EFFECTIVENESS OF EU LAW IN MEMBER STATES

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Abstract
When the original Rome Treaty was drafted, it was envisaged by the authors that the procedure as set out in what is now article 258 T.F.E.U. (infringement procedure) would be the primary means by which EU law is enforced - a "centralized" and "public" form of enforcement assured by the ECJ, the Commission and Member States, which was itself innovative, since most international treaties contained no such mechanism. It was a point of view shared by Member States, who could see no reason why provisions of EC Treaties should be treated any differently from those of other international treaties.
Thus, on the one hand, the effect of international treaties was generally governed by the principle that they cannot by themselves create rights and obligations for individuals, but only for contracting states - therefore, states were considered the only ones entitled to claim respect of international norms in international courts (individuals and national courts were excluded); on the other hand, as the text of EC treaties made no specific reference to the effect their provisions were to have, the general rule governing international treaties should also apply to them. The European Court of Justice disagreed and engaged in a prolonged judicial activism, resulting in the creation of other legal mechanisms by which national courts and individuals (rather than ECJ, Commission and Member States) were to take the leading role in the enforcement of EU law - a "decentralized" and "private" form of enforcement, governed by three interrelated principles developed jurisprudentially by the ECJ: direct effect, indirect effect and state liability.
In this context, the purpose of this paper is to provide an overview of actual means of EU law enforcement, as presented above; to this end, there will be considered the legal/judicial basis, scope, limits and practical difficulties of the "centralized" and "decentralized" form of enforcement.

Keywords: *infringement, direct effect, incidental horizontal effect, indirect effect, state liability*

1. Introduction

The paper intends to provide an overview of primary means by way of which, at present, EU law is enforced against Member States, national authorities and individuals.

The topic proposed is central for EU law, both from theoretical and practical point of view.

From a theoretical perspective, the importance of analysis results, on the one hand, from the fact that means of EU law enforcement are different from those provided in case of international law enforcement; on the other hand, nor treaties or the other EU law sources identify a general scheme of these means (of which some have been established, in fact, by the case-law of Court of Justice of the European Union) – the analysis should therefore prove useful, taking into account the lack of legal provisions and also the evolving jurisprudence of ECJ on the subject.

From a practical perspective, although EU law measures should willingly be complied with in Member States, experience has proved that existence of coercive methods of enforcement is still necessary, and a good knowledge of those methods is undoubtedly useful.

In this context, the paper will systematically present the public and private means of EU law enforcement which are part of the complex coercive means at the disposal of all those involved in application of EU law (EU institutions, Member States, national authorities, individuals); it will also discuss their legal or judicial basis, area of application, limits and possible interferences; to this end, both ECJ case-law and doctrinal opinions will be presented.

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2. General aspects

Since none of the sources of EU law provided a general scheme of means ensuring EU law enforcement, the difficult task of conceptualising most of them fell on the European Court of Justice; the concepts established by ECJ were subsequently discussed and systematized by juridical literature.

The starting point was represented by the distinction between „public" and „private" enforcement – „Law can be enforced either through a public arm of government, which is accorded power to bring infringers to court, or through actions brought by private individuals, or a mixture of the two"[1].

The „public" enforcement was stipulated by the EEC Treaty and initially considered as the only means of enforcement; nevertheless, the ECJ conceived a complex system of „private" means, at the same time pointing out that „public" and „private" ways of enforcement do not exclude each other, but must coexist in order to ensure a complete effectiveness of EU law in Member States[2].

It can be concluded from those presented above that, at the present time, there are two channels which secure compliance with EU law in Member States: on the one hand, a „centralised" and „public" system of enforcement, assured by the Commission/Member States through actions brought before ECJ, and on the other hand a „decentralised"[3] and „private" system, assured by national courts in proceedings brought by individuals; the coexistence of these two forms amounts to what the European Court of Justice[4] and juridical literature[5] have referred to as „dual vigilance".

3. Public enforcement of EU law

When the original Rome Treatiy was drafted, the principal channel of Community law enforcement conceived by the authors consisted in a specific procedure by which the Commission/Member States could demand sanction of failure to fulfil an obligation under the Treaty, through actions brought before the European Court of Justice.

