

THE RELATIONSHIP BETWEEN COMMUNITARY LAW AND THE INTERNAL LAW OF THE MEMBER STATES OF EU

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Abstract

Communitary Law can implement its norms in the internal legal order of the member states, without being to fulfill certain formalities in order to integrate them into the internal legal norms. The communitary law has a direct applicability, regardless of its sources. As a result, it has a direct effect, in the sense, that it can create rights and obligations not only for the member states, but also for individuals. This characteristic of the Communitary Law to induce a direct effect is linked to the essence of the communitary legal order. Therefore, the direct effect of the Communitary Law consists of its capacity to create rights and concrete obligations for the physical persons and for the legal ones in the member states and their impossibility to resort to the communitary norms in front of the national legal courts and of the communitary organisms. The Court of Justice has also established that the secondary legislation creates a direct effect, like the primary legislation, being able to make use of the provisions included in the communitary treaties in order to initiate an action in the Court. Bringing motivation to this solution, the Court proved that the communitary legal order is a new legal, autonomous order whose subjects are not only the member states but also their resortisants. Being independent from the national law, the communitary law provides for individuals not only obligations but also rights resulting not only from an explicit assignment but also as being a correlative right of an obligation included in treaties allotted to member states. If the state does not fulfill the obligation imposed by the Communitary Law, its resortisants can invoke it in front of the legal national and communitary courts.

Keywords: *communitary law, dirrect application, internal legal norm, communitary legal order, communitary objectives, the principle of priority, the principle of immediate application.*

1. GENERAL REMARKS REGARDING THE DIRECT IMPLEMENTATION OF THE COMMUNITARY LAW

A characteristic feature of the Communitary Law is its autonomy both in relation to the public international Law and regarding the internal right of the member states¹.

The characteristic feature of the communitary Law norms and of those of the internal law resides in the fact that both categories of norms appeal to the same categories of persons. Between the two legal orders there is a relationship of cooperation, which implies mainly a participation of the local authorities to the fulfillment of the communitary objectives and to the implementation of the communitary law.

In order to outline this relationship we should have in view three aspects²:

- How is implementation of the communitary law ensured in the internal legal order;
- Which is the place of the communitary law in the system of the national law;
- What authority has the communitary law in the states that make up the community.

The direct implementation is a principle formulated by C.J.C.E., according to which the provisions of Treatises or of the documents produced by communitary institutions, which observe certain criteria, could create rights and obligations in favour and in the obligation of private persons respectively³.

The phrase „directly implemented ” occurs in art. 249 referring to one of the sources of the derived communitary law – **The Regulations**. In this way, the direct implementation means that the communitary provisions are integrated as such in the internal legal order and, as any national measure of transformation or inclusion in the internal legal order, it is banned.

The reasons which led C.J.C.E. to come up with this principle were presented for the first time in Van Gend&Loos resolution. In this respect, C.J.C.E. comes to the conclusion that the

objective effect of the Treatise consists of "setting up a common market whose functioning has mainly in view the legal persons of the Community"⁴. The association of the resortisants of the member states with the community construction is confirmed by the preamble of the Treatise which, as the Court insists, "besides governments, peoples are taken into account by creating organisms which institutionalize sovereign rights whose activities influence both the member states and their citizens". Thus, in the opinion of the Court, the Community represents a new legal order, whose subjects are not only the states but also their resortisants.

We would like to reiterate that the direct implementation and the principle of priority represent the two pillars of the community legal order or that, "*those essential characteristics of the community legal order (...) are, mainly, the priority in relation with the system of law of the member states and the direct effect of a number of provisions applicable to the resortisants and even to the member states*"⁵.

For a community provision to be recognized the direct effect, this has to meet the following criteria: clarity, precision and non violation of conditions. The direct effect cannot differ from one state to another one regarding its existence and consequences, the principles of unity and uniformity of the community law, imposing a definition of the direct effect. From the point of view of its elaboration, the community norms should be perfect to create rights and impose obligations to private people without the necessity to add internal provisions or the intervention of community documents.

The natural quality of a norm of law to lead to direct effects result in the fact that both the community and the national measures can have only an auxiliary function⁶.

The jurisprudence of C.J.C.E. distinguishes between the **direct vertical implementation** and the **horizontal** one. The **direct vertical implementation** indicates mainly the possibility to invoke the provisions of a directive in relation to a state or to one of the state authority. The **direct horizontal** implementation allows a legal person to invoke a community provision against another private person.

