THE EVOLUTION OF DIRECT EFFECT DOCTRINE IN THE FRAMEWORK OF THE NOTION OF 'RIGHT', THE DIRECT EFFECT DOCTRINE: SWORD OR SHIELD?

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The Evolution of Direct Effect Doctrine in the Framework of the Notion of 'Right', The Direct Effect Doctrine: Sword or Shield?
'Hak' Kavramı Dahlinde Doğrudan Etki Doktrininin Gelişimi, Doğrudan Etki Doktrini: Kılıç mı Kalkan mı?

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Abstract

The aim of this paper is to analyse the doctrine of direct effect, which have been a subject of debate and controversy for more than four decades, still preoccupies European minds. As is well known, the ECJ set out the main principles of doctrine through the *Van Gend en Loos* case. In this significant case, the Court held Community law directly effective and thus creating rights for individuals that are enforceable before national courts. The existence of direct effect, which affects both the member-states and their citizens, resulted in remarkable changes in the evolution of the Community law. Not only the meaning of direct effect doctrine but also to determine whether provisions of a Community directive are capable of producing direct effect, if so to what extent is a question that results in severe discussions among the scholars for a long period of time. In addition to those complexities, different perceptions of the member-states have led to conceptual confusions. The question whether the existence of individual rights has something to do with the conditions of direct effect is one other issue that has been the focus of discussions among different point of views. This debate results in the separation between 'subjective' direct effect and 'objective' direct effect. Such a study will be useful in analysing the distinction between 'subjective' direct effect and 'objective' direct effect; and to understand the logical background of this distinction. In other words, how this distinction reflected in different articles? This study also seeks to investigate whether the existence of individual rights is a precondition for a directive to be capable of direct effect. Another crucial question that has to be evaluated is whether the existence of direct effect doctrine, which is diluted by the different perceptions, is an obstacle to the development of Community law.

Bu çalışmanın amacı kırk yılı aşkın bir süredir Avrupa'da tartışma konusu olan doğrudan etki doktrininin analiz edilmesidir. Doktrinin temel ilkeleri ve ön koşulları *Van Gend en Loos* adlı davada belirlenmiştir. Avrupa Adalet Divanı bu davada verdiği kararla Topluluk Hukukunun doğrudan etkisini kâbul etmiş ve AB vatandaşlarına haklar verdiğini belirlemiştir. Bireyler söz konusu haklara dayanarak ulusal mahkemeler önünde haklarını savunabilirler. Doğrudan etki doktrininin üzerinde fikir birliğine varılmış bir tanımlaması yoktur. 'Hak' kavramının doğrudan etkinin varlığı için bir ön koşul olup olmadığı hâlâ bir tartışma konusudur. Kimileri doğrudan etkinin olabilmesi için AB hükümlerinin bireylere 'hak' vermesinin bir ön koşul olduğunu savunurken, diğerleri bunun gerekli olmadığını *Van Gend en Loos*'ta belirlenen kriterlerin gerçekleşmesinin doğrudan etkinin kâbulu için yeterli olacağını savunmaktadırlar. Bu tartışma sübjektif doğrudan etki ve objektif doğrudan etki ayrımını da beraberinde getirmiştir.

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1. Introduction

Direct effect refers to the principle that enables the citizens of the member-states to enforce the European Community law [hereinafter Community law or EC law] before their national courts. Although direct effect has never been mentioned in the Treaties that establish the Community, it now applies to most pieces of European legislation. The legal background of the term was first established by the European Court of Justice [hereinafter ECJ or the Court] through the judgement in the *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62, [1963] ECR 1). In *Van Gend en Loos* (Case 26/62) the ECJ held one of its most significant decisions which resulted in remarkable developments in the Community law. The Court announced the Community law directly effective, certain provisions of EC law may confer rights or impose obligations on individuals that national courts had to recognise and enforce.

The ECJ established the criteria for a Community provision to produce direct effect in the *Van Gend en Loos* (Case 26/62). For a provision of the Treaty to be directly effective three conditions must be fulfilled. These three conditions are commonly known as *Van Gend en Loos* criteria. The provision concerned must be sufficiently clear and precisely stated; it must be unconditional or non-dependent; and the provision should be self-executing (no further implementing measures are necessary). Only the satisfaction of these three criteria enables the EC citizens to invoke Community law before their national courts.

In *Van Gend en Loos* (Case 26/62) the ECJ held that an individual may rely on EC law against the state if the latter violates the rights of the former. However, the question on the violation of an individual right by another individual remained unanswered. Could individuals be able to protect their rights against another private party before the national courts? *Van Gend en Loos* (Case 26/62), which set out the main principles of direct effect doctrine, resulted in incredible changes in the evolution of the Community law concerning the direct effect doctrine. However, this

judgement of the ECJ was not the only one that broadened the concept of direct effect. The ECJ has eventually strengthened and extended the scope of direct effect doctrine in its subsequent judgements. In *Gabrielle Defrenne v. SABENA* (Case 43/75, [1976] ECR 631), the ECJ defined two different varieties of direct effect. Those were vertical direct effect and horizontal direct effect. The distinction between vertical direct effect and horizontal direct effect was based on to whom the right is to be enforced.

Vertical direct effect refers to the principle where EC citizens invoke the Community law against the state. In this regard, the principle of vertical direct effect indicates the relationship between EC law and domestic law of the member-states that are obliged to comply with the Community law. Since vertical direct effect is related to the relationship between the state and the individuals, it is important to figure out whether a body concerned could be considered an emanation of the state. In *Foster and Others v. British Gas* (Case C-188/89 [1990] ECR I-33/3), the ECJ made a wide definition of state and provided a definition of an emanation of a state.

> "… whatever its legal form, which has been made responsible pursuant to a measure adopted by a **public authority**, **for providing a public service** under the **control of that authority** and has for that purpose **special powers** beyond those which result from the normal rules applicable in relations between individuals."(Templeman & Kaczorowska 2000: 142).

As Templeman and Kaczorowska indicate, "it results from that definition that three criteria should be satisfied in order to consider an organisation as an emanation of the State." (2000: 142). The body that is accepted as an emanation of a state must be entitled for providing a public service. This public service must be provided under the control of the state. Finally, this body must have special powers beyond those which result from the normal rules applicable in relations between individuals, to provide that service (Templeman & Kaczorowska 2000: 142).

Horizontal liability, between private parties, for breach of the Community law, refers to another principle: Horizontal direct effect. If a Community provision is horizontally directly effective, an individual (including private companies) could rely on it against another individual. In *Gabrielle Defrenne v. SABENA* (Case 43/75) the ECJ established that some provisions of the Treaty may produce horizontal direct effect[1]. This case was related to the Article 141 (ex 119) EC that prohibits all the discrimination between men and women workers. This case of the ECJ established that the some provisions of the EC Treaty were not only enforceable against the actions of the state or an emanation of the state, but also they are applicable to the relationships between individuals, therefore capable of producing horizontal direct effect.

