken into UKSC without considering EU courts.

To send a preliminary reference is up to the domestic courts and what if that reference is not sent then it is feared that interpretation of the similar EU provision be different in different legal system. As a result, uniformity/harmony would be infringed.

State liability: (separate question on state liability and direct effect)

Remedies for Union Right

Individual do not have the rights to enforce EU law directly in the ECJ because ECJ has no appellant authority. They can only do so under strict standing conditions under judicial review (Article 263 TFEU) and in private action for damages against EU institution (Article 268 TFEU). The enforcement of EU law by individual or legal persons mainly takes place at national level in the domestic court. State liability is not contained in any treaty article but it is a product of judicial activism.

If a member state fails to implement a directive or if a domestic court fails to interpret it correctly then individuals could bring a claim under national law before the national court for state liability.

This right is guaranteed by the EU law however, there is no uniform law of remedies.

State liabilities

- Criteria:
(Established by ECJ).
- Remedies:
(Left up to member state).

There must be a remedy, however, quantification of that remedy is a domestic court exercise. National court will follow their own procedures and will give their own existing remedies while assessing state liability.

Rewe vs Kiel, the community law was not intended to create new remedies in the national court to ensure the observance of EU law other than those already laid down by the national law.

Rewe Zentra, Comet BV, the remedy for union law right should be no less favourable than those relating to similar domestic name, it is based on principle of equivalence, proportionality and non-discrimination.

Remedies must be practically possible effective, however, if no such remedies exist then member-state are under an obligation to create remedies.

Francovich, Bonifaci vs Italy, the existence of state liability was first established in this case, ECJ laid down three condition for state liability to apply:

1. The directives must be intended to confer rights on individuals.
2. The breach is sufficiently serious.
3. There must be a causal link between the loss suffered and member state breach.

Ex parte Factortame III, Brasserie, the principle of state liability was available for all community measures (EU law) whether or not they have direct effect. It is not a strict liability and there must exist a sufficient serious breach for the state to be held liable in damages. Whether a breach of EU law is sufficiently serious? The decisive point is whether member state has manifestly and gravely ignored the limit on its discretion.

The national court must take account of all factors such as degree of clarity of rule, the element of intention, whether error of law is excusable or position taken etc,

Application of state liability:

Dillenkofer vs Germany, the court held that the non-implementation of directive is always a sufficiently seriously breach, thereby state liability would be witnessed subject to Francovich condition.

The procedure for bringing an action for damages against the member state will be governed by national rules.

Ex parte British Telecommunication, the case concerning incorrect transposition of a directive. The breach was held no to be sufficiently serious because wording of directive was unclear and several member states unintentionally misinterpreted it.

Haim Case, a public law body separate from the state was held liable under the principle of state liability.

Kobler, it was possible for the principle of state liability to apply where the alleged infringement originated from a decision of national court of last instance.

State liability has been developed by ECJ by dual objective that is EU law prevails over domestic law and individual can obtain their rights under EU law. It contributes towards uniformity, harmony and effectiveness of EU law on domestic level. Moreover, it is strongest possible evidence of supremacy of EU law.

Real effectiveness and deterrence

The court has insisted that the remedies provided by the national law must be effective sufficient, deterrent and ensured real protection.

Von Colsom Case, this case established the principle of indirect effect, National court must interpret national laws in light of wording and purpose of EU law. In order to ensure adequate and effective remedy with a deterrent effect as contained under Article 6 equal treatment directive (ETD) 2006/54.

Ex parte Factortame, house of lords held that it had no jurisdiction to suspend a statute that is Merchant shipping act 1988, since doctrine of parliamentary sovereignty is fundamental in UK legal system. ECJ in order to ensure full effectiveness of EU law empowered the domestic to set aside the offending provisions of Merchant shipping act 1988. A national court which considers that the sole obstacle which preclude it from granting interim relief is a rule of national law and must set aside that rule.

The principle of requirement of effectiveness is now having an effect of being entrenched.

Marshall no. 2, the applicant early retirement had been held to be unfair dismissal and compensation was subjected to an upper limit.

The court maintain that the applicable of upper limit would not provide for an adequate remedy. Article 6 of ETD required that the remedy chosen by the member state must be adequate and effective thereby compensation being granted.

Johnston vs Royal Ulster Constabulary, Chief constable decided that men constables would carry firearm on daily bases while female constable would not be equipped with firearm. The applicant challenged this policy on the bases of equal treatment directive on the bases gender discrimination under ETD.

Held: the ECJ in its preliminary ruling referred the requirement of effective judicial control under ETD and stated that it is a general principle common to all member state that applicant had right to obtain effective remedy in the court against the measures which they considered to contrary to the principle of equal treatment.

Unectef vs Heylens, there is a requirement placed national authorities to give reason for the decision in relation to EU law rights.