It was a „public" and „centralised" form of enforcement of Community law, stipulated by articles 169-170 of the Treaty and assured by the ECJ, the Commission and Member States, which was itself innovative, as most international treaties contained no such mechanism of international law enforcement.

The procedure mentioned above still exists and finds its actual legal basis in the provisions of articles 258-259 T.F.E.U.[6]

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[1] P. Craig, G. de Burca, *EU Law, Text, Cases And Materials*, Fourth Edition, Oxford University Press, 2007, p. 269 (translated to Romanian by B. Andreşan Grigoriu and T. Ştefan, Hamangiu Publishing, Bucharest, 2009, p. 335).

[2] A. Evans, *A Texbook on EU Law,* Hart Publishing, Oxford, 1998, p. 186.

[3] J. Engstrom, *The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse Achieve Effectiveness?*, European University Institute, Doctoral dissertation, Florence, 2009, p. 1; C. Boch, *The Iroquois at the Kirchberg; or some Naive Remarks on the Status and Relevance of Direct Effect – Dual Vigilance Revisited,* in Jean Monnet Working Papers no. 6/1999, published by Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law, p. 1.

[4] „The vigilance of individuals concerned to protect their rights amounts to an effective supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States." – ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62.

[5] B. Moriarty, *Direct Effect, Indirect Effect and State Liability: An Overview,* Irish Journal of European Law, vol. 14, no. 1 and 2, 2007, p. 197-160, p. 100; J. Steiner, L. Woods, C. Twigg-Flesner, *EU Law*, Ninth Edition, Oxford University Press, 2006, p. 112; C. Bosch, *op. cit.*, p. 1; A. Howard, D. J. Rhee, *Private Enforcement – A Complete System of Remedies ?,* in *A True European. Essays for Judge David Edward,* edited by Mark Hoskins and William Robinson, Hart Publishing, Oxford and Portland, Oregon, 2003, p. 307-326, p. 308; R. Munteanu, *Drept european. Evoluţie – Instituţii - Ordine juridică,* Oscar Print Publishing, Bucharest, 1996, p. 347.

[6] Ex articles 226 and 227 EC Treaty.

There are nevertheless significant limits of this form of EU law enforcement, which will be presented further on.

The first and most important limit is represented by the fact that individuals[7] take absolutely no part in this procedure (which was, indeed, conceived not for the protection of individuals, but as a form of EU law enforcement) – therefore, legal proceedings cannot either be initiated by individuals, nor used against them (active procedural position is attributed to the Commission/Member States[8], and passive procedural position to Member States).

Secondly, in most of the cases, the Commission itself finds out non-compliance with EU law only as a consequence of individual complaints (not every breach is as blatant as to determine the Commission to take action or result in a complaint on part of a Member State) and therefore its actions depends on the vigilance of individuals; on the other hand, the Commission does not have the institutional capacity to prosecute but a rather small number of infringements; finally, the Commission has discretionary power over the decision to initiate or not legal proceedings[9].

Thirdly, the sanction itself in case the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties is rather ineffective, as long as the ECJ decision (althouhg compulsory) is not self-executing and has only declarative effect – the Court limits itself to declare non-compliance of a Member State with an EU law obligation[10].

Thus, the Court cannot impose on Member States in breach certain obligations or particular measures – it is only for the domestic authorities to establish and carry on measures of execution of the infringed EU obligation so as comply with the judgment of the Court; the most „burdensome" sanction consists, eventually, in imposing on the Member State concerned payment of a lump sum or penalty payment (the Commission indicates the amount of the lump sum or penalty payment to be paid by the Member State which it considers appropriate in the circumstances[11])[12].

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[7] Both physical and moral persons - A. Fuerea, *Drept comunitar European. Partea generală,* All Beck Publishing, Bucharest, 2003, p. 34.

[8] The procedure stipulated by article 258 T.F.E.U. is used frequently by the Commission; by contrast, Member States themselves make use of provisions of article 259 T.F.E.U. quite rarely (e.g., ECJ decision, 04.10.1979, *French Republic v. United Kingdom of Great Britain and Northern Ireland*, C-141/78 and ECJ decision, 16.05.2000, *Kingdom of Belgium v. Kingdom of Spain,* C-388/95), choosing instead to inform the Commission of the infringement, which continues the procedure in conformity to article 258 T.F.E.U.