However, since a provision of a directive may not impose obligations on an individual, an individual against another individual may not rely on it. Regulations, which are directly applicable in all member-states, and certain provisions of the Community law, on the other hand, are capable of producing horizontal direct effect. For example, in *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others* (Case C-453/99) the ECJ held that "Article 85 (1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effect in relations between individuals and create rights for the individuals concerned which the national courts must safeguard."

Direct effect doctrine of EC law is a very ambiguous legal concept since it covers almost every field of the Community law including the Treaties of Community/Union, secondary legislation, and even international agreements. In other words, it relates to all binding Community law including regulations, decisions and directives. Regulations are most commonly directly applicable since they are incapable of being conditional. Unlike regulations, the situation of the Community directives is not so clear.

[1] They are the case-law of the ECJ that determine the certain provisions that produce both vertical direct effect and horizontal direct effect. Some of these Treaty articles are Article 119 EC that specifies the competition policy, Article 6 EC relating the discrimination based on nationality and certain articles relating the free movement of workers and self-employed.

Directives are binding as to the objectives to be achieved. Moreover, directives are binding only in those member-states to whom they are addressed. Finally, the legislative body of the member-state concerned must implement a directive that is addressed to it. Directives may not produce horizontal direct effect because they are only enforceable against the state or an emanation of a state.

On the other hand, since directives are capable of imposing obligations on member-states, they may produce vertical direct effect if the state concerned fails to implement the measure after the time limit for their implementation has expired. Nevertheless, member-states are free to choose the method and the actual implementation of the directive. In *Grad v. Finanzamt Traunstein* (Case 9/70 [1970] ECR-825) and in *Becker v. Finanzamt Munster-Innenstadt* (Case 8/81 [1982] ECR 53), the ECJ held that a directive might produce direct effect when it imposes an obligation to the member-state concerned to achieve a required result within the prescribed period. However, the state that fails to implement the related provisions of a directive within the prescribed period may not take advantage of its own failure to perform the directive obligations or to comply with the Community law. On the grounds of these judgements, it is true to say that unconditional and sufficiently precise conditions of a Community directive could be relied on by individuals against the state or an emanation of a state[2]. Still, the fulfilment of the *Van Gend en Loos* criteria is the key for any Community directive to produce direct effect.

Moreover, if there is a conflicting measure in domestic law, member-state may not apply its internal law that is not in conformity with the Community law. At the same token, unimplemented measures of a Community directive may not be invoked by a state in a proceeding against an individual. Nevertheless, if the time limit given to the member-state has not expired a directive is incapable of producing direct effect. In *Pubblico*

[2] As stated in the judgement of the *Foster and Others v. British Gas* (Case 188/89), provisions of a directive is applicable against public bodies such as tax authorities, local or regional authorities, constitutionally independent authorities responsible for the maintanence of public order and safety, and public authorities providing public health services.

Ministero v. Ratti (Case 148/78 [1979] ECR 1629) the ECJ held that "[…] if the time-limit for implementation into national law had not been reached at the relevant time, the obligation was not directly effective." (Templeman & Kaczorowska 2000:146).

On the other hand, the ECJ developed a number of mechanisms for giving more effect to EC directives prior to time limit for implementation of a directive. National courts have been obliged to interpret the domestic law in conformity with the EC directive. This is called "the indirect effect" of Community law. Even though the domestic governments are free to draft their own implementation method, this method or the domestic implementing law has to comply with the aims of a directive.

In *Von Colson and Kamann v. Land Nordrhein-Westfalen* (Case 14/83 [1984] and *Harz v. Deutsche Tradax GmbH* (Case 79/83 [1984] ECR 1921) the ECJ held that "[…] national law must be interpreted in such a way as to achieve the result required by the Directive regardless of whether the defendant was the State or a private party." (Templeman & Kaczorowska 2000:152). The judgement in these two cases offered a new solution for the non-existence of the horizontal direct effect of the directives. Since directives are incapable of producing horizontal liability, they cannot be relied on by an individual against another individual. By producing indirect effect, the ECJ provided a new system: National judges are obliged to interpret the national law in the light of a Community directive concerned. A logical comparison to this principle is that although time limit for a directive is not expired, the national courts may interpret the national laws in the spirit of the wording of a Community directive.

Direct effect doctrine is not only a complex phrase, but also it is imprecise; the meaning of the doctrine remains vague. As Craig and de Búrca (2003) indicate, "academic and even judicial uncertainty remains about the exact meaning and scope of the term" (179). However, the concept can be evaluated and defined within two dependent meanings: namely, narrower (traditional) and the broader (modern) definitions.

First, since it is connected to the individuals, in order to be relied on by individuals before national courts, a provision must 'confer rights on individuals'. This, conferring rights on individuals test, is the '**narrower definition**' of the direct effect doctrine. The traditional meaning of the direct effect doctrine is first set through the mediation of *Van Gend en Loos* judgement.

Second, it is necessary to explain the meaning of the doctrine by focusing on the '**broader meaning**' of it. In its simplest sense, when the provisions of Community law are sufficiently precise and unconditional, a private individual may rely on them before the national courts of the member-states.

This study will aim to show that the provisions of Community law are sometimes capable of having direct effect and other times incapable of producing it. Some scholars strongly link the direct effect with the existence of individual rights and others indicate that former could only be the consequence of the latter. This study analyses the evolution of the direct effect doctrine in the light of individual concern in order to investigate whether the existence of individual rights is a precondition for Community directives to produce direct effect. Although most of the scholars in common law countries have argued that the existence of individual right is a precondition for a directive to be directly effective, relatively new case law of the ECJ demonstrate that the individual concern is not a precondition but a consequence.

Secondly, it is in that perspective that this paper wishes to examine the renewed discussions on direct effect doctrine in the framework of studies given by Prechal (1996, 1998, 2000, 2006), Van Gerven (2000), de Witte (1999) and Coppel (1994). Although the existence of direct effect doctrine induces the application of Community law in the member-states, closer examination shows that national judges are able to escape the application of Community law through the mediation of direct effect doctrine by disapplying it. However, in a community where rule of law is enhanced, there is no need for such vague concept. The direct effect doctrine

seems to be an obstacle to the development of Community law as a ‘law of the land’ of the member-states. Later, the paper will focus mostly on the obsolete character of the direct effect doctrine in a new era where interdependencies among member-states increase dramatically and where rule of law reigns.

2. Evolution of the Direct Effect of Community Law

2.1. General Conditions for Community Law to Produce Direct Effect

Legal integration, effectiveness and uniform application of the Community law throughout the member-states are among the aims of the ECJ. However, the provisions of the EC Treaty may not be designed for immediate application of the member-states. It is almost impossible for the national courts to apply all EC provisions uniformly. Application of a Community provision may lead to different results in different member-states. In order to realize the uniform application of the EC law and because of these concerns above, the general conditions for Community law to produce direct effect were set. The specific conditions on direct effect have first provided by the ECJ through the mediation of its early decision on the *Van Gend en Loos* (Case 26/62).

The central point of the case was whether private parties could rely on Community law against national authorities before national courts. To put it another way; whether Article 25 (ex 12) EC, which prevents member-states introducing new customs duties on imports or exports or any charges having equivalent effect, and increasing existing duties in trade, produced direct effect.

