Fordham International Law Journal

Volume 20, *Issue* 4 1996 *Article* 4

An Introduction to the Relationship Between European Community Law and National Law in Ireland

Hugh O'Flaherty*

*

An Introduction to the Relationship Between European Community Law and National Law in Ireland

Hugh O'Flaherty

Abstract

It is possible to isolate three pillars of this emerging legal order which form the basis of any discussion of the relationship between Community law and the laws of individual Member States. These three pillars are the supremacy of Community Law, the effectiveness of Community Law in national courts, and state liability for breach of Community Law.

AN INTRODUCTION TO THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW IN IRELAND

*Hugh O'Flaherty**

INTRODUCTION

Since obtaining its independence in 1921, Ireland has had two constitutions. Both constitutions were democratic and their differences related more to problems of external sovereignty *vis-à-vis* Great Britain than to any difference on questions of democracy or the rule of law. Indeed, of all the democratic states that were created in Europe after the First World War, the Irish democracy alone survived the vicissitudes of the following three decades.

Article 5 of the Irish Constitution[1] proclaims that Ireland is a sovereign independent democratic state.[2] Article 6 provides that all the powers of government derive, under God, from the people.[3] Furthermore, the Irish Constitution provides for a National Parliament comprising a Chamber of Deputies, *Dail Eireann*, with extensive powers,[4] a Senate with minor powers of revision,[5] a Government,[6] and a President,[7] whose powers are largely formal but whose prime duty is to act as guardian of the Constitution. Articles 40 through 45 of the Constitution contain a charter which protects the usual fundamental rights.[8] Article 34 provides for the establishment of independent courts which include a High Court[9] and a Supreme Court vested with the power

* Senior Associate Judge of the Supreme Court of Ireland. The author gratefully acknowledges the assistance of Mr. Justice Donal Barrington, his colleague on the Irish Supreme Court and former Judge of the Court of First Instance of the European Communities, and of Mr. David Herlihy B.C.L., Judicial Research Assistant at the Supreme Court and High Court of Ireland.

1. IR. CONST. art. 5.
2. *Id.*
3. *Id.* art. 6.
4. IR. CONST. arts. 15.1-15.15.
5. *Id.* arts. 15.1, 18-19.
6. *Id.* arts. 28.1-2.
7. *Id.* art. 12.
8. *Id.* arts. 40-45.
9. *Id.* art. 34.3.1.

to set aside any act of Parliament which violates the Constitution.[10] Finally, Article 46 provides for the amendment of the Constitution by referendum.[11] All of these Articles caused difficulty for Ireland when it joined the European Economic Community. Amending the Constitution would have appeared a very drastic solution to the people of Ireland and might have caused considerable popular unease. Instead, the Irish Government chose to by-pass these Articles by a simple amendment to Article 29 of the Constitution which deals with international relations.[12] Accordingly, a referendum was held which amended Article 29 by authorizing the State to become a member of the European Economic Community,[13] the European Coal and Steel Community,[14] and the European Atomic Energy Community.[15] At a later date further amendments were passed, also by referendum, to authorize the State to ratify the Single European Act[16] and the Treaty on European Union,[17] commonly referred to as the Maastricht Treaty. The Irish Government, however, amended the Constitution to contain also the following far reaching provision:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.[18]

The Irish, like many other Member States of the European Community, preferred not to acknowledge that they were sur-

---

10. *Id.* art. 34.3.2.

11. *Id.* art. 46.

12. *Id.* art. 29.

13. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

14. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], *as amended in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

15. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 140 [hereinafter Euratom Treaty], *as amended in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

16. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 15).

17. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending EEC Treaty, *supra* note 13).

18. IR. CONST. art. 29.4.5.

rendering part of their national sovereignty. Indeed, advocates of closer European integration avoid the words "transfer" or "surrender" of sovereignty and prefer to refer to Member States as "pooling" their sovereignty for the benefit of all. These advocates argue that this "pooling" is a process by which the Member States lose little and gain much. In Ireland's case this has certainly been true. Prior to entry into the European Community, Ireland was formally independent but, in fact, largely under the economic domination of Great Britain. Since joining the European Community, Ireland's freedom of economic and political action has increased immensely, but at the same time the Irish people, by virtue of the constitutional amendment to Article 29, have become subject to a system of Community law which, where applicable, overrules not only the common and statutory law of Ireland but its Constitution as well. As a former Judge of the Irish Supreme Court wrote, "[i]t is as if the People of Ireland had adopted Community law as a second but transcendent Constitution."[19]

I. *BACKGROUND TO EUROPEAN COMMUNITY LAW*

A. *Treaties*

The European Union, as it is now known, is based on five great international treaties.[20] In the context of international law, these treaties are just like any other treaties between states. What distinguishes them from other international treaties is that they establish lawmaking institutions and create obligations and rights which bind the Member States and their citizens. In short, these treaties create a community and provide for governance of the community by law. Community law is not international law but it is the internal law of the community. Community lawyers work, as it were, under the roof of the treaties and for them the treaties are their constitution.

The most important of the treaties is the treaty signed at Rome in 1957 which created the European Economic Community ("EEC Treaty") and is usually referred to as the Treaty of

19. Seamus Henchy, *The Irish Constitution and the E.E.C.*, 12 DUKE L.J. 20, 23 (1977).

20. *See supra* notes 13-17 and accompanying text (delineating five treaties establishing European Union).

Rome.[21] In 1992, the Treaty Establishing the European Community[22] ("EC Treaty") amended the EEC Treaty. All of the treaties are concerned with economic matters but it would be foolish to assume that the dynamic which drives them is purely economic. Rather, the driving force is political.