The community Regulations is the main source and legal act of the derived community law. It is a complex and efficient act for the progress of the Community and of the integration process. It is also obligatory for the member states of the Community even in the situation when they were against the endorsing of the respective regulations.

In the Treatise of Maastricht it is stipulated: "The Regulation has general authority, it is obligatory in its totality and is *directly implemented* in all the member states." The community Regulation secures directly rights and establishes obligations for the member states, for physical or moral persons without the necessity of its being included in the national legislation of these states, but having the obligation to protect them⁷.

The directive is not directly implemented, therefore, as a principle, it should not have a direct effect. The community directive imposes obligations only to the member states that are its addressees. By means of it, it is aimed to get results from the hinted countries and it remains up to the respective country, to its national bodies respectively, the complete competence in choosing the means of achieving its provisions⁸.

The directive induces effects from the moment it is notified to the addressed state. As it has in view the member states, the directives should be transferred to the internal law observing the deadline indicated in the body of the community act under discussion. As a conclusion, only the implementation measures will produce direct effects in the national legal order.

It should also be mentioned that, the directive does not meet the requirement of nonconditionality, because its implementation implies an evaluation measure from the respective member state.

We can conclude regarding the directive, saying that the direct effect occurs in the framework of certain hypotheses only under exceptional circumstances⁹.

The community decision, being an individual act, can also lead to direct effects. The community decision is the act which involves only its addressee, which can be a member state, a physical or moral person. It should be made the distinction between the decision addressed to a private person and the one destined to the

member states. The former produces, without doubt, a direct effect, the private persons being able to invoke such decisions in front of the national courts. Regarding the latter, the decisions addressed to the member states, we could apply the doctrine regarding the provision. In the case of the private persons both vertical and horizontal effects could be produced, while in the case of the member states, the Courts of Justice has not yet given its opinion whether provisions could have a direct horizontal effect too (it is thought that the content of the provision should be examined in order to see if it can produce direct effects in the relationship between the act of the addressed person – the state authority- and the third party).

The International Agreements signed by the Committee can also lead to direct effects and can give the legal persons the right to use them in Courts¹⁰.

C.J.C.E. is of the opinion that the spirit, the economy and the conditions of the international agreement should be examined and analysed in the light of its object and aim as well as taking into account the respective context.

2. THE PLACE OF THE COMMUNITY LAW IN THE SYSTEM OF INTERNATIONAL LAW

The direct implementation of the Community law consists of introducing its norms in the internal legal order of the member states without the necessity of carrying out some formalities of their transfer into the internal legal norms.

The community law as a whole has a direct implementation regardless of its sources. The consequence of the direct implementation of the Community law is the fact that the Community law produces a direct effect, that is, creating rights and obligations not only for the member states but also for the private persons. This characteristic of the Community law to produce a direct effect results from the essence of the legal community order. This is what distinguishes it from the International law, whose topics do not refer to the physical or legal persons, which cannot be entitled to have rights and obligations

derived directly from the norms of the International law¹¹.

The direct effect of the Community law consists of its capacity of creating rights and concrete obligations for the physical and juridical persons from the member states and their impossibility of invoking community norms in front of the national legal courts and the community organisms¹².

The Law Courts has also decided that the secondary legislation produces a direct effect like the primary legislation, the physical and legal persons can also avail themselves of the provisions of the community treaties in order to initiate a legal action. Motivating this solution, the Courts showed that the legal community order is a new legal order, autonomous, whose subjects are not only the member states but also their residents. Independent of the national law, the Community law imposes on private persons not only obligations but confers them also rights, which result not only from an explicit awarding, but can occur as a correlative right, resulting from an obligation imposed by the treaties that the member states should observe. If the state does not observe the obligation imposed by the Community law, the residents can invoke it in front of the national and community legal courts¹³.

Some of the legal community norms have a direct complete effect implying the fact that the rights provided or obligations imposed can be invoked in relation to the community or national organisms (vertical effect) and in relationships with the private persons (horizontal effect). Such an effect is proper to some of the provisions of the community treaties, which create rights and obligations for private persons as well as the Regulation as the main source of the derived Community law and the decisions of the community institutions which have the residents of the member states as their target.

In the case of other community norms the direct effect is limited, they could be invoked only in the private persons' relationships with state authorities¹⁴. In this way, the provisions and decisions addressed to the member states have only a direct vertical effect, private persons

being able to invoke them against the state, which does not observe their indications.

More than its limitations, the direct effect can be declared as being nonapplicable by decisions of the European Courts of Law, regarding some norms which refer only to community institutions and to the relationships between them¹⁵.