[9] O. Ţinca, *Drept Comunitar General*, Third Edition, Lumina Lex Publishing, Bucharest, 2005, p. 337; C. Boch, *op. cit.,* p. 2, points out that in practice, in most cases, Commission's decision depends on political considerations.

[10] This is the reason why „judgements declaring Member States in breach of their Community obligations were all too often ignored" – C. Boch, *op. cit.,* p. 4.

[11] According to article 260 T.F.E.U. (ex article 228 EC Treaty).

[12] G. Gornig, I. E. Rusu, *Dreptul Uniunii Europene,* Second Edition, C. H. Beck Publishing, Bucharest, 2007, p. 104, pointed out that it was only in 2000 when the ECJ first decided to impose on a Member State penalty payments (ECJ decision, 04.07.2000, Commission v. Greece, C-387/97) – as a consequence of having been found in breach of EU obligations by judgment of the Court from April 1992, case C-45/91, Greece had been imposed to take measures necessary for the disposal of waste and toxic and dangerous waste from the area the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975; as Greece had not implemented the measures necessary to comply with the judgment in Case C-45/91, penalty payments were ordered by the Court. "Greece has been imposed payment of penalty payments (20.000 Euros per day) ... The Court took into consideration calculations proposed by the Commission, which assured transparency, predictibility, legal certainty and proportionality of the measure".

4. Private enforcement of EU law

In this context, starting from the first and well-known case Van Gend en Loos[13] up to the present, the European Court of Justice "has engaged in a prolonged and radical programme"[14], which resulted in the judicial establishment of methods by means of which „national courts, rather than the Court of Justice, are expected to play the lead role in the enforcement of Community law against the Member States, national authorities and private parties"[15].

The Court thus legitimated a „private" mechanism of EU law enforcement which integrated individuals into UE legal order, by establishing their capacity to invoke EU law, respectivelly challenge domestic non-compliance with EU provisions before national courts[16].

English literature[17] appreciated that three principal means have been conceived and subsequently developped by the Court: direct effect, indirect effect (harmonious interpretation of domestic law in accordance to EU law) and state liability for breach of EU provisions (methods to integrate EU law into domestic law[18]).

In addition to these channels of compliance, juridical literature also made reference to the preliminary ruling procedure[19] regulated by article 267 T.F.E.U.[20] and incidental horizontal effect[21] consacrated by the Court.

Preliminary ruling procedure will not be discussed in the present paper – although it undoubtedly allows individuals to invoke EU law before domestic courts, its efficiency is still weak concerning individuals' implication in the procedure and their protection.

On the one hand, decision to send the case before ECJ belongs exclusively to domestic courts (individuals have absolutely no competence in this respect), and on the other hand the procedure was designed in order to ensure the correct and uniform application of EU law by internal courts, and not for the purpose of individual protection.

Concerning incidental horizontal effect, for reasons to be presented, its efficiency is also diminished, mainly because this judicially established notion has not yet been intirely clarified by the Court.

4. 1. Direct effect

No legal provision consacrated direct effect, and therefore the main role in establishing the theory belonged to the ECJ[22] – the Treaty on the Functioning of the European Union contains a

[13] ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[14] D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law, Text and Materials*, Cambridge University Press, 2006, p. 365.

[15] Idem; B. Moriarty, *op. cit.,* p. 159.

[16] A. Howard, D. J. Rhee, *op. cit.,* p. 307, underline the exclusive judicial effort of ECJ which, in spite of the contrary opinion expressed both by G.A. Roemer and the Member States in Van Gend case, has dismissed the argument that the Treaty addresses only to Member States and thus the only means of enforcement is the one stipulated by ex articles 169 and 170 EEC Treaty, emphasising that the Treaty also creates individual rights, which can be invoked before domestic courts.