Essentially, the treaties seek to eliminate the possibility of war between European nations, particularly between France and Germany. Thus, the EC Treaty announces in its preamble that its purpose is to create "an ever closer union."[23] It is not difficult to know where the inspiration for this comes from. Clearly the inspiration is the U.S. Constitution and its reference to "a more perfect union."[24] But while the preamble to the U.S. Constitution refers to the "the people" of the United States the preamble to the EC Treaty refers to the "peoples" of Europe.

A difficulty arises when one attempts to compare the institutions of the European Community with those of the United States. To begin with, there is no clear distinction between Federal Powers and State Powers. Next, there is no system of Federal Courts operating throughout the European Community. Finally, if one attempts to apply the theory of the separation of powers to the European Community one is confronted with the realization that there exist four great institutions of government instead of three, and it is hard to describe any one of them as being either the legislative or the executive branch.

Although the citizens of the European Union directly elect the European Parliament ("Parliament"), it has virtually no lawmaking power. The Council of Ministers ("Council") is the dominant lawmaking authority in the European Community, but its members consist of representatives from the various governments of the various Member States who are answerable, not to the Parliament, but to their respective national parliaments. The Council also possesses certain executive powers. There exists an ongoing struggle for power between the Parliament and the Council but the Council remains the dominant lawmaker. Some people would like to see a situation develop where the European Commission ("Commission") would become totally an-

21. EEC Treaty, *supra* note 13.

22. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 19.

23. *Id.*, pmbl., [1992] 1 C.M.L.R. at 573.

24. U.S. CONST. pmbl.

swerable to Parliament and the Council would become the Senate of the European Union.

The Commission is the principal administrative body of the European Community. The Commission has executive and some law making powers. Its members are nominated by the various Member States for a fixed term but are independent in the exercise of their office. The Commission is not answerable to the Council but it may have its budget rejected by Parliament or may be dismissed as a body by Parliament. Finally, there is the European Court of Justice ("ECJ" or "Court") who ensures that the law shall prevail in the administration of the affairs of the community.

The ECJ and the Commission have been extremely successful in their work, and there can be no doubt that the European Community is a community governed by law. It is also a community of democratic states. But, in view of the weakness of the European Parliament, it is possible to argue that it is not a democratic community. This is what is referred to as the "democratic deficit."

B. *Reference Procedure*

Under Article 177 of the EC Treaty,[25] a court in any Member State may, and a court of final appeal if requested by one of the parties must, refer any question of European law which may be in dispute between the parties to the ECJ sitting in Luxembourg.[26] The ECJ interprets the relevant provision of Community law but the national court of each Member State ascertains the facts of the case and applies the law to the facts. Therefore, the national judge becomes the ultimate enforcer of Community law. He is obliged, even in his own court, to give precedence to Community law even over the constitutional law of his own country. The national judge, in essence, becomes a community judge and fruitful cooperation exists between the national judges in the various Member States and the ECJ in Luxembourg. For this reason, there is no necessity under the EC system for a separate system of Federal Courts. It also accounts for why it is easy for the outsider to miss the extent of the revolution which has taken,

25. EC Treaty, *supra* note 22, art. 177, [1992] 1 C.M.L.R. at 689.

26. *Id.*; *see* Carl Otto Lenz, *The Role and Mechanisms of the Preliminary Ruling Procedure*, 18 Fordham Int'l L.J. 388 (1994) (detailing Article 177 reference to ECJ by member state courts on matters of community law).

and is taking, place in the domestic law of the Member States of the European Union.

C. *Penetration of National Law*

Article 189 of the EC Treaty[27] vests in the Council of Ministers and also in the Commission the power to make legislation binding on the European Community.[28] This legislation can take the form of regulations or of directives. A regulation has general application, is binding in its entirety, and is directly applicable in each of the Member States. Therefore, a citizen may invoke a regulation against his own government. On the other hand, a directive is binding on each of the Member States but the choice of how to implement the directive is left to each national government.

The ECJ has interpreted the EC Treaty and the lawmaking power in such a way as to emphasize the predominance of Community law. For instance, some of the provisions of the EC Treaty require, on their face, the making of a community regulation before they can have direct effect in the domestic law of the Member States. The Court has drawn the inference that the other provisions of the EC Treaty take effect in the domestic law of the Member States without any community regulation or any national legislation. Moreover, because directives do not take direct effect in the domestic law of the Member States in the absence of national legislation implementing them, the ECJ will not permit a national government which is in default through non-implementation of a directive to use its own default to gain advantage over one of its citizens in litigation. Furthermore, if the provisions of a directive are clear and the date by which it should have been implemented has passed, the ECJ will allow the citizen to invoke the directive against his national government. Again, while the Commission has the power to prosecute before the ECJ any national government which has failed to implement a directive within the time prescribed, the Court will also permit a citizen who has suffered damage as a result of the failure of the national government to implement the directive to sue the government for compensation. This notion is referred to as "vertical penetration" of domestic law by Community Law.

---

27. EC Treaty, *supra* note 22, art. 189, [1992] 1 C.M.L.R. at 693.
28. *Id.*

Finally, there are circumstances in which private citizens may invoke Community legislation in their own national litigation, and this is referred to as "horizontal" penetration of domestic law by Community law.

II. *WHAT IS THE RESULTING RELATIONSHIP BETWEEN COMMUNITY AND NATIONAL LAW?*

It is possible to isolate three pillars of this emerging legal order which form the basis of any discussion of the relationship between Community law and the laws of individual Member States. These three pillars are the supremacy of Community Law, the effectiveness of Community Law in national courts, and state liability for breach of Community Law.

