Doorwerking van Europees recht. De verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid
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SUMMARY

With a view to increasing the effectiveness of European law, the European Court of Justice has devised three original and penetrating means for Community obligations to have binding effect in a non-complying Member State’s legal order and to be relied upon notably by persons in cases before Member States’ courts. These three means have been developed as the separate doctrines of direct effect, consistent interpretation and State liability. Each of these doctrines is mainly concerned with the constraints imposed upon its application and has been the subject of extensive scholarly analysis. The present book brings together the three doctrines and their evolution in a single perspective by considering the different way in which each of them relates to the other, by means of their interaction, complementarity and priority.

Part One examines the creation and evolution of these three doctrines in the case law of the European Court of Justice and outlines their main characteristics (chapters 2-4). Part Two studies the different relationship between the doctrines of direct effect, consistent interpretation and State liability (chapters 5-7). Part Three considers the system as a whole (chapter 8).

The doctrine of direct effect is the subject of Chapter 2. Direct effect is the possibility for persons to rely on a provision of European law before a court or other authority of a Member State with the effect of their setting aside or replacing a conflicting domestic standard. The Court of Justice only acknowledges this quality for those provisions that are unconditional and legally perfect. Doctrine has it that these conditions are meant to keep the judge within constitutional limits and not to encroach upon the powers of the legislature and the executive. While Treaty provisions may have both vertical direct effect (in a private person’s challenge of a State rule) and horizontal direct effect (in one person’s action against another), directives have only vertical and no horizontal direct effect. However, the notion of the ‘State’, against which directives can be relied upon vertically, is broadly interpreted. Furthermore, it is argued that from a European law perspective individuals do not have to show that they actually intend to receive a benefit from the directly effective provision they are relying upon.

Direct effect, backed by the principle of supremacy, obliges national courts in their turn to disapply, or set aside, national law in case of conflict with provisions of European law. However, issues of further legal consequences and the procedures by which direct effect is deployed are left to national courts, on the basis of the so-called ‘principle of national procedural autonomy’. This national discretion is nevertheless subject to the mini-
mum standards as formulated by the Court of Justice, namely the principles of non-discrimination, effectiveness and effective judicial protection.

Chapter 3 deals with the obligation of national courts to interpret their national laws as far as possible in light of European law. This obligation requires national courts to interpret national law in its entirety in conformity with all European law, regardless of the existence or absence of (horizontal) direct effect. The duty to interpret national law as far as possible can be considered an obligation for national courts to do their utmost to achieve conformity with European law.

The possibility to proceed to consistent interpretation largely depends on the substantive proximity between European law and national law, that is to say, on whether national law offers enough space for such an interpretation. It is limited by general principles of law, in particular the principle of legal certainty. Generally speaking, national courts are to a large extent obliged and, in principle, are always permitted to interpret their national laws in conformity with European law, as long as such interpretation does not violate general principles of European law.

Chapter 4 is dedicated to the doctrine of State liability for breaches of European law. A Member State can be held liable for damage resulting from every breach of European law, regardless of whether the breach is committed in an executive, administrative or judicial capacity. Member State liability is subject to the European law-based conditions of there being an identifiable legal right, a sufficiently serious breach of Community law and causation. The same conditions apply in each case, but the ‘rigour’ of the system may vary depending on the nature of the breach; the more discretion a Member State enjoys, the more difficult it is to establish that a breach is sufficiently serious, that is to say, that the Member State in question has manifestly and gravely disregarded the limits on the exercise of its discretionary powers. In this respect, the precision and clarity of the provision breached are of relevance.

Whether the three conditions for State liability in a concrete case are met is in principle a matter for national courts to decide, although the Court in its preliminary ruling may provide guidance or even make an appreciation when it has sufficient information at its disposal. In this respect, it is argued that the issue of the grant of rights to individuals should more properly lie conclusively in the hands of the Court. Furthermore, the conditions have to be regarded as minimum standards. This means that national courts are obliged to apply national law (only) when it offers stricter forms of liability. Once the conditions are met and liability is thus established, it is up to the national legal order to determine the procedural conditions that govern the right to reparation, i.e. questions relating to such matters as access to court, amount of compensation and liable authority are matters for national law to decide, provided that the national judicial system complies with the minimum standards as established by the Court.