Many voices would claim Article 25 (ex12) EC was aimed at member-states and could not be relied upon by private parties before a national court since so called provision did not grant any rights to them but only imposed an obligation to member-states. In other words, Article 25 (ex 12) EC was not conferring rights on individuals to import goods from other member-states free from customs duties. Therefore, Article 25 (ex 12) could not be considered as having direct effect. The ECJ, on the other hand, did not recognize the applicability of this definition and set out specific standards for direct effect. Direct effect of a provision could not be denied just because it is merely addressed to member-states. Specifically, a provision of EC provides direct effect if it meets several conditions.

However, before focusing on those conditions set out by the ECJ, it is necessary to understand the path followed by the Court during the course of the *Van Gend en Loos* case. Hartley's 1998 study explains the Court's first reaction to this case as below:

> The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a **negative obligation**. This obligation, moreover, is not qualified by any reservation on the part of states that would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects (191).

The *Van Gend en Loos* criteria are the modified version of this statement above. As Hartley (1998) indicates negative obligations (prohibitions), which the Court recognised as the only directly effective part of the article, have been amended. In order to have a direct effect, the provision of the Community law must be sufficiently precise and unconditional.

2.1.1. Sufficiently Precise and Clear

The content of the Community provisions, which member-states are obliged to adhere to, has to be clear and precise before they can produce direct effect. If a provision of a Community is clear and precise enough it can be relied on by individuals before national courts. Moreover, precision of a provision made it operational to be applied by a national court. Fundamentally, these are the intended purposes of almost all legal provisions. Yet it is not an easy task to perform; it is more complicated within the Community where a number of conflicting interests collide among different member-states.

In its judgement on 23 February 1994 in *Comitato di Coordinamento per la Difesa dela Cavaand others v Regione Lombardia and others* (Case

C-236/92 [1994] ECR 1) the Court defines what it meant by sufficiently precise by saying: "…a Community provision…is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in **'unequivocal terms.'** The *Lombardia* case was on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste. According to Article 4 of the Directive 75/442, member-states shall take all necessary measures to prevent the disposal of waste endangering human health and to harm environment. Directive 75/442 determines neither the specific measure, nor does it set out a method of waste disposal. Therefore, it is not sufficiently precise to produce a direct effect, so cannot be relied upon by individuals against a member-state before a national court.

Pescatore's (1983 qtd. in Weatherill & Beaumont, 1999) view is that "the requirement to be sufficiently precise is fulfilled if the provision of Community law furnishes 'workable indications' to the national court" (395). In *Defrenne v. SABENA* (Case 43/75) the ECJ determined which part of Article 141 (ex 119) EC produce direct effect by making a distinction between "first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character". (Templeman & Kaczorowska 2000: 137). The ECJ held that the first one was directly effective since it is sufficiently precise to be identified by the national courts. In other words, the wording of the directive concerned was providing workable indications to the national courts. The second one, on the other hand was failed to be directly effective because it was not sufficiently precise.

Direct and overt discrimination is sufficiently precise because it occurs when the man and the woman paid unevenly for the same job. Indirect and disguised discrimination, on the other hand, is less straightforward to determine. It can occur when a man earns more than a woman for a work of equal concerning jobs which are different in nature.

However, Hartley (1998) signifies that the ECJ is there when a Community condition is needed to be clarified. That is to say, Community provision could be directly effective even if the wording of it is unclear and not precise; the Court is obliged to interpret the provisions whose interpretation cause difficulties. As in many legal documents, the wording of the Community provisions are quite complex. However, the complexity of a provision is not necessarily an obstacle to the provision to have direct effect.

Hartley (1998) indicates, "Since the ECJ's interpretation will resolve the ambiguity question, generality and lack of precision would always be the genuine questions to be discussed" (192). Community provision could be vague; it could have a general intention and give no clues on reaching the desired purpose within the provision itself after all. Craig and de Búrca (1999) propose that "if a provision is vague, e.g. it sets out only a very general aim which needs further implementing measures to be made concrete and clear, then it is difficult to accord direct effect to that provision and allow its direct application by a national court" (168). The Union's economic policy is a vague purpose, therefore not sufficiently precise to produce direct effect. Hartley's 1998 study shows that Article 10 (ex 5) of the Treaty as a relevant example of such a provision as follows:

> Member-states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty (192).

Article 10 (ex 5) EC itself is only the expression of the more general rule imposing on member-states and the Community institutions mutual duties of genuine cooperation and assistance. Therefore, it is not directly effective by itself, on the other hand, it could still produce direct effect when combined

with another Community provision[3]. Alternatively, if a provision accurately imposes obligations on the nationals of a member-state, the provision is precise. Conversely, if a provision gives rights to individuals against the national authorities, the precision of the provision would be limited.

2.1.2. Unconditional

In *Lombardia* (Case C-236/92) the criteria for unconditional provision is defined by the ECJ;

> "[…] a Community provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States […]"

A logical corollary to this quotation is that, a Community provision is said to be conditional when it is under the discretion of an independent body, such as a Community institution or an administrative authority of a member-state. If this is the case, it cannot produce a reliable direct effect.

As indicated by Hartley (1998: 193-195) and Weatherill and Beumont (1999: 393-394); through the mediation of Community provisions on state aid, unconditionality principle can be defined accurately, since state aid involves institutional interference. Indeed, as said in *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic* (Case 354/90, [1991] ECR 1-5505), the Commission is entitled to determine the compatibility of state aid to the common market under Article 87 (ex 92) EC. It is also subjected to the supervision of the ECJ. This article is dependent on the judgement and is subjected to the discretion of

[3] Hartley also says that Article 10 (ex. 5) EC combining with another Community provision may produce a direct effect, if the wording of the latter is precise enough. However, in some cases Article 10 (ex.5) may fail to produce direct effect even if it combines with another article. In *Hurd v. Jones* (Case 44/84, [1986] ECR 29) the Court held that Article 3 of the Act concerning the conditions of accession of UK, Denmark and Ireland to the EEC produces no direct effect since it is not clear and unconditional and not contingent on any discretionary implementing measure.

Community institutions; Therefore, Article 87 (ex 92) is not directly effective.

State aid distorts trade among member-states because it favours selected enterprises or their certain products against the others competing within the same market. Indeed, state aid is declared incompatible with the common market under Article 87(1) {ex 92(1)} EC where it affects trade between member-states. However, there are some exceptions set out by the provisions of the same article. Under these circumstances, one might think that Article 87 (ex 92) EC is clear enough to produce direct effect. Yet Hartley (1998) indicates that it is not directly effective since European Commission is obliged to determine whether the state aid affects the trade between member-states under Article 88(2) {ex 93(2)} EC. The Commission may ask the member-state to terminate the state aid within a given time period if it decides the so-called aid is infringing the provisions of Article 87 (ex 92). The Council is also allowed to approve any aid compatible with the common market; and if the Council were asked whether the proposed aid was compatible to the common market, a proceeding given by the Commission would have been suspended. In the light of these above conditions, it is fair to say that Article 87 (ex 92) does not provide direct effect since it is conditional – restricted to the decisions taken by the European institutions.