A. *The Supremacy of Community Law*

1. The Supremacy of Community Law in General

If the emerging Community was to be more than the *Europe des Nations* envisaged by Charles de Gaulle, then establishing the primacy of Community Law was essential and it would be futile to attempt a new cohesive legal order if each Member State could override any Community Law that was inconsistent with its domestic legal provisions. In this context it is instructive to refer to the rationale behind the principle of supremacy as described by a former judge of the ECJ:

> The Community legal order is intended to bring about a profound transformation in the conditions of life - economic, social, and even political - in the Member States. It is inevitable that it will come into conflict with the established legal order, that is to say the rules in force in the Member States whether they stem from constitutions, laws, regulations, or legal usage .... Community law holds within itself an existential necessity for supremacy. If it is not capable in all circumstances of taking precedence over all national law, it is ineffective and, to that extent, non-existent. The very notion of a common order would be destroyed.[29]

The treaties do not expressly declare the primacy of Community law, as is the case in some other jurisdictions governed by

29. PIERRE PESCATORE, L'ORDRE JUDIQUE DES COMMUNAUTÉS EUROPÉENNES 227 (2d ed. 1973).

a constitution, such as the United States[30] or Canada.[31] Nonetheless, the ECJ established this primacy at an early stage in the Community's development. In its landmark judgement in *Costa v. ENEL*,[32] the ECJ took the opportunity to put the matter beyond doubt.

Flaminio Costa believed that the Italian law establishing the ENEL electricity company offended Community law, including Articles 37 and 92 through 94 of the EC Treaty[33] which govern state aids to industry and state monopolies. Having refused to pay his electricity bill for 1950 italian lire, he was brought to court and pleaded that the Italian law establishing the ENEL electricity company violated Community law. The case was referred to the ECJ which responded in unambiguous terms to the Italian Government's defense of its national law:

> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[34]

Even though Costa's challenge was ultimately unsuccessful, it established that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[35] Implicit in such a decision is a rejection of the general rule that *lex posteriori derogat lex anteriori*, preventing a Member State from attempting to enact its own law overriding an earlier Community law.

In *Internationale Handelsgesellschaft v. Einfuhr*,[36] the ECJ further developed this theme to grant primacy to Community law over national constitutions. A potential conflict arose between a Community regulation and the fundamental rights enshrined in

---

30. U.S. CONST. art. 6, cl. 2.
31. CAN. CONST. (Constitution Act, 1982) art. s.52(1).
32. Costa v. ENEL, [1964] E.C.R. 585, [1964] 1 C.M.L.R. 425.
33. EC Treaty, *supra* note 22, art. 37, 92-94, [1992] 1 C.M.L.R. at 605-06, 630-32.
34. *Costa*, [1964] E.C.R. at 593-594, [1964] 1 C.M.L.R. at 433.
35. *Id.* at 594, [1964] 1 C.M.L.R. at 456.
36. Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

the German Basic Law, *Grundsatz*. The ECJ's decision confirmed that European Community law enjoyed complete supremacy over any national law by noting that: "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."[37]

In order to balance the protection of fundamental human rights in the Community against the supremacy of Community law, the ECJ has begun to draw upon national constitutions, international treaties, and the European Convention for the Protection of Human Rights and Fundamental Freedoms[38] in order to define its own catalogue of fundamental rights which have become part of Community law.[39]

To conclude this exposition of the supremacy of Community law, the position may be summarized thus: where an actual conflict between Community and national law arises, as a consequence of the supremacy of Community law, national courts throughout the Member States have a duty to give full and instantaneous precedence to the Community law in question and set aside national provisions conflicting with that Community law.[40]

The ECJ's insistence upon supremacy illustrates the point made earlier that in Ireland and throughout the European Union the character of Community law is much closer to that of constitutional law than to that of international law generally.[41] It is interesting to compare, for example, the ECJ's judgement in *Costa* with the spirit of the judgement of Justice Joseph Story in *Martin v. Hunter's Lessee*,[42] which stated, "[t]he people had a right to prohibit to the states the exercise of any powers which were, in their judgement, incompatible with the general compact [and] to make the powers of the State governments, in

37. *Internationale Handelsgesellschaft*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 264.

38. 213 U.N.T.S. 221, Europ. T.S. No. 5.

39. *See, e.g.*, Nold v. Commission, Case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338; Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42; Regina v. Kirk, Case 63/83, [1984] E.C.R. 2689, [1985] 3 C.M.L.R. 522.

40. *See* Amminstrazione delle Finanze dello Stato v. Simmenthal, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

41. *See supra* notes 19-20 and accompanying text (describing nature of Community Law as supreme to national law).

42. 14 U.S. (1 Wheat) 304 (1816).

given cases, subordinate to those of the nation."[43]

2. Recognition of Supremacy in the Irish Courts

According to Chief Justice Thomas Finlay of the Irish Supreme Court in *Crotty v. An Taoiseach*,[44] "the decisions of [the ECJ] on the interpretation of the Treaty and on questions covering its implementation take precedence, in case of conflict, over the domestic law and the decisions of national courts of Member States."[45] This statement can be contrasted against the place of international law in the Irish legal order as summarized by the court in *In the Matter of Gearoid O'Laighleis*,[46] "[w]here there is an irreconcilable conflict between a domestic statute and the principles of international law or the provisions of an international convention, the Courts administering the domestic law must give effect to the statute."[47]

An interesting test of Irish acceptance of this principle arose in *Pesca Valentia Ltd. v. The Minister for Fisheries*.[48] Irish law stipulated that boats fishing within the exclusive fishing territory of the State must contain a crew made up of seventy-five percent or more of Irish nationals. On one of the plaintiff's boats, the entire crew were of Spanish nationality and, therefore, the boat was arrested and its master was charged with the offence of fishing otherwise than in accordance with the seventy-five percent requirement.

Pesca Valentia challenged this provision as discriminating between nationals of different Member States and sought, *inter alia*, an interlocutory injunction suspending the application of the relevant national provision until the ECJ had pronounced on the matter. The Irish Supreme Court granted the injunction, notwithstanding that such relief suspended the application of a national law. Implicit in such a decision is both a respect for, and a recognition of, the supremacy of Community law.