Chapter 5 examines the interaction between direct effect, consistent interpretation and State liability. The first question is whether consistent interpretation or the imposition of
State liability is possible with regard to provisions of European law that, owing to their lack of clarity or precision, cannot be relied upon directly before national courts. First of all, the doctrine of consistent interpretation has added value over the doctrine of direct effect. An important feature of the method of consistent interpretation in this respect is that such obligation covers all European law and the absence of direct effect does not in itself form an obstacle to the success of consistent interpretation. Some provisions of European law for instance leave too much discretion to Member States for them to have direct effect but in certain cases it is nevertheless possible to interpret national law in conformity with such provisions.

A national court can resort to an interpretation in conformity with non-directly effective European law when its national law offers enough flexibility for such an interpretation so as not to jeopardise the limits of its judicial function. Furthermore, national courts are allowed to interpret national law in conformity with directives even before the time-limit for their implementation has expired. They may even be deemed obliged to do so when the directive concerned has already been implemented before the expiry of the deadline. In any event, national courts should, even before the term of expiry, abstain from an interpretation that would seriously endanger the result prescribed by the directive.

The doctrine of State liability also offers an alternative remedy in the absence of direct effect. Violation of provisions that do not have the required clarity and precision to be held directly effective, but nevertheless create identifiable legal rights, may give rise to a liability action. That is to say, the degree of clarity and precision needed for the existence of direct effect resembles, but cannot be equated, with the requirements needed for the imposition of State liability. Furthermore, Member States could in theory be held liable for a serious breach of their obligation to refrain from taking any measure contrary to a directive during the period prescribed for its transposition, i.e. before the date that direct effect can be pleaded.

However, in other cases the doctrine of direct effect has more to offer. As opposed to the doctrine of consistent interpretation, direct effect can be considered as a strict obligation to apply European law and may not depend on national tests. Regardless of whether consistent interpretation is acceptable or not under national law, the national court must in any case disapply the national measure concerned when it is found to be incompatible with directly effective European law. Furthermore, the thresholds of State liability are too high to acknowledge that the methods of direct effect and consistent interpretation are actually unnecessary. For instance, in this respect it is argued that not each directly effective provision of European law intends to automatically confer individual rights that can give rise to State liability.

Finally, the doctrine of State liability has important merits compared to the other two doctrines in offering the possibility to make up for additional losses not made good by using either the doctrine of consistent interpretation or the doctrine of direct effect and
the possibility to claim damages for judicial mistakes in the application of direct effect or (the negligence) of the interpretative obligation.

Chapter 6 pays special attention to the ways in which provisions of European law can produce effects against private parties. Treaty provisions and regulations may give individuals claims against other individuals. For instance the provisions on competition, free movement of persons and equal payment can be relied upon directly also as against individuals. However, the horizontal direct effect of other provisions of the Treaty is still unsettled (e.g. art. 56 EC) or has (at least partly) been excluded by the Court of Justice (art. 28 EC). Furthermore, the Court of Justice consistently refuses to grant horizontal direct effect to directives because of their inability to impose obligations on individuals.

However, the case law does show a tendency to accept the indirect effects of directives (and as a matter of fact also of Treaty provisions such as art. 28 EC) for private relationships. The Court of Justice does this by allowing reliance on directives both against the State and against private parties to set aside conflicting national measures, even if this might be to the detriment of the interests of another private party. Any attempt to reconcile this case law with the denial of the horizontal direct effect of directives meets with anomalies and inconsistencies. In any event, it is clear that the Court of Justice has persevered in its denial of mere horizontal direct effect of directives; they cannot be used to enforce obligations as against an individual.

The doctrine of consistent interpretation on the other hand does allow the imposition of obligations even on individuals, as long as national law provides enough margin for such a result and the legitimate expectations of those affected are taken into account. It is argued that this can not be equated with horizontal direct effect or reverse vertical direct effect, because the obligation in the end is enforced through national law. This is not to say that consistent interpretation with adverse effects for individuals is without specific difficulties, but that the application of the principle of legal certainty secures the necessary protection against unwanted results. Given this, national courts should not arrive too easily at the conclusion that consistent interpretation is to be excluded and should base their final analysis on arguments of legal certainty.