The characteristic of the Community law to create a direct effect in the internal law of the member states induces the necessity to establish the place the community law will hold in the internal law in relation to the national norms and the way a possible conflict between a national norm and a community one could be solved up.

When the community legislation does not have a definite settlement in this sense, the answer to this problem has been given by the Legal Courts, which certified the priority of the Community law before the national law of the member states¹⁶. This is the only compatible solution with the integrating character of the Community law, because, otherwise, if the possibility to implement a national norm would be recognized, and will be contrary to the Community law, giving efficiency to the national interest detrimental to the community one, even the existence of EU and the Community law would be placed under discussions.

According to the principle of priority, of the supremacy of the Community law, its rules will make nonoperative all the other rules of national law, if they were adverse¹⁷.

The priority of the Community law implies, on one hand, the impossibility for a subsequent national law to be contrary to the norms of the Community law, and, on the other hand, the possibility for the subsequent community norm to modify or to make unapplicable national legal norms¹⁸.

Being directly implemented in the legal order of the member states and being superior to the internal norms, the rules of the Community law are imposed to all internal organisms, including the national jurisdictions, which have the obligation to secure them total efficiency, getting rid of any national contrary rule.

The rule of the priority of the Community law is unconditional and absolute, being applicable to any internal norm, regardless of its rank, therefore, also, to a constitutional norm¹⁹.

Concluding regarding the relationship between the Community law and the internal law, we can note four elements which characterize this relationship²⁰:

- the coexistence of the national norms with the community ones. As an example, we may mention the national norms that can coexist with the community ones. For example, the legal norms referring to competition. The legal practice in this matter gives priority to the community norms²¹.

- the national right is entailed by the Community law in those domains in which competences have been transferred from the states to EU, the national authorities cannot give legal norms in these domains any more. This entailment can be partial or total. E.g., the

Customs Common Tariff represents a document of total entailment.

- harmonization of the national legislation with the Community law. This implies taking certain legislative measures which have in view a certain organization of the national provisions. It is to be started from the requisite according to which the legislative competence belongs to the national authorities, but, having in view community objectives, it is necessary to adopt legal norms with a certain degree of homogeneity in the member states. Practically, the community organisms give indications, explanations and, as a rule, the normative decision is given by the national authorities.

- the coordination of the systems of the national law with that of the community one. In this way, the system of national law is subjected to some modifications in order to achieve the effects which the legal community norms should create.

2. THE GENERAL PRINCIPLES THAT GOVERN THE RELATIONSHIP EUROPEAN LAW- THE LAW OF THE MEMBER STATES, INCLUDING THE APPLICATION OF THE NORMS OF THE COMMUNITY LAW IN ROMANIA

a. The principle of immediate implementation of the European law

An analysis of the immediate implementation implies the study of the relationship between two systems of law, of the relationship between the public international law and the internal law, according to the doctrines in the matter, which assumes involving either a dualistic theory or a monistic theory in this domain²².

In this way, the dualistic theory, whose representatives are Italians (D. Anzilotti) and Germans (H. Triepel) comes with the following conception: the international legal order and the traditional one are independent, separate and coexist in parallel. Therefore, an international treatise can be effective in the internal legal order only if it is ratified; there takes place a "nationalization" of the treatise which is implemented as internal law.

According to this theory, there is not a subordination relationship between the two systems.

On the other hand, the monistic theories consider the internal norm of law to be in the same sphere of influence as the international one, being a supra/subordination relationship according to the variant adopted. In the first variant, the public international law should be immediately implemented in the internal law. The best known supporter of this theory is Hans Kelsen, the representative of the school of Vienna. In this doctrine, it is said that the international norm is immediately implemented in its status of international norm, without the necessity to "nationalize" it²³.

The other variant of the monistic theory gives priority to the internal law over the international law. Its supporters start from the philosophical conceptions of Hegel (the School of Bonn, 20th century). Due to the absolute independence and sovereignty of states, the relationships between

them are based on force: thus, the international public law represents only a projection of some norms of the internal law²⁴.

Regarding the relationship between the European law and the internal law of the member states, we must say that the institutive treaties sanction the monistic theory and impose its being observed by the member states. This is because the community system can function only in the framework of monism, which is the only principle compatible with the idea of a system of integration.

The notion of integration on the European level implies obligatorily a transfer of competence from the member state organisms to the institutions and organisms existing on the European level. In the relationship EU - member states, the community law, original or derived, is immediately implemented in the internal law order, being part of it. The international norm will be immediately applicable, without being admitted or transformed into the internal order of the member states.