Finally, it is often the case that domestic law is introduced in order to give effect to a Community provision such as a directive. One might wonder whether this affects the supremacy of that

43. *Id.* at 322.
44. [1987] I.R. 713 (Ir. S.C.).
45. *Id.* at 769.
46. [1960] I.R. 93 (Ir. H. Ct.).
47. *Id.* at 103.
48. [1985] I.R. 193 (Ir. S.C.).

Community provision. If a Community law takes the form of a national law, does this deprive it of its primacy over other national laws? The Irish Supreme Court addressed this matter in *Meagher v. Minister for Agriculture*[49] where Justice John Blayney analyzed such an implementing measure by saying, "[i]t is only in form that it is part of domestic law. It derives its force from the directive which is binding on the State as to the results to be achieved."[50] Thus, it appears that the dependency of a Community law upon national implementing measures does not affect its supremacy over the national laws of Ireland or any other Member State.

B. *The Effectiveness of Community Law in National Courts*

The genesis of a determination to secure the effectiveness of Community law in Member States lies in Article 5 of the EC Treaty which provides, "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."[51] It is accepted practice that Member States will occassionally, either deliberately or inadvertently, fail to fulfill their undertaking given in Article 5, thereby frustrating the tangible effect of Community law in individual Member States. This, coupled with a lack of measures for the effective enforcement of Community laws, obviously affected the resulting relationship between Community law and national law.

To counteract such inaction and save Community law from becoming little more than a hollow aspiration, the ECJ has adopted an active approach which has ensured a close and effective bond between the Community legal order and its national counterparts.

One product of this activism has been the adoption of the concept of "direct effect". When a Community provision is of the direct effect type, it confers rights and imposes obligations which may be invoked before, and if so invoked, must be recog-

49. [1994] I.R. 329 (Ir. S.C.).

50. *Id.* at 360.

51. EC Treaty, *supra* note 22, art. 5, [1992] 1 C.M.L.R. at 591.

nized and enforced by the courts of the individual Member States, including Ireland.

As a consequence of the supremacy of Community law, such a directly effective provision can be employed to override a conflicting national law. Thus, a directly effective Community provision is simultaneously part of, and superior to, Irish law. In the recent Irish case of *Tate v. Minister for Social Welfare, Ireland and the Attorney General*,[52] a directly effective Community law was described as "not . . . constitutional law or statute law. It is still community law governed by community law but with domestic effect. And it is in that form that it is part of domestic law."[53] The following caveat, however, should be sounded at the outset. Direct effect, does not, *per se*, invariably mean that a given provision can be relied upon as against all parties, for example, against a member State and against private persons.

An assessment of the true effectiveness of Community provisions requires a brief consideration of two relevant species of direct effect, vertical direct effect, and horizontal direct effect. Vertical direct effect means that the provision in question may be invoked only against a Member State or an emanation of that Member State. Such a provision may not be enforced against private persons, whether legal or human. In recent years the ECJ, however, has sought to widen the ambit of vertical direct effect beyond merely the Member State. The Court has done this primarily through development of the "emanation of the State" doctrine to include within that phrase "organisations which [are] subject to the authority or control of the State or [have] special powers beyond those which result from the normal rules applicable to relations between individuals."[54] In contrast to vertical direct effect, a provision enjoying horizontal direct effect may be invoked against private parties such as legal and human persons.

Admittedly, the doctrine of direct effect is not unique to Community law. It is, however, highly significant in the Community context. This significance is due not only to the effect of the

52. [1995] I.L.R.M. 507 (Ir. S.C.).

53. *Id.* at 521 (Carroll J.).

54. Foster v. British Gas plc, Case C-188/89, [1990] E.C.R. I-3313, 3348, [1991] 2 C.M.L.R. 833, 856-57.

doctrine but also to the extent of its application in the Community legal order.

1. The Effect of the Doctrine of Direct Effect

Direct effect exemplifies the fact Community law generally has acquired a character far removed from that of international law generally. For example, one fundamental principle of public international law is that international obligations are addressed to states, not to individuals, and therefore, cannot be invoked by individuals until incorporated into national law. This principle is dispensed with by direct effect, which empowers individuals to invoke Community law in their national courts regardless of any action or inaction of their Member State. The ECJ has held that direct effect may apply not only to articles of the Treaties, but also to secondary legislation made pursuant to those Treaties.

2. Direct Effect and Provisions of the Treaties

The doctrine of direct effect was first employed to give teeth to Community law in the context of the articles of the EC Treaty. In *van Gend en Loos v. Administratie der Belastingen*,[55] the question arose "whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of the Article lay claim to rights which the national court must protect."[56] The Court's response has been quoted repeatedly in the intervening years, but is nonetheless instructive in assessing the relationship between Community law and Irish law:

> [T]he Community constitutes a new legal order of international law . . . the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[57]

The result was that Article 12 produced "direct effects in the re-

55. [1963] E.C.R. 1, [1963] 2 C.M.L.R. 105.
56. *Id.* at 11, [1963] 2 C.M.L.R. at 128.
57. *Id.* at 12, [1963] 2 C.M.L.R. at 129.

lationship between Member States and their subjects."[58]

Decisions such as that in *Van Gend en Loos*[59] do not extend to the entire EC Treaty. The question of whether or not a given EC Treaty provision is of direct effect is confined to the particular provision in dispute, depending on whether the obligation which the particular provision creates is sufficiently unconditional and precise to enable a national court to identify and enforce that obligation.[60] Since 1963, the Court has considered the effect of most of the provisions of the EC Treaty, and of those considered, approximately two-thirds have been deemed to be of direct effect. Because EC Treaty articles are considered in this *ad hoc* manner, it will be some time before the ECJ produces a similar commentary upon the amendments that the Treaty on European Union of 1992 introduced to the EC Treaty.[61]

3. Direct Effect and Secondary Legislation

It was indicated earlier in this Essay that much of the significance of direct effect in the Community context results from the extent of the principle's application which includes both treaty articles and secondary legislation. In Community law, secondary legislation is principally created through regulations and directives, both of which require distinct consideration.

a. Effectiveness of Regulations

Article 189 of the EC Treaty[62] provides, "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[63] Irish Law dictates that after the date upon which a regulation enters into force, it

---

58. *Id.* at 13, [1963] 2 C.M.L.R. at 130.