Furthermore, persons who are faced with a breach of European law by another person do have a right to reparation against the State for loss resulting from the failure to comply with a directive. However, the system of State liability does not seem to protect persons who are affected by the indirect effects of directives. In this respect it is argued that the growing willingness to accept the adverse effects of directives on the legal position of private parties is matched by the desirability to acknowledge a right to claim damages in these cases.

Finally, European law requires that national law must provide in principle for a right of action in damages against another private party for breach of the Treaty competition rules. It is however still unclear whether this obligation goes beyond breach of the competition rules and addresses breaches of other provisions of European law that have hori-
horizontal direct effect. That is to say, the Court of Justice has not (yet) enunciated a broader, European law-based principle of liability of private parties. In this respect it is submitted that, by analogy with the principle of State liability, recognition of such a principle would be a logical complement to horizontal direct effect.

Chapter 7 explores the hierarchy of the three doctrines in the case of simultaneous availability. The first question in this respect is whether the doctrine of direct effect or consistent interpretation enjoys priority. It appears that European law is neutral with regard to the choice between the doctrines of direct effect and consistent interpretation, both of them equally safeguarding effective judicial protection and the full effect of European law. However, from a national point of view it may appear more attractive and preferable to interpret the law in conformity with European law in order to avoid a clash between the rules concerned and to render preliminary questions about potential direct effect redundant. Yet, when consistent interpretation interferes with legal certainty or limits to the judicial function, direct effect will be available to give effect to European law.

A second issue discussed in this chapter is the hierarchy between the doctrine of State liability on the one hand, and the doctrines of direct effect and consistent interpretation on the other. Essentially this boils down to the question whether the doctrine of State liability constitutes a complementary remedy, which is only available after an attempt has been made to solve the clash between European and national law by way of direct effect or consistent interpretation. The principle of effectiveness and the obligation to mitigate one’s loss seem in principle to allow for the availability of an action in damages under (autonomous) national procedural law to be made subject to the prior exhaustion of other remedies, the timely reliance upon which would make it (partly) redundant to claim damages. However, this does not mean that national courts can always refuse a claim on the (sole) ground that the claimant has failed to make use of the other two doctrines. The rather narrow interpretation of the mitigation of loss principle by the Court of Justice seems to call for a balancing exercise between the ‘negligence’ of the applicant and the ‘obstruction’ by the defaulting authority. Therefore, by virtue of the principle of effectiveness, national courts in some (hardship) cases might be obliged to offer European law-based claims better than ‘national treatment’.

Chapter 8 evaluates the results of this study and contains a critical analysis of the system as a whole. The system of enforcement of European law in national legal orders, as set out by the Court of Justice, creates an arsenal of remedies, which cater to the needs of judicial protection and threats to the uniform application of European law, and at the same time reflect the idea of the ‘Rule of Law’. The specific features of the separate, but interrelated doctrines allow each of them to alleviate the detrimental consequences of non-compliance with European law at the national level and correspondingly make up for the flaws of the other doctrines.

However, one cannot but note that the current system is wanting in some respects. In particular, the case law of the Court of Justice concerning the ways in which directives
produce effects against private parties contains many anomalies and inconsistencies that potentially endanger the coherence of the system. In the absence of more explicit guidance from the Court of Justice, the odds are high that national courts may rule out the effects of European law too swiftly. After all, it is up to the Court of Justice to enhance the coherence of its key doctrines, by laying down clearer distinctions among them. Additionally, and mainly in the sphere of the principle of liability, some important challenges remain for the Court of Justice.

The postulates of effective judicial protection and uniform application of European law as embraced by the Court presuppose that national courts in their turn apply European law and its key doctrines correctly, and respect their power or duty to refer a case to the Court of Justice. In this respect, national courts should be extremely cautious, especially in closing a route to conformity with European law. If in the slightest doubt, they should never exclude the effects of European law without consulting the Court of Justice. After all, it is the Court of Justice that is the sole guardian of the key doctrines of direct effect, consistent interpretation and State liability, as well as their inter-relationship. Accordingly, the Court should live up to its function of a constitutional court by being more systematic itself.