The Doctrine of Direct Effect from Van Gend to Kücküdeveci:  
A Story of Misunderstandings and Inconsistencies

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The idea is to depict some rather common misunderstandings and inconsistencies in the context of the doctrine of direct effect in light of the very latest case law. For this reason I mention the judgment of the ECJ, C-555/07 - Kücküdeveci, from 2010 which nicely illustrates some of my arguments and serves the function of a leitmotif throughout my presentation.

I hope to clarify the discourse on the doctrine of direct effect in three regards. These three regards are intertwined in respect of the question of horizontal effect of directives.

A. Positive and Negative Application

It is one of the latest and rather widespread trends to argue that concerning direct effect, there should be an elementary distinction between a “positive” and “negative” application of the relevant norms; positive application meaning application by substituting for a lack of national law; negative application meaning the right to plead a norm in exclusion of a national norm. For some the doctrine of direct effect is even confined to the positive application. Prominent scholars in this regard are Prechal, De Witte, Advocate Generals Alber, Saggio, Léger and Bot.

I will try to illustrate that
-the negative application is the standard case concerning the doctrine of direct effect starting from the earliest cases such as Van Gend & Loos.
-there are only a couple of – although prominent – cases in the history of the ECJ-jurisprudence of several hundred cases on direct effect that concern the positive application.

-in the case law of the ECJ there has – contrary to some - not been a doctrinal distinction between positive and negative application.

-the premises for the distinction are not convincing. I will give examples.

-the distinction is not practicable. I will also give an example from the case-law.

B. Direct Effect and Interpretation in Conformity

In its case law the ECJ differentiates between direct effect and interpretation in conformity of Union law. Direct effect starts where an interpretation in conformity with EU law would be contra legem to the national law. I argue that this differentiation is methodologically not viable because interpreting a norm in conformity with a Union provision is a form of direct application of the latter. This differentiation leads to inconsistencies. Furthermore it is not practical to differentiate between direct effect and pure interpretation in conformity simply according to the boundaries of the wording. I will also give some examples. All of this leads me to my last group of misunderstandings in the field of the horizontal effect of EU law:

C. Horizontal Direct Effect: Misunderstanding in Terminology

I argue that the doctrines of horizontal direct effect and direct horizontal effect get confused. The first case deals with the doctrine of direct effect which addresses the question of applicability without an additional act of implementation either by the Union or the member states. The second case deals with the question whether a norm addresses private parties directly. I will prove that this misunderstanding is quite common, even within ECJ-case-law and among prominent scholars.

D. Conclusions and Theses

The explanations above lead me to different conclusions.

I. Clear Distinction between the Doctrines of Direct Effect and Horizontal Effect
II. Integrative Approach towards Direct Effect

Since the notions of application and interpretation are not contradictory both should be treated similarly in respect of the requirements for direct effect. This approach avoids inconsistencies and results that are a matter of chance.

III. Shifting the Burden of Proof

The concept of reducing the scope of application of the doctrine of direct effect to the positive application expresses the observation that the doctrine of direct effect has become blurry and inchoate, even superfluous or not adequate in respect of the level of integration. Several inductive and deductive arguments are in favor of this observation. The conclusion should yet not be a differentiation between positive and negative application but rather to shift the burden of argumentation: Principally every primary and secondary EU Norm (public international law should be excluded due to its different character) is to be regarded as directly effective. The lack of direct effect is the exception and needs to be argumentatively justified.

IV. Horizontal Direct Effect as a Doctrinally Obsolescent Model?

With regard to my explanations above I will try to shed new light on the discussion of horizontal direct effect of directives. I will argue that the ECJ – by pointing to several alternative solutions to the denial of horizontal direct effect – widely watered down the respective doctrine. A rather new palliative that has considerable potential is to compensate the lack of horizontal direct effect by promoting direct horizontal effect of EU Fundamental Rights. Yet, in a long term, the ECJ should dismiss its doctrine on the lack of horizontal effect.
Further Reading