[17] P. Craig, G. de Burca, *op. cit.,* p. 269-300; D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.,* p. 365; J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p.89; S. Prechal, *Member State Liability and Direct Effect: What's the Difference After All?*, European Business Law Review, vol. 17, no. 2, 2006, p. 299-316, p. 300.

[18] See I. Moroianu Zlătescu, R. C. Demetrescu, *Drept Instituțional European*, Olimp Publishing, Bucharest, 1999, p. 140.

[19] C. Bosch, *op. cit.*, p. 1.

[20] Ex article 177 EEC Treaty, respectively ex article 234 EC Treaty.

[21] B. Moriarty, *op. cit.,* p. 112.

[22] The theories of direct effect and supremacy of EU law (the latter was consacrated by ECJ decision, 25.06.1964, *Flaminio Costa v. E.N.E.L.*, C-6/64) have been established together (this is the reason why there are cases where the Court discusses both theories in the same judgment); in addition, direct effect and supremacy are inextricably

single disposition regarding direct applicability[23] (and not direct effect) of EU regulations (and not all sources of EU law), respectively article 288 T.F.U.E.[24], according to which regulations are directly applicable in all Member States.

In essence, direct effect theory[25] stipulates that a EU provision (should certain conditions be satisfied) has the capacity of creating individual rights and obligations, which can be relied on before national courts[26].

It can easily be observed that, by establishing direct effect theory, the most important deficiency of the infringement procedure has been eliminated – individuals have been brought into the legal order of European Union and could rely directly on EU law[27].

On the other hand, enforcement of measures of EU law partially shifted to domestic courts[28], which from this point on could sanction Member States at national level for failure to comply by means of direct application of EU provisions[29].

Effectiveness of EU law was therefore achieved even in cases where the „public" means of enforcement had proved ineffective – e.g., Member States ignored an ECJ decision declaring them in breach of EU law, choosing instead to pay the lump sum or penalties imposed.

Nevertheless, direct effect theory has important limitations[30], which result both from the Court's case-law, and also from national legislations.

In this respect, it should be noticed that not every source of EU law has been acknowledged the capacity of producing direct effect (e.g., the situation of non-binding secondary measures of EU law - recommendations and opinions).

Also, there is not always the case that the EU norm concerned fulfils the judicially established direct effect criteria of clearness, precision and unconditionality (this is the situation when direct effect is conditional).

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linked, as the problem of solving a conflict between a domestic and a EU law provision and decide which one should apply to the dispute (supremacy) cannot be settled but after having already established that both cathegories of norms produce effect in the national system concerned (direct effect).

[23] Direct applicability defines a specific characteristic of EU law which means that it needs no transposition measures in order to be applied at national level (therefore, EU law can be directly applied by domestic courts or national administration to particular litigations).

[24] Ex article 249 EC Treaty.

[25] Consacrated by ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[26] The narrower sense of direct effect consists in the capacity of a provision of EU law to confer rights on individuals (this sense is referred to as „subjective direct effect"); there is also a broader sense of the definition of direct effect, which can be expressed as the capacity of a EU law provision (clear, precise and unconditional) to be relied on by individuals before national courts – the provision does not necessarily create individual rights, but individuals are still interested in invoking it, e.g., in order to protect themselves in a dispute with a national authority or obtain disapplication of a national provision contrary to EU law (this sense is known as „objective direct effect").

[27] By contrast to the situation of „international law, where individuals are powerless before the all mighty State, the doctrine of direct effect of EC law opened for individuals effective channels, and thus made EC law a reality states should respect"– P. Pescatore, *L'effet direct du droit communautaire,* Paricrisie Luxembourgeoise, Imprimerie Joseph Beffort, Luxembourg, 1975, p. 19.

[28] Juridical literature pointed out the importance of the role played by domestic courts in enforcement of EU measures - R. Kovar, *L'integrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de Justice de la Communauté,* Das Europa der zweiten Generation, Nomos Verlagsgesellschaft, Baden-Baden, 1981, p. 164; also, see P. Pescatore, *op. cit.*, p. 1 – the author concludes that integration of EU law into domestic systems of Member States by way of direct effect entrusts its application mainly to the national judge and national courts.