Weatherill and Beaumont (1999) on the other hand, put the emphasis on the last sentence of Article 88(3) {ex 93(3)} EC through which national courts are given a limited role to play. It is worded as follows:

> The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

In fact, it is really not only the duty of the Community institutions to decide whether state aid is compatible with the common market. In addition, it is the duty for, having regard to the direct effect that the last sentence of Article 88(3) {ex 93(3)} EC has been held to have, the national courts (Case 354/90, [1991] ECR 1-5505). Yet as explained previously the role of the Commission is fundamentally different from the national courts. The Commission itself is responsible for examining the compatibility of the state aid with the common market; whereas, national courts are there just to preserve the individuals' rights who may be faced with an infringement resulting the act of state authorities; after all, this limited role given to the national courts does create direct effect. Above all else, one must be aware of the fact that a provision might be directly effective even though the directive itself failed to create direct effect.

Nevertheless, a provision of a Community law may produce direct effect even if it seems that it is under the discretion of an independent authority. In order to be directly effective the given discretion on the proposed provision (which is conditional since it is subjected to the control of an independent body) has to be dependent upon to the judicial control of a court. Hartley (1998) and Weatherill and Beaumont (1999) illustrate this statement through early *Van Duyn v Home Office*[4] (Case 41/74, [1974] ECR 1337). In this case, the ECJ ruled that Article 39 (ex 48) was capable of having direct effect. The ECJ appeared to determine that the Community law may be relied upon by individuals to challenge the discrimination on

[4] The ECJ decided that the Article 39 (ex 48) of the Treaty is directly effective within this case. The case begins with the denial of a Dutch woman, who is the member of a marginal religious group called the Church of Scientology, to enter the UK. The group itself was neither banned nor was its members put in jail. Instead, national authorities in the UK defined it harmful to the mental health and showed their disapproval to this religious community. As a consequence of this strong disapproval, the UK government takes all 'necessary' measures against the members. One of the outcomes was refusing to allow a Dutch woman to enter the country, who previously had taken up a post within this marginal group. This decision was challenged before the English courts by the Dutch woman. The direct effect of Article 39 (ex 48), which is concerned the free movement, was one of issues appeared before the national court. The question was whether Article 39 (ex 48) produces direct effect. The ECJ decided that the proposed article is directly effective even though it seems to be conditional on the grounds that the application of the limitations is subject to judicial control. To put it another way, the government's decision to put limitations on free movement on the grounds of public policy, public health or public security was subjected to the judicial control that's why the ECJ did not refuse the direct effect of Article 39 (ex 48).

nationality on right of free movement that is granted by Article 39 (ex 48). This article not only secures the free movement of workers within the member-states but also eliminates the nationality discrimination against workers. Even though workers are given the right to move freely between member-states through Article 39 (ex 48), this right has been subjected to the limitations including public policy, public security or public health. It is under the authority of member-states to determine whether an action taken by a private citizen or an institution is against its public security, public health or public policy. In addition to this, national authorities are entitled to define the parameters of public policy, public security and public health.

At first sight, the regulation of free movement of workers in Article 39 (ex 48) seems to be conditional. However, Hartley (1998) and Weatherill and Beaumont (1999) state that Article 39 (ex 48), despite the limitations on the grounds of public policy, public security or public health, is considered to be directly effective. To put the argument differently, there is a strong discretionary element within the proposed article; therefore, one might easily believe that it lacks direct effect. However like the ECJ did, all three writers justified their arguments on the ground that the application of limitations is subjected to judicial control; so Article 39 (ex 48) may be directly invoked by individuals in order to confront the nationality discrimination before a national court. It is also worth noting that the free movement is a right provided by the Community law; therefore, generally a Community provision concerned with this principle is deemed to be directly effective.

2.1.3. Not Contingent on Any Discretionary Implementing Measure

There are a number of Community provisions, which grant rights to individuals. The crucial point is that not all of those provisions are directly effective since they are contingent on a discretionary implementing measure to grant rights to individuals. In other words, their implementations are dependent on further action taken by either a national authority or

European institutions. If this is the case, one can assume that the provision of the Community concerned would not be directly effective unless the national authorities or Community institutions took a further action.

However, it should also be noted that Community provisions have a time limit for their implementation. Therefore, a Community provision could easily be directly effective if the member-state concerned fails to implement it in the given time limit.

Once more Article 141 (ex 119) EC can be given as an example. According to this article, member-states are obliged to ensure an equal payment for men and women. In order to provide equal payment requirement member-states had to take all necessary measures. This had to be done in a time limit determined by the Community institutions. In *Defrenne v. SABENA* (Case 43/75) the ECJ held that even though Article 141 EC required further action from the member-state's end, it was directly effective since the time limit had expired.

Actually, this last condition is useless recently because almost each directive has a deadline, i.e. Community provisions need a further action taken by the member-states. The only effect of this time limit as Hartley says in his 1998 study is that "direct effect is postponed until the deadline has passed." (195).

2.2. Evolution of Direct Effect Doctrine:

2.2.1. Traditional and Modern Definitions

Doctrine of direct effect neither has a specific meaning nor an original definition that is commonly accepted by scholars and legal practitioners. However, as many other legal terms, it has also developed a widely accepted connotation, and then gained a broader meaning through the various comments of the ECJ on different case law. The crucial point is that the debate over the clarity of the direct effect doctrine still continues; for example, some academics insist (Ruffert 1997; Van Gerven 2000; Craig & de Búrca 2003) on the groundlessness of the necessity of 'conferral of

rights on individuals' precondition. Unlike Hartley (1998), they say the conferral of rights on individuals is not a necessity for a directive to be directly effective. On the other hand, 'conferral of rights' clause maybe an expected outcome of direct effect, but it should not be evaluated as if it is a *sine qua non*. Instead of searching for a 'conferral of rights,' they offer to look at whether the directive fulfils the following requirements: whether it is sufficiently precise and clear, and unconditional.

Undoubtedly, the modern definition[5] of the term direct effect is reborn through the Court's judgement on *Van Gend en Loos* (Case 26/62). The Court accepts classical or modern definitions of the direct effect alternately in its various decisions. In *Van Gend en Loos* (Case 26/62), the Court ruled that the Article 25 (ex 12) EC should be interpreted as producing direct effect and creating individual rights. However, creating individual rights was not set as a precondition for producing direct effect.

Modern definition of the direct effect doctrine can also be evaluated as the expression of the applicability of the Community law before a national court. This is sometimes referred to as 'objective' direct effect (Craig & de Búrca 2003: 180). According to Van Gerven's 2000 study, " 'objective' direct effect refers to cases where a directive does not grant a 'subjective' right to individuals but only imposes a specific obligation on member states" (506). While Van Gerven (2000), explains it as a confirmation of link between 'obligations' of member-states and an individual rights requirement, others (Ruffert 1997) find that "the only test for direct effect is whether the provision is sufficiently precise and unconditional" (1056).