As it is not necessary a special form for its implementation in the internal law, the national judges are obliged to use the European law; at the same time, the European law is implemented in its quality of being European and not an internal law.

b. The principle of direct effect of the European law

The direct implementation is a principle devised by C.J.C.E., a principle according to which the provisions of treaties or of the documents of the community institutions, which observe certain criteria, can be invoked by legal persons in front of their national legal courts and can create rights and obligations in favour of private persons²⁵.

The phrase "**direct implemented**" occurs in art. 249 T.C.E.E. referring to one of the sources of the derived community law - the regulation. In this context, the direct implementation means that, first of all, the community regulations are integrated as such in the internal legal order and, as any national measure of transformation or implementation in the internal legal order, it is banned. This principle is also included in art. 81

from T.C.E. referring to provisions regarding competition, which are destined to institutions. This principle was generalized by a decision given by C.J.C.E. in 1963.

It is a principle²⁶ supported by the fact, that one cannot ignore the contribution of private persons regarding the way EU functions by means of the European Parliament and the Economic and Social Committee.

EU represents a new legal order whose subjects are not only states but also their resortisants. The Courts of Law underlines the fact the community law imposes obligations on the resortisants, being also destined to create rights in favour of private persons²⁷.

These rights occur not only by their direct allotting, but also on the basis of the obligations imposed clearly both on the private persons and on the member states and the institutions of the Community.

The direct implementation and the principle of priority represent the two pillars of the community legal order. The criteria necessary for a community provision to have the **direct effect** are: clarity, precision and non affecting conditions²⁸.

If these criteria are fulfilled, authorities have no power of discretionary assessment regarding the implementation of the provision, and this, as a consequence, is susceptible of being implemented by the judge²⁹.

The C.J.C.E. jurisprudence makes a distinction between the vertical direct implementation and the horizontal one. The direct vertical implementation designates mainly the possibility to invoke the provisions of a / directive in relation to a state or to one of its authorities.

For the Courts, "*when the legal persons are able to make use of a provision against the state, they can do this regardless of the quality in which the latter act: employer, or as a public authority*"³⁰.

In this way, C.J.C.E. has stressed the fact that a provision having a vertical direct effect can be invoked by legal people against a state authority or against the organisms and entities which are subjected to the state authority or those which have extraordinary powers in comparison with those that act between private persons.

Aplicabilitate directă orizontală permite unui justițiabil privat să invoce o dispoziție The direct horizontal implementation gives the possibility to a private legal person to invoke a community provision against another private person.

c. The principle of priority of implementing the European law

The statement of the priority of implementing the European law cannot be evidently found in the provisions of the primary law on the European level, but practice and the provisions of the Courts of Law have solved the conflict between the provisions of treaties and national laws that were adopted later on³¹.

In order to demonstrate the priority, C.J.C.E. started from a series of arguments. First, it is considered the specific nature of EU, its unlimited duration, having its specific responsibilities, with legal personality and capacity, with a capacity of international representation and, especially, having real powers resulting from limitation of competence or from transfer of the obligations from member states to the Union.

Member states have reduced, even though in a few domains, their rights to sovereignty and have founded, in this way, a legal system applicable to resortisants and to the state themselves.

From the transfer of responsibilities, there results the fact that the member states do not create legislation in the domain of transfer because they do no longer have the necessary competence.

The primary European legislation creates a specific legal order, which integrates itself in the national legal order. From this integration results the impossibility to adopt a subsequent national measure contrary to the European law. Any other solution would have hindered the European law to be implemented uniformly, because this would have varied according to the national subsequent legislation in each member state. A differentiated implementation by each member state would lead to fundamental discrimination on reasons of citizenship, discrimination which are banned by provisions of the European legislation.

The specificity of the European law is evident due to the consequences implied by the principle of priority. The member states have the obligation, according to the principle of loyal cooperation provided by art. 101 from T.C.E., to repeal the national norm incompatible with the community law and, up to that moment, to make unenforceable the respective provision. This obligation is imposed on all national authorities, including the local or regional ones and, especially, on the national judges.

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30. In contrast to the Regulations, the direct effect of the directive can not be invoked by an individual against another individual, but only against the State, because it is the only one guilty of not having implemented it.
31. Article 308 TEC introduces the concept of "implied Powers" which gives the Community the right to intervene in areas that are not expressly covered by the CE Treaty