[29] Direct effect "does not have the sole purpose of individual protection, but at the same time aims to guarantee effectiveness of EC law in national juridical orders." - D. Simon, *Le système juridique communautaire*, Second Edition, Presses Universitaires de France, Paris, 1998, p. 268.

[30] For a critical point of view over direct effect doctrine and an exhaustive presentation of its deficiencies - I. Sebba, *The Doctrine of „Direct Effect": A Malignant Disease of Community Law,* in *Legal Issues of European Integration*, Law Review of the Europa Instituut, no. 2/1995, Amsterdam University, p. 35-58.

Finally, there are UE measures in case of which only vertical direct effect was accepted (the well-known situation of directives, where the Court constantly denied horizontal direct effect)[31].

In the first case (EU measures which do not have the capacity of producing direct effect), the theory of direct effect is totally ineffective and, in addition, the infringement procedure is also not available, given the fact that recommendations and opinions are non-binding (effectiveness of these EU measures is therefore difficult to be achieved, but for the situation they are willingly accepted by the Member States).

In the second situation (failure to satisfy the conditions imposed in situation of conditional direct effect), although direct effect theory still remains useless, the public way of enforcement provided by article 258 T.F.E.U. becomes available, as the EU sources concerned are binding (nevertheless, in this situation, there is practically a turn over to the initially single form of enforcement stipulated by ex article 169 EEC Treaty).

The third case (no horizontal direct effect for directives) represents one of the most important judicially established limit of the doctrine, which means that non-implemented/inadequately implemented directives cannot be relied on in litigations between private parties (regardless that the directive in question should fully satisfy direct effect criteria).

Some authors[32] remarked also limitations imposed by Member States' legislation – litigations at national level where direct effect of EU measures is relied on must be judged by domestic courts in accordance to their own internal procedural rules, different fron one state to another, and which have obviously not been adopted for the purpose of enforcing EU law (e.g., a case solved by a Romanian court by application of the status of limitation concept[33] renders impossible the analysis of the merits, and therefore the enforcement of rights conferred by EU provisions on individual parties by way of direct effect theory).

4. 2. Horizontal incidental effect

Horizontal incidental direct effect was also established judicially by the ECJ[34], with the purpose of lessening the deficiency of direct effect doctrine consisting in denial of horizontal direct effect in case of directives; in essence, it means that directives can be relied on in litigations between private parties, in order to set apart inconsistent national legislation.

This does not mean that the directive concerned creates rights or obligations for individuals, but simply that it has an „exclusionary" impact of contrary domestic law and the protection it provides for individuals; the „vacuum" thus created is filled in by another conforming national provision, and private parties can therefore be subject of liability deriving from obligations created by the latter provision.

In other words, in such cases, the directive is invoked in litigations between individuals to preclude the application of inconsistent domestic law, and the result is that parties are exposed to a potential liability[35] under another consistent provision of national law - which would not have happened if offending national law would have been applied.

English doctrine[36] concluded that „The crucial factor in these horizontal cases is that one party suffers a legal detriment and the other party gains a legal advantage from the terms of an unimplemented directive".

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[31] In the particular case of directives, acknowledgement of direct effect is in fact a sanction against the Member State to which the directive is addressed – or, the sanction should apply strictly to the Member State who committed a wrong, and not also to other subjects, such as individuals.

[32] C. Boch, *op. cit.,* p. 6.

[33] In Romanian law – "excepția prescripției dreptului la acțiune".

[34] ECJ decision, 30.04.1996, *CIA Security International SA v. Signalson SA and Securitel SPRL*, C-194/94; ECJ decision, 26.09.2000, *Unilever Italia SpA v. Central Food SpA*, C-443/98.

[35] Although the State itself is in breach of EU law, individuals must accept the advantages/disadvantages of exclusion of the national law.

[36] P. Craig, G. de Burca, *op. cit.,* p. 297.

The most important limit of incidental horizontal direct effect theory, remarked by juridical literature[37], is that it is often difficult in practice to clearly distinguish it from horizontal direct effect theory, as the case-law of the Court in the area of incidental horizontal direct effect is rather confuse.