It is obvious that the modern definition of the direct effect doctrine does not necessarily require a conferral of legal rights to an individual who invokes the provision of a directive before a national court of law. The

[5] This time I call this definition of the direct effect doctrine as 'modern'; Van Gerven and many others sometimes call it objective; Craig and de Búrca on the other hand prefer to call it broader definition of the direct effect doctrine.

'traditional'[6] definition, on the other hand, requires the conferral of rights on individuals, which is occasionally called 'subjective' direct effect.

As former advocate-general [hereinafter A.G.], Van Gerven (2000) indicates, "the distinction between subjective and objective direct effect stems from German Law" (506). In the German point of view, the provision of a directive produces a direct effect when it is sufficiently precise, and unconditional; and besides, it has to confer rights on individuals that are enforceable before a national court. The ECJ, on the other hand, does not adopt all of the preconditions set out by the German law that requires both subjective and objective definitions for directive provisions to be directly effective. According to the ECJ, it is possible for a directive to be directly effective when it is just sufficiently precise and unconditional, because according to the Court when provisions of a directive are sufficiently precise and unconditional it naturally grants rights to individuals.

2.2.2. 'Subjective' Direct Effect: Individual Rights as a Condition for Direct Effect (?)

Individual rights are one of the core subjects of the Community law. As Ruffert indicates in his 1997 study, "without exaggeration, it can be said that rights are a fundamental topic in the ongoing development of Community law" (307). Therefore, when it comes to evaluating the direct effect of directives, individual rights should also be touched upon. When Community produces a new directive, a transposition process or internalization of Community directive concerned takes place within the member-states. A member-state may transpose a Community directive to its domestic law either by specific legislation or through the application of a general legal expression, which are clear enough and unconditional for the individuals to comprehend. To put the matter differently, member-states must transpose the Community directives in such a manner that individuals may be fully aware of their rights and rely on those directives before their

[6] I refer this definition of direct effect as 'traditional'.

national courts when their rights are violated. The transposition or internalization process will be returned below.

As it is stated above, the distinction between subjective and objective direct effect stems from German law which asserts that the existence of an individual right is a precondition for a directive to be directly effective. On the other hand, according to the Court, if the provisions of directives are sufficiently precise and unconditional, they produce direct effect. Some academics, particularly the German ones, insist on the existence of conferral of rights test and they say direct effect is related with the individual interest (Ruffert 1997). This view was first developed through the refusal of the direct effect of environmental directives of the Community by the German authorities. In this regard in *Becker v Finanzamt Munster-Innenstadt* (Case 8/81, [1982] ECR 53) the ECJ held that

> […] wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive **or in so far as the provisions define rights** which individuals are able to assert against the State.

After reading the above statement of the Court, one may think that direct effect is directly associated with the existence of individual rights. However, thanks to Ruffert (1997), who assesses the above statement of the Court in much more straightforward language than any other academic does, it is clear that the detection of an individual right derived from the content of a directive provision was at least an alternative way to establish its direct effect. The ECJ came to the same conclusion a number of times as follows in its various decisions:

> […] whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be **unconditional** and **sufficiently precise**, they may be relied upon before the national

> courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly[7].

However, the issue that will be considered here is not the exact analogy of the wording of that the Court used in several decisions after the *Becker* (Case 8/81) judgement. Careful readers may easily recognise the Court avoided using the second part of the *Becker* judgement in the above statement. Instead of asserting the existence of individual rights as a precondition, the ECJ prefers to examine the Community directive by just examining the directive's nature whether it is sufficiently precise and unconditional. Like in the *Becker* (Case 8/81) case, in *Francovich and Others* (Case 6/90, Case 9/90 [1991] ECR I-5357) and *Marks & Spencer* (Case 62/00 [2002] ECR I6325) decisions, the ECJ made a test that is defined in the first sentence of the *Becker* judgement.

The other judgement of the Court, which is worth analysing here since it is related with the direct effect doctrine is the *Marshall v. Southampton and South West Hampshire Area Health Authority – Marshall II*, (Case C-271/91 [1993] ECR 1-4367)[8]. In *Marshall II*, the ECJ did not quote the individual right clause, on the contrary, the Court quoted *Francovich* judgement by applying only the test of sufficient precision and unconditionality.

Similarly, in *Comitato di Coordinamento per la Difesa dela Cavaand others v Regione Lombardia and others*[9] (Case C-236/92 [1994]

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[7]See, *inter alia*, Joined Cases C6/90 and C9/90 Francovich and Others [1991] ECR I5357, paragraph 11, and Case C62/00 Marks & Spencer [2002] ECR I6325, paragraph 25.

[8] Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority – Marshall II*, [1993] ECR 1-4367. Miss Marshall was an employee of AHA, who was dismissed at age 62 on the ground that she exceeds the retirement age for women. The retirement age for women was set 60 and 65 for men. Miss Marshall wished to remain in her duty and argued that the act is against the Council Directive 76/207 on Equal Treatment. The national court asked two questions to the ECJ: whether the dismissal of Miss Marshall was unlawful and whether she could rely uon the Community Directive 76/207 against another private party.

[9] Comitato, which was an environmental interest group, brought an action against the establishment of a tip for waste on the grounds that Article 4 of the Waste Framework Directive grants individuals rights which must be protected. I will return to this case-law of

ECR 1-483) the ECJ held that the Article 4 of the Waste Framework Directive[10] was not sufficiently precise and unconditional therefore it was not directly effective. Besides, it did not create rights for individuals because the wording of Article 4 was not sufficiently precise and unconditional. As Ruffert (1997) indicates, "the Court does not consider individual rights as a condition of direct effect, but as its consequence" (315). It is obvious from the decision taken by the ECJ that the existence of direct effect doctrine depends on the precise and unconditional wording of the related provision; but not the existence of individual rights. To conclude it can be asserted that, neither case implies a change in the test for direct effect in the sense that protected interests were introduced as a condition.

2.2.2.1. The Doctrinal Function of Direct Effect

The purpose of the ECJ is not only evaluated by analysing the decisions taken during the case law. The doctrinal aim of the ECJ is providing member-states' compliance to the Community law through the correct implementation of the directives at state-level. As Ruffert (1997) indicates, by granting the control power to implement the Community law before the national courts, the ECJ provides the decentralization of the control mechanism, which is normally a duty to be implemented by the Commission. As a result, the Commission is relieved from its watchdog role. In German law, for example, there is a difference between the protection of individual rights and protection of the common interest. The Court, by giving direct effect to the directives provides a system that leads to the protection of the common interest of the European citizens. The Court probably believes that the effective implementation of the directives will

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the Court in the following chapter that examines the meaning of "suffciently precise" condition.

[10] Article 4 of the Waste Framework Directive reads as follows: Member-states shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without harming the environment, an in particular: a) without risk to water, air, soil and plants and animals, b) without causing a nuisance through noise or odour, c) without adversely affecting the countryside or places of special interest.

result in the inclusion of the European citizens in the implementation process and this process eventually leads to the protection of the common interest.