59. [1963] E.C.R. at 1, [1963] 2 C.M.L.R. at 105.

60. *See, e.g.*, Criminal Proceedings against Alfred Webb, Case 279/80, [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719 (giving direct effect to Article 59 of EC Treaty); Criminal Proceedings Against Casati, Case 203/80, [1981] E.C.R. 2615, [1982] 1 C.M.L.R. 365 (denying direct effect to Article 71 of EC Treaty).

61. *TEU*, *supra* note 17, [1992] 1 C.M.L.R. 719, 31 I.L.M. 247. *See* R v. Secretary of State for the Home Dept., *ex parte* Gerry Adams, [1995] 3 C.M.L.R. 476. In *Adams*, Article 8a of the EEC Treaty, an amendment inserted by the TEU, was referred for consideration to the Court when Gerry Adams was banned from entering mainland Britain, but the reference was withdrawn following the revocation of the relevant ban.

62. EC Treaty, *supra* note 22, art. 189, [1992] 1 C.M.L.R. at 693.

63. *Id.* An alert reader will have noticed that Article 189 describes regulations as "directly applicable", as opposed to "of direct effect." The distinction, if any, between

immediately penetrates the Irish legal order and is, thus, part of Irish law. A regulation requires no implementing legislation before it has full force in Irish jurisdiction.[64] In fact, there is authority to suggest that a Member State may be prohibited from enacting its own legislation purporting to give effect to a Community regulation.[65] The rationale underpinning such a stance is twofold. First, the ECJ is concerned that if Community law is the source of a given right or obligation, then that source should not be disguised by national legislation. Second, the uniformity of Community law as between Member States could be undermined by fifteen separate national laws purporting to give effect to a common regulation.

b. Effectiveness of Directives

A directive obliges Member States to achieve a specified objective on or before a particular date. When properly implemented, the directive is transposed into national law and thereafter may be relied upon by individuals in, for example, an Irish court. Article 189(3) of the EC Treaty[66] provides, "[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."[67]

As previously discussed, theory does not always translate into practice. The real test of the tangible effect of a directive arises when it has not been implemented or fully implemented by a Member State. It is in such circumstances that Community law strives to distinguish itself from the classical rules of international law. Faced with such pretermission, the Commission has the option of initiating proceedings against the errant Member

---

direct effect and direct applicability has not yet been thoroughly considered by the ECJ, and the Court seems to have used the terms interchangeably.

The distinction, it seems, can be explained in the following way. A provision enjoying direct applicability is immediately and automatically incorporated into national law. As such, that provision has the potential to be of direct effect. Whether or not the provision is in fact directly effective depends on whether it creates a sufficiently precise and unconditional obligation such as can be enforced on behalf of individuals by national courts.

64. Fratelli v. Amministrazione delle Finanze dello Stato, Case 94/77, [1978] E.C.R. 99, [1979] ___ C.M.L.R. ____.

65. *Id.*

66. EC Treaty, *supra* note 22, art. 189(3), [1992] 1 C.M.L.R. at 693.

67. *Id.*

State pursuant to Article 169 of the EC Treaty[68] which, if brought to fruition, may result in a declaration under Article 171[69] that the State has "failed to fulfil its Community obligations."[70] In practice, the Commission usually seeks to secure compliance by negotiation at the outset of such proceedings, an approach which seems to be eminently pragmatic in view of the unsatisfactory nature of the Article 169 procedure. Following a declaration under Article 171, a Member State is required to "take the necessary measures"[71] to remedy its failure and comply with Community law. The ECJ, however, is usually powerless to ensure genuine compliance by way of fines, retention of Community funds due to the Member State, or otherwise. It is only in the case of a most recalcitrant State that a recent amendment enables the Court to impose any penalty payments.[72] Moreover, such penalties are of little use to the intended beneficiary of the directive, the individual citizen.

It was in this context that the ECJ had to assess the difficulty of giving tangible effect to Community law which takes the form of a directive. Was it possible to extend the doctrine of direct effect to directives and allow judicial activism to succeed where the draftsman's pen had failed? Based on the terms used in Article 189(3),[73] directives might seem to be incapable of direct effect because, unlike regulations, they require implementation by individual Member States in order to become an integral part of national law. Notwithstanding the wording of Article 189, the ECJ, desiring to distinguish Community law from international law generally and provide it with tangible effect in every Member State, has held that directives can in certain circumstances enjoy a form of direct effect.[74]

In order for a directive to be given direct effect, it appears that the directive must create an obligation which is sufficiently

---

68. *Id.* art. 169, [1992] 1 C.M.L.R. at 686.

69. *Id.* art. 171, [1992] 1 C.M.L.R. at 687.

70. *Id.*

71. *Id.*

72. *Cf.* EC Treaty, *supra* note 22, art. 171(2), [1992] 1 C.M.L.R. at 687. Article 171(2) is an amendment inserted by the TEU, which provides for "appropriate" penalties following a second set of Article 169 proceedings initiated after the Member State has failed to comply with the original Article 171 judgement.