Thus, the no-horizontal-direct-effect-of-directives rule (unimplemented/inadequately implemented directives cannot be relied on in litigations between private parties) is based on the argument that directives cannot impose obligations upon individuals – or, incidental horizontal direct effect has the result that, although the directive itself does not create obligations upon individuals, it allows removal of domestic legal protection and makes the individual subject to potential liability; thus, indirectly, directives produce effects in private litigations.

4. 3. Indirect effect

Most deficiences presented above were stepped aside by creation of indirect effect theory[38] (a second „private" means of enforcement of EU law), according to which domestic courts[39] must interpret national legislation in conformity with EU law.

It must be underlined that indirect effect theory applies to all EU sources[40], even those non-binding, such as recommendations[41]; also, it applies to all measures of national law (including domestic case-law[42]).

In addition, indirect effect theory applies regardless of fulfilment of direct effect criteria[43] by the EU provision concerned – in this respect (independence of theories of direct and indirect effect), it was pointed out[44] that „duty to construe national law in conformity with Community law ... gives an individual the possibility of obtaining satisfaction, not because he can derive rights from directly effective Community law ... , but because he can derive rights from national law once it has been interpreted in conformity with Community law."

In the same line of reasoning, indirect effect operates independently of complete direct effect –directives do not have horizontal direct effect, but national courts are still under the obligation to interpret national law according to directives even in litigations between private parties.

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[37] B. Moriarty, *op. cit.,* p. 155; P. Craig, G. De Burca, *op. cit.,* p. 296.

[38] The Court established the indirect effect theory in Von Colson case – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83, based on provisions of ex article 5 EEC Treaty (ex article 10 EC Treaty and the actual article 4 alin. 3 T.E.U.).

[39] Indirect effect theory is to be considered not only by domestic courts, but also by all national authorities applying EU law, either legislative, administrative or judicial – G. C. R. Iglesias, J.-P. Keppenne, *L'incidence du droit communautaire sur la droit national,* Mélanges en hommage à Michel Waelbroeck, vol. I, Bruylant, Bruxelles, 1999, p. 530.

[40] In case of Treaties – ECJ decision, 05.10.1994, *Van Munster v. Rijksdienst voor Pensioenen*, C-165/91, ECJ decision, 26.09.2000, *Rijksdienst voor Pensioenen v. Robert Engelbrecht*, C-262/97; in case of regulations – ECJ decision, 07.01.2004, *Montres Rolex S.A. and others v. Customs Authorities Kittsee-Austria*, C-60/02; in case of directives – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83; liberalisation of indirect effect theory was consacrated in the Pfeiffer case (ECJ decision, 05.10.2004, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller, Matthias Döbele v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01 to C-403/01), where the Court stipulated that requirement of conforming interpretation is „inherent to the system created by the Treaties" and thus applies to all sources of EU law (including decisions - measures of secondary binding EU law - in case of which it could not have been identified a case explicitly taking in discussion harmonious interpretation).

[41] ECJ decision, 13.12.1989, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, C-322/88.

[42] L. Flynn, *Simple catchwords and complex legal realities: recent developments concerning the juridical effects of EC legal norms,* Irish Law Times, no. 16, 2000, p. 260, exemplifies by ECJ decison, 13.07.2000, *Centrosteel Srl v. Adipol GmbH*, C-456/98, where the Court makes reference to case-law.

[43] Idem, p. 260 - „the direct effect of a legal norm forming part of the Community legal order is not the only way in which such a norm can have juridical effect ... principle of loyal interpretation also gives rise to such effect even in the case of measures which do not have direct effect themselves".

[44] W. van Gerven, *From "direct effect" to "effective judicial protection",* in Schritfenreihe der Europaischen Rechtsakademie Trier, Bundesanzeiger, 1996, Band 12, Academy of European Law, Trier, p. 31.

Nevertheless, establishment of harmonious interpretation theory succeeded only in smoothing the limit consisting in prohibition of horizontal direct effect of directives, but not creating a secure means of repairing of loss suffered by individuals as a consequence of non-implemented/inadequately implemented directives – this is because the juridical effect of such a directive concerning the rights it confers on individuals is left to the power of appreciation of domestic courts, which are sovereign in the interpretation of national law according to the said directive[45].