2.2.2.2 Transposition and Implementation of Community Directives

The internalization process may frequently become the subject of an appeal before the ECJ and national courts. This is the result of incorrect transposition of the directives to the domestic law. The ECJ held that such cases would have been avoided if the member-state concerned had correctly implemented the related directive into the national law[11]. It may be necessary to analyse the constitution of a Community directive in the light of its prospect to produce a direct effect. The objective of some directives might solely be 'the creation of individual rights'; others may not intend to produce individual rights.

A Community directive is formulated within the Community level (first step) and then it is transposed into the national law (second step) in the framework of national laws of the transposition. The ECJ held that the national rules of transposition have to be so clear and unconditional that a private party, where appropriate, may rely on them before a national court. The creation of individual rights may occur at domestic-level, but not during the formulation of the directive in the Community-level. In conclusion, two different types of individual rights may come into existence. First, individual rights that occur in the Community level during the composition of a directive. Second, individual rights that may stem from the transposition process in domestic level. The first one is dependent on the precision and unconditionality test. For the second one there is a need to create individual rights at the state-level.

The problematic issue here is that the Court does not determine which directives were meant to produce individual rights. Only some

[11] Such a constraint is made in Marshall case (Marshall v Southampton and South West Hampshire Area Health Authority Case 152/84 [1986], ECR 723, Commision v Germany 1991] ECR I-825, Commision v Germany C-298/95 [1996] etc.

directives are meant to create individual rights including the ones on the environment and the ones that are related to public procurements. Which directives provide individual rights and when? Ruffert (1997) responds that the answer to those questions must be given at Community law level. However, it is also necessary to take member-states' domestic laws into consideration in order to prevent any failure during the transposition process. EC is composed of a number of countries whose constitutional laws are different from each other. In order to provide effective transposition and implementation it is necessary to consider those differences and provide a solution that complies all the member-states' domestic laws.

When the focal point of a directive is the individual, it may be necessary to produce individual rights. In other words, the creation of individual rights would be the outcome of the concerned directive. Community law has a protective character concerning the individuals. Therefore, transposition process of a directive must also consider the protection of individual interests in order to comply with the spirit of the Treaty. Secondly, the implementation of a directive may affect individuals (in other words, an applicant may be factually affected by any administrative decision); when this is the case; the directive concerned must also include individual rights at the domestic-level. In short, Community law mostly confers individual rights in order to enhance Community directive's effective implementation. .

Individual rights may occur because of direct effect and they may be created as a consequence of transposition process. If the aim of a Community directive is solely the protection of individual rights and if such interests are factually concerned it can shortly be asserted that concerned directive must create individual rights. Creation of individual rights during the transposition process has to be considered separately. To conclude, it could be said that the concepts that are produced by the Community would be more effective if they, theoretically, fit in the legal systems of the member-states because the better these concepts fit the better they will be implemented in practice.

3. The Direct Effect of Community Law: Sword or Shield?

3.1. Introduction: Position of Direct Effect in the Community

The doctrine of direct effect has always been the central point of discussions between the Community legal order and the national law of the member-states. Direct effect doctrine not only results in scores of discussions among national courts and the ECJ but it influences the development of the constitutional laws of the member-states. Direct effect doctrine makes the Community law distinctive from other international organisations; it "makes the Community legal order unique" (Prechal 2000: 1047). As some academics say "by placing Community law directly before the national courts, it has *de facto* and has decisively contributed to the acceptance of Community law as law which must be applied by national courts" (Prechal 2000: 1047). To put the matter differently, individuals may invoke or rely on Community provisions before national courts, at least in theory. This is the outcome of the direct effect mechanism. If a directive is directly effective, national courts have to treat it, as the law of the land, i.e. a provision made by an outsider will be treated as a law promulgated in the land of origin.

Direct effect doctrine has functioned as a "sword" (Prechal 2000) in the Community legal system because through it, national courts have to apply the Community law to the cases brought before them. Provisions of a Community directive would be equated with the national ones. To put it another way, national judges are obliged to treat the Community provisions as if they are the part of national laws. It is with this perspective that the constitutional background of direct effect doctrine should be examined. "The constitutional background of direct effect is formed by Articles 65 and 66 of the Dutch Constitution" (de Witte 1999: 180). Article 65 of the Dutch Constitution held that [p]rovisions of agreements which, according to their terms, can be binding on anyone shall have such binding force after having been published" and Article 66 added: "[L]egislation in force within the

Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into either before or after the enactment of such legislation."

On the other hand, some academics (Prechal 2000) claim that by limiting the powers of national judges to review national law in the light of international law provisions, the direct effect doctrine has functioned as a 'shield' (p.1047). In this regard, the Dutch authorities' constitutional amendment above limits the application of international agreements by the national judges. Through this constitutional amendment, national judges could not apply any international agreement that is not directly effective—or, as de Witte puts it in his 1999 study of a 'self executing character', as traditionally expressed in international law(179). Instead of testing the compatibility of all national law to the international agreements, judges are encouraged to make a self-execution test. Indeed, under Dutch Constitutional law, as mentioned above, self-executing or directly effective provisions of any international treaty will prevail over conflicting national law.

To put the matter differently, state authorities may be able to turn the sword into a shield. The issue to be considered in the following section is whether decision-makers in several member-states are able to turn the doctrine of direct effect—which has made the Community legal order unique since the founding years—into a concept functioning as a shield by limiting the powers of national judges to review national law in the light of international law provisions.

3.2. The Jurisprudential Nature of Direct Effect Doctrine

3.2.1. Administrative Direct Effect

ECJ aimed to control judicial behaviours of the member-states by developing the direct effect doctrine four decades ago. One must understand that direct effect doctrine relates to the 'activities' of national courts of the member-states. In other words, national courts of the member-

states are the addressees of the direct effect doctrine. As de Witte (1999) clearly defines "direct effect can be provisionally defined as the capacity of a norm of Community law to be applied in domestic court proceedings" (179). Prechal's 1996 study on direct effect arrives with a similar definition. She defines direct effect as follows: "direct effect is the obligation of a court or another authority to apply the relevant provisions of Community law, either as a norm which governs the case or as a standard for legal review" (qtd. in Prechal 2000: 1048). According to de Witte (1999) those kind of traditional definitions say nothing specific either on Community law or on the norms of national laws of the member-states. Therefore, as Prechal (2000) says the concept of direct effect should be reconsidered.

The ECJ provides a mechanism that controls the compliance of member-states with the Community law through the mediation of national courts. In other words, as Ruffert (1997) puts it, the system of checks and balances is decentralised with this effort and besides, effective participation of national courts is reinforced. National courts are obliged to apply the directly effective Community provisions, i.e. an obligation is entrusted to the member-states by the ECJ. The issue to be discussed briefly herein is whether this obligation was a result of a 'dialogue' between the ECJ and the national courts.