73. EC Treaty, *supra* note 22, 189(3), [1992] 1 C.M.L.R. at 693.

74. *See, e.g.*, Van Duyn v. Home Office, Case 41/74, [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1.

precise and unconditional to enable the national court to identify and enforce it, and the time limit for implementation of the directive by the Member State must have expired before the date of the proceedings in which the directive is invoked. The case of *Pubblico Ministero v. Ratti* illustrates this latter criterion.[75] In 1978, Ratti sought to rely upon two unimplemented directives in a national court. The deadline for transposition into national law of the first directive, set for December 12, 1974 had expired, but the deadline for implemention of the second directive was not until November 9, 1979. Therefore, only the first could be of direct effect and the defendant could only invoke that directive. This principle is based on a quasi-estoppel approach which seeks to prevent a wayward Member State from benefiting as a result of its failure to give full effect to Community law.

In keeping with this estoppel argument and that Article 189(3) is directed at Member States, a directive can have, at most, vertical effect only. Despite the opinion of Advocate General[76] Carl Otto Lenz inviting the Court to depart from its earlier decisions and to grant horizontal effect to directives, the ECJ recently reaffirmed this position in *Faccini Dori v. Recreb Srl.*[77] A possible argument for the retention of the status quo is that it would be inequitable to grant horizontal effect to unimplemented directives if to do so would impose obligations and consequent sanctions upon individuals where such persons had not breached any national law, and had no role in the failure to implement the relevant Community law.

Finally, it is worth remarking that the Court has attempted to bestow some sort of effectiveness upon directives which, for whatever reason, do not enjoy direct effect. This has been done by relying on Article 5 to conclude that each Member State's

---

75. Case 148/78, [1979] E.C.R. 1629, [1980] 1 C.M.L.R. 96.

76. The office of Advocate General is a *sui generis* one with which the North American reader may be unfamiliar. There are currently nine Advocates General from various Member States who, while they are members of the ECJ, act independently of the Court. Article 166 of the Treaty provides, "it shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the court in the performance of the task assigned to it in Article 164." EC Treaty, *supra* note 22, art. 166, [1992] 1 C.M.L.R. at 685. The ECJ is free to accept or depart from the opinion of an Advocate General. *See* Nial Fennelly, *Reflections of an Irish Advocate General*, 5 IRISH J. EUR. L. 5 (1996) (providing thorough consideration of office of Advocate General).

77. Case 91/92, [1994] E.C.R. I-3325, [1994] 1 C.M.L.R. 665.

obligation in that Article extends to the courts of that Member State. Therefore, "in applying national law . . . national courts are required to interpret their national law in light of the wording and purpose of the directive."[78] More recently, in *Marleasing SA v. La Comercial International de Alimontacion SA*,[79] the Court established that such mandatory judicial interpretation applies to national law enacted both prior to and after the relevant directive.

Left unqualified, such a ruling could have far-reaching effects for the judiciary in national courts. An Irish court, for example, may have interpreted a statute in a particular way some years ago and, as a consequence of a directive which has not yet been transposed into national law, may have to depart from its own precedent in order to construe the statute in a manner which accords with the terms of a directive which is not of direct effect. The ECJ, however, has recognized the understandable disquiet of some national legal systems at such a prospect and has conceded that such "indirect effect" is not absolute. In the *Von Colson* case, it was stated that the obligation to construe national law in light of a directive applies only "insofar as [the national courts have] a discretion to do so under national law."[80] Later in *Marleasing*, the obligation imposed was to interpret national law in light of the not directly effective directive "as far as possible," indicating that a respect for legal certainty in the national courts tempers the Court's zeal.

c. Effectiveness of Decisions

In addition to regulations and directives, Article 189[81] refers to decisions and provides that a decision of the Council or Commission shall be binding in its entirety upon those to whom it is addressed.[82] It is implicit in Article 189 that any such decision must be "substantiated," by having a provision of one of the treaties as a foundation. Decisions which create a sufficiently precise and unconditional obligation are of direct effect as against their

78. Von Colson v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

79. Case C-106/89, [1990] E.C.R. I-4135, [1992] 1 C.M.L.R. 305.

80. Von Colson, [1984] E.C.R. at 1909, [1986] 2 C.M.L.R. at 454.

81. EC Treaty, *supra* note 22, art. 189, [1992] 1 C.M.L.R. at 693.

82. *Id.*

addressees.[83] If the addressee is a Member State, then the decision may be relied upon against that Member State in a national court. In addition, the decision may be relied upon as against emanations of the Member State as discussed earlier in the context of vertical effect. If the addressee of the decision is an individual there would appear to be, in principle, no reason why such a decision could not be capable of direct effect once it satisfied the standard test for such effect. Hence, it would be open to a third party to invoke the decision against the individual addressee in, for example, the Irish High Court. In practice, such a scenario is unlikely to arise for a number of reasons, principally because decisions addressed to individuals are usually based on EC Treaty articles which are directly effective anyway. Thus, the quest to rely upon any such decision would be an unnecessary one because that decision merely applied a set of rights and obligations which, because of their direct effect, were already at the plaintiff's disposal independent of the relevant decision.

III. *MEMBER STATE LIABILITY FOR THE BREACH OF COMMUNITY LAW*

A. *Member State Liability Generally*

Thus far, it should be clear that the ECJ has consistently striven to ensure the binding and tangible effect of Community law throughout the Member States. Supremacy, the concept of a new legal order, the permanent transfer of sovereign rights, direct effect, and indirect effect may all be viewed as tools the Court employs in its quest to breathe life into Community law. This quest is frustrated when Member States fail to implement their Community obligations. The Court's initial response to this problem was to import the concept of direct effect into Community law. Yet, while direct effect may have satisfied individual cases, it did not address a central problem, namely, the failure of Member States to implement directives. To remedy this, the Court has introduced another significant weapon into the Community law arsenal, Member State liability for breach of Community law.