On the other hand, the Court itself was fully aware of the risks implied by use of indirect effect theory, and therefore specifically established two important limits of its application.

Firstly, the Court has held that „in applying national law, ... , the national court called upon to interpret ... is required to do so, *as far as possible*, in the light of the wording and the purpose of the directive"[46] – indirect effect does not require thus *contra legem* interpretation of national law (the force of the interpretative obligation is not so strong as to impose a provision of domestic law to be given a meaning that clearly contradicts its ordinary meaning)[47].

Secondly, the Court was very cautious in allowing application of indirect effect in the area of criminal law, where legal certainty is especially important for the protection of individual rights and freedoms[48] - provisions of criminal law must be interpreted and applied *stricto sensu*, and indirect effect cannot result in determining or aggravating liability in criminal law[49].

4. 4. State liability

As a consequence of limits presented above, there were still cases when individuals could not use direct/indirect effect theories, and therefore a third „private"[50] way of enforcement of EU law against the Member States was conceived by the Court[51], namely the theory[52] of state liability for breach of EU law.

The starting point was the situation of unimplemented/inadequately implemented directives – in horizontal litigations, rather than attempting to enforce the obligation stipulated by such directives against the opposite party by way of incidental horizontal direct effect or indirect effect[53], the individual can bring proceedings for damages against the state (a much more effective means to impose Member States correct and in due time implementation of directives).

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[45] For evolution of English case-law concerning application of harmonious interpretation theory and cases where it was denied, see J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p. 108 - 110.

[46] ECJ decision, 13.11.1990, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, C-106/89.

[47] ECJ decision, 16.12.1993, *Teodoro Wagner Miret v. Fondo de Garantía Salarial*, C-334/92 (where the Court suggested legal proceedings based on state liability procedure, as indirect effect procedure was inapplicable) – for a comment on this decision, see S. Drake, *Twenty years after Van Colson: the impact of "indirect effect" on the protection of the individual's Community rights,* European Law Review, vol. 30, no. 3, 2005, p. 329-348, p. 342 ("As a result, it is clear that the duty of purposive interpretation imposed on national courts is not absolute and is not designed to give national courts a legislative function so as to allow them to re-write national law"); in the same line of reasoning, see D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.,* p. 365.

[48] ECJ decision, 26.09.1996, *Criminal proceedings against Luciano Arcaro*, C-168/95.

[49] ECJ decision, 08.10.1987, *Criminal proceedings against Kolpinghuis Nijmegen BV*, C-80/86.

[50] P. Craig, G. de Burca, *op. cit*., p. 300.

[51] ECJ decision, 19.11.1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90.

[52] Some authors use the expression "*principle* of state liability" - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 365; T. Ştefan, B. Andreşan Grigoriu, *Drept comunitar*, C. H. Beck, Publishing, Bucharest, 2007, p. 236 or „*doctrine* of state liability " - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit*., p. 391 (interchangeable use of these expressions is also characteristic for direct/indirect effect).

[53] In this case, direct effect theory is inapplicable.

Over the years, application of state liability theory extended beyond the original situation of non-implementation/inadequate implementation of directives[54] (the said theory had been created as a means of enhancing the ability of national courts to enforce directives, still without allowing them full direct effect), and in consequence the state could also be held liable in case of breach of EU law by way of legislative[55], administrative[56] or judicial[57] actions (which did not have to relate to directives at all).

What should firstly be noticed is that state liability theory applies regardless of the direct effect of the concerned EU provision (even in case of a directly effective EU norm, the individual is not imposed to use the direct effect theory prior to bringing proceedings based on state liability theory) - nevertheless, until having been clarified by the Court in *Brasserie du Pecheur*[58] case, this was a subject of debate.

Some domestic courts[59] and a part of juridical literature[60] opinated that state liability as a remedy for breaches of EU law should be made available only in case of infringement of directly effective EU provisions (arguing that non-directly effective norms do not have the capacity of having any juridical effect whatsoever).

There was also an opposite opinion, according to which state liability should apply only for breaches of non-directly effective measures of EU law[61] – individuals can assert their rights by way of direct effect theory if they are directly effective.