The application of National procedural rules

The European court have considered the legality of national procedural rules which are concerned with the applicable of EU law right.

Emmott vs Minister of Social Welfare, when an applicant brought an action for the breach of ETD in the domestic court, she was told that the claim was time barred. ECJ maintained that the time limit does not start to run until after proper transposition directive. ECJ went against national procedural rule and stated that national government cannot rely on its own failure to implement a directive.

Steenhorst – Neerings, the court upheld the national procedural rule by maintaining that the national rule restricting retrospectivity is in accordance with the community law and it satisfied the principles of equivalence and practicality.

Procedural protection under Treaty of Lisbon

The courts ability to contest the legality of national procedural rules have been strengthened by treaty of Lisbon. Article 19.1 TEU 1992 stated that court is obliged to ensure that the interpretation and application of treaties must be observed and member states are under a duty to provide effective legal protection and sufficient remedies.

Article 51 of charter of fundamental rights maintained that court is obliged to respect the rights, observe the principles and promote the application of charter additionally article 47 of the charter provides right to effective remedy and fair trial assistance to those who lacked sufficient resources

DEB vs Germany, A commercial applied for the legal aid in order to bring an action. Issue was that whether state liability hold application?

Held: court held that in light of ECHR, it is not impossible for legal person to rely on the provisions of article 47 of charter and national courts must evaluate whether the relevant provisions in relation to legal aid constituted denial of access to justice.

Sophie Robin-Olivier (<https://doi.org/10.1093/icon/mou007>)

Important as it is for European integration, effectiveness of European Union law is not absolute. And this is not only the outcome of procedural autonomy. As the requirement of consistent interpretation illustrates, for instance (see Section 3 of this article), there are hypotheses in which it is accepted that EU law should yield, at least temporarily, when confronted to the resisting substance of national law. And this does not undermine the presence of EU law in national courts where it is quite clear that not only the increased domain, but also the evolutive reasoning that characterizes the development of EU law, call for an extension, rather than a retraction, of EU law influence. Overall, EU law executive force is contingent on the situation of each national legal system (rules, actors), and this is a feature of the system of EU law. That is already a reason why effectiveness does not stand as a very strong argument to justify that constitutional protections be set aside, even in cases in which the solution is entirely determined by EU law.

At the time of *Van Gend en Loos*, it was probably difficult to imagine that the impact of EU policies on individual rights and freedoms would become a major concern. Today, no one contests that the protection of fundamental rights has become a central issue, especially in the development of the area of freedom, security, and justice.¹⁰⁷ In those fields, the reasoning and principles that were crafted for the achievement of the internal market are not always well-suited, although they may apply at the moment. More generally, there is a distinction to be made between the possibility for individuals to obtain that the interests they draw from EU law are effectively protected in national courts, and the situation in which individuals are brought to courts and held responsible for their actions under European law. As these situations becomes more frequent, namely in relation to the development of EU policies, it becomes urgent to reconsider the effects of EU law in member states in order to avoid a decline of individual rights and freedoms resulting from EU law enforcement. The same is true when a situation cannot be described in terms of reduced protection, but is one in which a European conception of a fundamental right or freedom opposes, without solid justification, the national conception of the same right. This hypothesis was illustrated in the recent *Alemo-Herron* case.¹⁰⁸ In that case, the Court based its interpretation of the directive on transfers of undertakings¹⁰⁹ on a particular conception of the freedom to conduct a business laid down by article 16 of the Charter, which includes, according to the decision, freedom of contract.

This interpretation was preferred to the British conception of contractual freedom, which would have to allow enforcement of the terms of a private contract.

To avoid such solutions, judicial discretion, at national courts' level, could be a tentative method. By judicial discretion, I only mean granting a margin of appreciation to national courts in cases in which enforcement of EU law impacts fundamental rights or freedoms. Inspiration can be found, *mutatis mutandis*, in the relationships entertained by courts of different legal orders (the European Court of Human Rights and the Court of Justice of the European Union, for instance), where mutual trust goes together with some retained sovereignty. But if national courts are allowed to enforce constitutional rights, this cannot happen without restriction. The disruption to the basic principles of EU federalism needs to be contained and occur only in cases in which it is particularly important that national constitutional rights are not called in question. In this perspective, article 4(2) TEU must be considered:¹¹⁰ it can justify that national constitutional law prevails,¹¹¹ and, at the same time, avoid abuses. If, according to article 4(2) TEU, the Union must respect "member states national identities, inherent in their fundamental structures political and constitutional," national courts should be able to set aside EU law provisions in order to preserve their national identity whenever it is threatened by the application of EU law. In addition to this condition, national courts' discretion could also be limited by taking into account the need to ensure that the essential objective pursued by EU law, in the particular field, can still be fulfilled. Teleological interpretation, a traditional method of interpretation of EU law, would serve, this time, to circumscribe, not expand, EU jurisdiction.