In *Francovich v. Italy*,[84] the ECJ enunciated this novel con-

83. Grad v. Finanzamt Transtein, Case 9/70, [1970] E.C.R. 825, [1971] 1 C.M.L.R. 1.

84. Joined Cases C-6 & 9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

cept. Such liability is entirely independent of the principles so far considered in this Essay. *Francovich* concerned the failure of a Member State, Italy, to implement a directive designed to protect employees of companies which became insolvent. Article 3 of Directive 80/987 provided, "measures must be taken [by Member States] to ensure the payment of [employees'] outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a period prior to a date determined by the Member State."[85]

The plaintiffs in *Francovich* were employees of insolvent companies which owed them arrears of wages. Because their former employers were insolvent they had to seek compensation from a source with deeper pockets, the Italian Government. Their claim, which originated in the Italian courts, was two-fold. They argued that the provisions of the directive were of direct effect and that they were entitled to damages as a result of Italy's failure, through non-implementation of the Directive, to meet the obligations which Community law imposed on it.

The national courts referred the cases to the ECJ under Article 177 of the EC Treaty.[86] The ECJ seized this opportunity to consolidate the effectiveness of Community law by ruling that, in principle, a Member State may be liable to compensate individuals for loss, where a breach of Community law for which that Member State is responsible causes that loss. The source of such liability was the obligation imposed by Article 5 of the EC Treaty coupled with the fact the *effet utile*, or full effectiveness, of Community law would be undermined if individuals were powerless to obtain redress where their loss resulted from the failure of a Member State to fulfill its obligations under Community law.

The ECJ went on to specify the conditions for establishing such liability. These conditions depended upon the nature of the breach of Community law in question. In the case of failure to implement a directive, as in the *Francovich* case, the following three conditions have to be satisfied before liability will be imposed:

> [T]he result required by the Directive must include the conferring of rights for the benefit of individuals; the content of these rights must be determinable by reference to the provi-

85. *Id.* at 5409, ¶ 15, [1992] 2 C.M.L.R. at 110.

86. EC Treaty, *supra* note 22, art. 177, [1992] 1 C.M.L.R. at 689.

> sions of the Directive; and there must be a causal link between the breach of the obligation of the state and the damage suffered by the persons affected.[87]

Recently, the ECJ has elucidated the conditions of liability applicable to other types of breaches of Community law. A series of cases in 1996 exemplified various other ways in which a Member State may infringe Community law, specifically, the omission by a Member State to alter its laws so as to accord with an EC Treaty article,[88] enactment of national legislation that is incompatible with an EC Treaty article,[89] a decision of a national government which breaches a directly effective EC Treaty provision,[90] and a timely and bona fide, but incorrect, implementation of a directive.[91]

To succeed on a claim for compensation for the loss resulting from these infringements of Community law, the Court imposed three conditions. The rule of Community law infringed upon must be intended to confer rights on individuals, the infringement must be sufficiently serious, and there must be a direct causal link between the state's infringement of Community law and the loss suffered by the injured party. Presumably, the meaning of this test, and particularly the second condition thereof, will be the subject of further consideration in future cases.

Returning to *Francovich*, it is significant that the right to compensation was deemed to arise wholly independently of the doctrine of direct effect. Thus, the fact that the Directive was held not to be of direct effect did not preclude the plaintiffs from succeeding in their claim against the Member State for compensation. Indeed, some commentators have submitted that the ECJ could have construed the Directive's provisions as directly effective but chose not to do so in order to emphasize that direct effect is not a prerequisite in a claim for compensation for loss resulting from a Member State's failure to observe

---

87. *Francovich*, [1991] E.C.R. at 5415, ¶39-40, [1992] 2 C.M.L.R. at 114-15.

88. Brasserie du Pêcheur v. Germany and R v. Sec. of State for Transport, *ex parte* Factortame, Joined Cases C46 & 48/93, [1996] E.C.R. I-102, [1996] 1 C.M.L.R. 889.

89. *Id.*

90. Regina v. Ministry of Agriculture, Fisheries and Food, *ex parte* Hedley Lomas (Ireland) Ltd., Case C-5/94, [1996] E.C.R. I-2553, [1996] 2 C.M.L.R. 391.

91. Regina v. H.M. Treasury, *ex parte* British Telecommunications plc., Case 392/93, [1996] E.C.R. I-1631, [1996] 2 C.M.L.R. 217.

Community law. In addition, it is worth noting that the ECJ has stated that the converse position is also true. Because a finding of direct effect is only a minimum guarantee of the effectiveness of Community law, it does not bar a parallel action seeking compensation for loss suffered by an individual as a result of a breach of Community law attributable to a Member State.[92]

Significantly, the ECJ in *Francovich* saw fit to apply the axiom of Community law that in the absence of Community rules governing a particular area, it is incumbent upon each Member State to provide its own form of regulation. The application of this axiom in *Francovich* led the ECJ to rule that each Member State is obliged to remedy the loss "within the context of national law on liability."[93] The effect of this decision is that following the ruling in *Francovich*, the assessment of damages and the rules governing an action for damages are matters for national law, provided that such national laws are not less favorable to a plaintiff than those governing similar claims for reparation following breaches of national law, and do not make it effectively impossible for a *Francovich*-type plaintiff to succeed in the national courts. This element of the judgment may be seen as an indication of a wish to prevent the alienation of national courts in the Community law dynamic by bestowing upon them an input into this "new legal order" and, thereby, adding another layer to the already complex ebb and flow between Community law and national law.

Ireland's application of *Francovich* is illustrated by the recent High Court decision in *Tate*.[94] In fact, the illustrative value of the *Tate* case transcends the limited question of damages for loss suffered as a consequence of a breach of Community law by the Member State. The case offers a revealing insight into the relationship between Community law and national law in the Irish legal order generally. As such, *Tate* demonstrates the workings of several of the themes introduced in the foregoing pages and merits more detailed consideration.