The Court dismissed both opinions in the *Brasserie du Pecheur* case, holding that „The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right … cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State."

Secondly, state liability theory is available independently of any prior use of the infringement procedure regulated by articles 258 and 259 T.F.E.U.[62], and this aspect was also clearly stated by the Court in the same *Brasserie du Pecheur* case:

„ … to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions … cannot

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[54] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, Second Edition, Oxford University Press, 2007, p. 73 (the author discusses in detail the means conceived by the Court in order to compensate prohibition of horizontal direct effect of directives).

[55] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93.

[56] ECJ decision, 26.03.1996, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.,* C-392/93.

[57] ECJ decision, 30.09.2003, *Gerhard Köbler v. Austria,* C-224/01.

[58] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93, quoted before.

[59] S. Prechal, *op. cit.*, p. 299, identifies the judgment of Hoge Raad (the Netherlands), 11.06.1993, AB 1994, no. 10, regarding the proceedings which concerned the so-called „Roosendaal-method" of expulsion of aliens. The author points out that, generally, proceedings setteled by domestic courts prior to the *Francovich* decision (the case concerned a non-directly effective directive) implied only application of EU directly effective provisions (for discussion, see A. Barav, *State Liability in Damages for Breach of Community law in the National Courts*, in Heukels and McDonnel (eds), *The Action for Dameges in Community Law*, Kluwer Publishing, Haga, 1997, p. 363).

[60] W. van Gerven, *op. cit.,* p. 40-41.

[61] In this respect, S. Prechal, *op. cit.,* p. 299, makes reference to M. Nettesheim, *Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht*, Die Offentliche Verwaltung, 1992, p. 1002.

[62] B. Moriarty, *op. cit.,* p. 119.

depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement."

In fact, direct effect of the EU provision concerned or prior use of the infringement procedure are not at all mentioned among criteria to be satisfied for incidence of state liability theory (which are: the EU rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious, and there is a direct causal link between the breach of the obligation imposed on the Member State and the damage sustained by individuals).

This final private way of EU law enforcement also has its limit, belonging to the procedural area, namely the principle of national procedural autonomy, according to which cases involving state liability are to be judged by domestic courts by applying national relevant provisions.

Still, this principle is subject to two conditions: 1. procedural circumstances required by national law may not be less favourable in the context of EU law enforcement than they are in case of norms deriving from domestic law[63]; 2. procedural domestic circumstances must not be applied if their effect is practically to make impossible to exercise the EU rights which national courts are required to enforce[64].

5. Conclusions

There are two channels which secure at present effectiveness of EU law in Member States: on the one hand, a „centralised" and „public" form of enforcement assured by the ECJ, the Commission and Member States, based on the procedure stipulated by articles 258 and 259 T.F.E.U., and on the other hand a „decentralised" and „private" form of enforcement in which national courts and individuals play the leading role, through legal proceedings based either on direct/indirect effect theories, or on the theory of state liability for failure to comply with EU law (the coexistence of these „public" and „private" means of enforcement amounts to the notion of „dual vigilance", initially legitimated by the Court and later accepted in doctrine).

All these „public" and „private" forms of enforcement are legally independent one from another, and their use in practice evolved over the years, as the ECJ attached increasingly more importance to integration of individuals in EU legal order and therefore to the significant contribution of the „private" way of enforcement of EU law[65].

The „public" means of enforcement has never been contested, nor by Member States or doctrine (contestation would anyway have been difficult, as legal basis was provided by the Treaty); on the other hand, in spite of the initial opposition of some of the Member States to the judicial creation of the „private" channels, the theories of direct effect, indirect effect and state liability are nowadays fully accepted.

Judicial acknowledgement of horizontal incidental direct effect remains though highly controversial, especially as a consequence of an insufficient delimitation from the concept of horizontal direct effect (and this is an aspect which needs to be cleared by the Court in its case-law to follow).

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[63] Condition of equivalence.
[64] Condition of effectiveness.
[65] ECJ decision, 25.07.2002, *Unión de Pequeños Agricultores v. Council,* C-50/00 P.

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