Actually, this duty to apply is not a result of dialogue between parties concerned. Even though creation of rights is not set as a condition during the *Van Gend en Loos* case, the concept of direct effect is often equated with the creation of rights for individuals that national courts must protect. This issue has already been introduced in the above through analysis of German national law. Therefore, it will not be handled here in detail. However, it should be noted that the provisions of Community directives generally grant individuals a privilege to interrogate the actions of member-states when they get suspicious of a legality of a member-state action. To put the matter differently, individuals may rely on the provisions of a Community directive against a member-state before a national court because directives set out procedural obligations for the member-states.

In this regard, it would be appropriate to examine the case law of the ECJ. In *CIA Security International v. Signalson SA and Securitel SPRL* (Case C-194/94, [1996] ECR I-2201), which is a case law related with the prior notification of technical standards to the Commission, the Court has taken this kind of decision. The issue to be considered herein is not the details of case law itself, but to determine whether the notification provisions of Directive 83/189 are directly effective and whether breach of the obligation to notify the Commission constitutes legal consequences for the member-states. The Court, prior to its judgement, referred to its settled case law on direct effect citing *Becker* and *Franchovich*. In other words, the Court made its famous test of sufficient precision and unconditionality. The ECJ held that the concerned provisions of Directive 83/189 are sufficiently precise and unconditional and besides set out procedural obligations for member-states that must be complied with. In the light of these grounds above, the Court decided that the concerned provisions of Directive 83/189 are directly effective. The German, Dutch and UK governments claimed that the Directive 83/189 was solely concerned with relations between the member-states and the Commission, and added that so-called directive creates obligations for the former without affecting their power to adopt technical regulations. According to the Court, this could not be a reason for non-compliance with the directive. To put the matter differently, even though technical regulations are inapplicable to individuals, Directive 83/189 provides an obligation to the member-states to notify. Therefore, the non-existence of individual rights cannot be a reason of failure to comply the notification obligation.

There is another characteristic of direct effect that is not discussed above i.e. it is an obligation for a court or any other administrative authority. In order to show the scope of this form of direct effect, de Witte (1999) looks at the judgement of the Court in *Costanzo* (Case 103/88 [1989] ECR 1839) where the ECJ held that:

> When the conditions under which the Court has held that individuals may rely on the provisions of a directive before the

> national courts are met, all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions (188).

This form of direct effect is called 'administrative direct effect' and as Prechal (2000) says, since there is no other more recent case law on this issue which addresses these implications, we have to take this form of direct effect seriously (1049).

3.2.2. Invocation of Community Directives by National Courts

As mentioned previously the legal position of individuals within the directly effective Community directives is an evergreen issue to be discussed. However, the other crucial point that deserves attention is whether directly effective provisions of Community law come into existence just when individuals rely on them. Actually, the idea that directly effective provisions of a directive are operational when individuals invoke them is not held by the ECJ. In *Van Schijndel v. Stichting Pensioenfonds voor Fysiootherapeuten* (C-430/93 [1995] ECR I-4705) and *Peterbroeck v. Belgian State* (C-312/93 [1995] ECR I-4599) the Court made clear that even courts and national administrations are obliged to apply directly effective Community provisions. To put the matter differently, national courts have to apply Community law even though none of the parties rely on it. According to the ECJ, applying the directly effective provisions is the duty of national courts, i.e. "it implies a duty for the courts to give full effect to the provisions at issue" (Prechal 1998: 684). Direct effect is not an issue that is invoked by individuals; rather it is an issue that involves the invocation of it by the national courts. As a result, it is clear from the relatively new case law of the ECJ that the application of directly effective Community provisions by national courts of their own motion is an obligation and a duty for the national courts even if the parties concerned do not rely upon it. These statements were first reinforced in the seventies by the Court through

Simenthal SpA v. Amministrazione delle Finanze dello Stato (Case 106/77 [1977] ECR 629). In *Simenthal* ECJ held that:

> National courts should not request or await the prior setting aside of an incompatible national provision by legislation or other constitutional means but of its **own motion**, if necessary, refuse the application of conflicting national law and instead apply Community law (Templeman & Kaczorowska 2000: 126).

It is clear from the wording of the ECJ that it is the obligation of courts to apply the directly effective provisions of the Community of its own motion. As a result, the direct effect doctrine is not an issue regarding the individuals but it is an issue that involves the national court's application to it.

3.2.3. Directly Effective Provisions of Community Law

A criticism, which has often been raised, is how the national courts of member-states would expound the direct effect and which kind of provisions can be considered as directly effective. Another concept, as one scholar (Prechal 2000) calls it "the broader concept of invocability," is important. According to Prechal this concept is broader because

> […] it also allows those provisions to be successfully relied upon, which do not as such create rights or do not have the objective to do so, but may in a proceedings be invoked for other purposes, for example as a defence in criminal proceedings or as a standard for review of the legality of member-state's action in administrative proceedings (1050).

In fact it is the structure and the nature of the proceedings pleaded before the national courts, which determine the structure of a Community provision and whether it is directly effective or not. One must also bear in mind that the existence of individual rights is not out of scope of the Court. The ECJ still uses the individual rights as a concept to explain the direct effect

doctrine. In *the Queen v. Ministry of Agriculture, Fisheries and Food ex parte: Hedley Lomas (Ireland) Ltd*. (Case C-5/94 [1996] ECR I-2553) the ECJ coincided the direct effect doctrine with the existence of creation of rights. Therefore, the existence of creation of rights is still on the European scene to be discussed.

3.3. Renewed Discussions on Direct Effect Doctrine

From the very beginning of the discussions on direct effect doctrine, legality review has been one of the evergreen issues which has been the subject of debate and controversy between the member-states and the ECJ. The ECJ decides whether Community law provisions are directly effective. The new discussions on the legality review took place in a decade old decision of the Court. In *Aannemersbedrijf P. K. Kraaijeveld B.V. and Others v. Gedeputeerde Staten van Zuid-Holland* (C-7295 [1996] ECR I-5403), the Court held that member-states failure to comply with the environmental directive within a given time limit would not exclude the individuals to sue the state, for not realizing its obligation resulting from the concerned directive, before national courts. As is well known, the old debate on the creation of rights as a condition for direct effect is still on the agenda of the member-states. Jan Winter's 1972 study made "a famous distinction between direct applicability and direct effect" (qtd. in Prechal 2000: 1052). According to this distinction, separation of the existence of individual rights from the direct effect results in severe confusion in the definition of direct effect doctrine because individual rights have always been related with the direct effect doctrine in most of the case law, and the set of minds of the scholars. Actually, many old-school scholars who analyse the directives capable of direct effect had come to the same conclusion. For almost all scholars, who wrote in the first decade of the concept, direct effect cannot be defined separately from the existence of individual rights. What was more striking for them was the division between direct applicability and

direct effect. Easson in his 1979 study equates the direct applicability with Community regulations. He explains it as follows:

> It is binding in its entirety, not merely as to the result as to be achieved, and it is *directly applicable* within the legal systems of all member-states without the necessity of being implemented or incorporated into national legal systems by any national measure (320).