---

92. *Cf. Brasserie du Pêcheur*, [1996] E.C.R. at 1029, ¶ 20, [1996] 1 C.M.L.R. 889 at 985, ¶ 20.

93. Opinion of Advocate General Mischo, *Francovich*, [1991] at 5383, ¶ 44, [1992] 2 C.M.L.R. at 45.

94. *Tate*, [1995] 1 I.L.R.M. at 507.

B. Tate v. Minister for Social Welfare

Council Directive 79/7[95] seeks to establish equal treatment between men and women in the field of social security and prohibits, *inter alia*, all discrimination on grounds of sex in such matters. Prior to the Directive, Irish social security law was exclusively governed by the Social Welfare (Consolidation) Act of 1981, part of which was based on the principle that a married woman was deemed to be the dependant of her husband if she was living with him or was wholly or mainly maintained by him. A husband, by contrast, was only deemed to be a dependant of his wife if he was incapable of self-support because of some physical or mental infirmity and was being wholly or mainly maintained by her. One result of the 1981 Act was that married women suffered discrimination both as to the amount of unemployment benefits they received and as to the duration of their eligibility for those benefits.

Under Article 8 of the Directive, the deadline for implementation was December 23, 1984. However, it was not until November 21, 1986 that any of the Directive's provisions were implemented through the Social Welfare Act of 1985, which effected certain changes so as to bring about the required equality from that date forth. Another six years passed before the relevant Government Minister, acting under Section 3 of the European Communities Act[96] introduced the European Communities (Social Welfare) Regulations in 1992 which enabled the making of supplementary payments to compensate for the differences in payments as between married men and married women during the period between December 23, 1984, the expiration of the period for implementation of the Directive, and November 21, 1986, the date when the Irish implementing legislation took effect. These 1992 Regulations, although designed to wipe the slate clean, did not compensate for all the differences which existed during that twenty-three month period. They failed to address discrimination in relation to certain social welfare allowances such as the adult dependency allowance and the child dependency allowance.

The plaintiffs were all married women who claimed that from December 23, 1984 on, they were entitled to have the same

95. O.J. L 6/24 (1979).

96. European Communities Act, 1972 (Eng.).

rules applied to them and receive the same benefits that were applied and paid to married men in similar circumstances. Their claim was assisted by the ruling of the ECJ in *Cotter and McDermott v. Minister for Social Welfare*[97] which established that the relevant article of Directive 79/7 "is sufficiently precise and unconditional to allow individuals, in the absence of national implementing measures, to rely upon it before the national courts as from 23 December 1984, in order to preclude the application of any national provision inconsistent with that article"[98] and that in the absence of national measures implementing the Directive "women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference."[99]

Relying upon *Cotter and McDermott* and *Francovich*, the plaintiffs in *Tate* sought to establish that they had suffered discrimination contrary to the terms of the Directive because the relevant national law provided to married men in like circumstances payments to which the plaintiffs were not entitled, and when the 1992 Regulations were introduced to address this discrimination, the compensatory payments made by those Regulations failed to include an element of compensation, by way of interest due or otherwise, for the lateness of those payments. Moreover, invoking the judgement in *Francovich*, the plaintiffs sought compensation by way of damages for the loss suffered as a result of Ireland's failure to fulfill its Community law obligations. Justice Mella Carroll accepted the argument that Ireland had failed to fully or properly implement the Directive and held that as a result of this failure the plaintiffs had suffered discrimination and consequent financial loss. Given this holding, the issue of compensation for this loss needed to be considered.

Recall that in *Francovich*, the ECJ left it open to each Member State to provide specific methods of compensation. Before deciding how to compensate the plaintiffs, Justice Carroll sought to identify the nature of the wrong committed by the State in failing to implement Directive 79/7 within the specified time limit. The learned judge described it as:

---

97. Case 286/85, [1987] E.C.R. 1453, [1987] 2 C.M.L.R. 607.

98. *Cotter and McDermott*, [1987] E.C.R. at 1467, ¶ 16, [1988] 2 C.M.L.R. at 614.

99. *Id.*

> [A] wrong arising from community law which has domestic effect. It is not a breach of constitutional rights; it is not a breach of statutory duty and it is not a breach of the duty of care. It is a breach of a duty to implement the directive and it approximates to a breach of constitutional duty.[100]

The Justice went on to say that "in my opinion, the word 'tort' is sufficiently wide to cover breaches of obligations of the State under community law. There is nothing strange in describing the State's failure to fulfil its obligations under the Treaty as a tort."[101] Justice Carroll then granted a declaration that the State had failed to fully or properly implement the Directive and awarded damages equivalent to the disparity between the payments made to men and women in like circumstances, increased by the appropriate amount under the Consumer Price Index.

CONCLUSION

There can be little doubt that the dynamic effect of Community law upon the Irish legal system will continue to grow. There can be equally little doubt that such influence will continue to be founded upon the abandonment of the classic principles of international law for those of a constitutional system. Such evolution is the inevitable consequence of ongoing political advances towards a federal-type structure.

The removal of barriers between Member States, the common market, the possibility of a single European currency and other similar "political" developments all contribute towards copper fastening the place of Community law in the Irish legal order and decreasing the chances of a return to the pre-1973 position. In such a context the following observation of Francois Rene De Chateaubriand seems an appropriate note on which to conclude that, "quand les barrières fiscales et commerciales auront été abolies entre les divers Etats, . . . quand les différents pays en relations journalières tendront à l'unité des peuples, comment ressusciterez-vous l'ancien mode de séparation?"[102]

---

100. *Tate*, [1995] 1 I.R.L.M. at 522-525.

101. *Id.*

102. Lord Gordon Slynn, INTRODUCING A EUROPEAN LEGAL ORDER (Hamlyn Lectures), 1992 (quoting CHATEAUBRIAND, MÉMOIRES D'OUTRE-TOMBE (1841)).