According to Winter (1972), Easson (1979) and Pescatore (1982) directives, which are binding only upon certain member-states or individuals, are said to be directly effective if they confer rights on individuals. However, according to Winter (1972) and Pescatore (1982) directives that are not capable of direct effect as they are not conferring rights on individuals may still have certain limited effects. Pescatore (1982) calls these directives as "less perfect provisions" (155) of Community. In order to produce direct effect it is necessary to test these Community provisions on the grounds of legality of actions taken by member-states. It is clear from the explanations above; there is a difference between direct effect with the existence of individual rights and moderate form of direct effect, which is related to the review of the legality of Community acts.

In most common law countries, such as the United Kingdom, the focus of attention is remedies instead of rights that are enforceable before the national courts. Remedy does not result from rights but it is evaluated as a "cause of an action" (Prechal 2000: 1053-1054). From this point of view, diverging rights from remedies is impossible. The breach of a Community law is a result of causes of action that will bring a remedy to the applicant. In continental law countries, on the other hand, such as France and Belgium, the attention is on the administrative actions that are incompatible with the Community law. In other words, the creation of individual rights is not considered as a condition for direct effect. In France and Belgium the only important test is the legality of the legislative acts; i.e. the compatibility of the legislative acts with the concerned Community directive. An individual

may even rely on a directive to review the legality of the national measures. In addition to those countries, in the Netherlands, the perception of direct effect is free from the existence of individual rights. Like France and Belgium, in the Netherlands the legality review is allowed, i.e. individuals may invoke a Community directive before a national court to review its legality based on Community law.

In the *CIA Security* (Case C-194/94), the ECJ ruled that "where a member-state neglects to notify draft national technical regulations to the Commission in breach of the obligations set out in Directive 87/189, it may not rely on those regulations in subsequent proceedings before national courts" (Weatherill & Newman 1999: 217). To put it another way, national measures on technical standards without notifying the Commission were inapplicable. Beyond this inapplicability a relatively recent attempt has been initiated to utilize the Court's judgement on *CIA Security*. In *Criminal Proceedings against Johannes Martinus Lemmens* (C-227/97 [1998] ECR I-3711), Mr Lemmens was charged with driving his vehicle while he was under the influence of alcohol, which was proved through the use of a breathalyser, a technical machine used to measure the alcohol in the blood. The use of breathalyser was put into effect by a ministerial regulation. Unfortunately, as in the *CIA Security* case, the administrative authority failed to notify the Commission as was required by the same directive, namely, Directive 83/189. As a result, *Lemmens* relied on that directive before the Dutch national court and claimed that the use of a breathalyser was against the Community directive. Unlike the *CIA Security* judgement, in *Lemmens* the Court held that the field of criminal law was not under the scope of the application of Community law[12]. However, a new question has

[12] Actually, the purpose of the Directive 83/189 is to protect the freedom of movement of goods. The Community itself has no explicit competence to adopt legislation which imposes criminal penalties. However, one must bear in mind that the Community law may affect the exercise of national competence in the field of criminal justice. The Court did not notify the Commission on the breathalyser. But in the *Lemmens* case, the consequences were different. It involves the use of a breathalyser but neither the import of the breathalyser nor trade of it; therefore, the use of brerathalyser by Dutch authorities did not create any obstacle to trade and did not produce direct effect that was enforceable before the national courts. For more details on this issue see "Weatherill, S. & Newman K. 1999,

arisen from the *Lemmens* case: "Who is allowed to rely on this inapplicability?" (Prechal 2000). According to A.G. Fennelly (qtd. in Prechal 2000), "Only those persons whose interests are intended to be protected by the directive provisions may invoke the directive before the courts" (1056). According to the Court, the purpose of Directive 83/189 is to protect the freedom of movement for goods by means of preventive control. The use of breathalyser by the local authorities in the *Lemmens* case was not considered as an obstacle to the trade. Therefore, an individual could not rely upon notification requirement under concerned directive before a national court. Nevertheless, the Court did not make clear who is allowed to rely on this inapplicability. Prechal (2000) says that by avoiding this issue the Court is paving the way for different interpretations. In this regard, Van Gerven in his 2000 study highlights the link between the claimants' invocation of Community law and the issue of individual's right (501-508). In his study Van Gerven makes a link between the effective judicial protection of Community rights and uniform application of Community law in all member-states.

Prechal's 2000 study, on the other hand, even though not denying the role of the matter of interest in the direct effect doctrine, asserts that "introducing an interest requirement of this type for the "invocability" of Community law provisions would amount to an unnecessary and incomprehensible restriction, adding in fact a new condition for direct effect" (1056). Indeed, claiming an interest requirement means nothing but a subsequent limitation to the direct effect doctrine to be applied. According to Prechal (2000) the issue of protection of individual interest plays a pivotal role at national procedural level. The protection of individual interest may not be considered an issue of direct effect. Therefore, in order not to retreat from the scope of direct effect doctrine it is sufficient to indicate that the interest requirement is a matter of different parts of the Community law, e.g. a condition in actions for damages.

'Free Movement of Goods', *The International and Comparative Law Quarterly*, vol. 48, no. 1, pp. 217-219."

3.3.1. Individual Rights v. Legal Review: In Search of Direct Effect

Even though "the intention to grant rights is not a condition of direct effect, but a consequence" (Ruffert 1997: 315) Van Gerven's 2000 study made clear that "granting rights is a condition for state liability to arise" (507). Rights v. legal review in search of direct effect will be considered briefly in three different articles in this paper: One by Van Gerven (2000), who indicates the ambiguity of the concept of 'right'; one by Coppel (1994), who investigates the concept of 'right' by using the analytical legal philosophy; and one by Prechal (2000), who based her argument of 'rights' on the 'legality review'.

The notion of 'right', as the direct effect doctrine, has always been the subject of controversy and debate within the Community. It is an evergreen issue, which has resulted in broader discussions in the different school of thoughts. Some scholars seek to explain the notion of right by *Hohfeldian*[13] terms and other scholars have severely condemned the Court's attitude towards it to make their own definition of right. There are also divergences in the depiction of the features of the rights among the member-states that makes the issue more complex.

Van Gerven, who criticizes the Court's attitude in his 2000 study, indicates that the use of rights language of the Court adds nothing but confusion to the matter. As Prechal (2006) says, "[…] the ECJ has not really indicated what it means […] by the term 'right'." In the *Becker* judgement, as mentioned under the title of "'Subjective' direct effect", the Court held that direct effect might occur if the provisions are sufficiently precise and unconditional, i.e. if national measures are incompatible with the Community law, former should be replaced by the latter. Nevertheless, the Court in its judgement did not consider any "specific right" (Van Gerven

[13] Hohfeld analysis is based on the distinction between the notion of 'right' and the notion of 'liberty'. Hohfeld argued that the right and duty were corelative concepts. One must always be matched with the other. Each individual has a relationship with the other. Each individual had rights and duties. The relationship between rights and duties determine the degree of liberty. The corelative between right and duty describes the way in which two individuals are limited in their choices to act.

2000) or "procedural right" (Prechal 2000) given to the private party. According to Van Gerven (2000) by not determining the specific 'rights' in the *Becker* case the Court "demonstrates how ambiguous the concept of a 'right' is" (507). Van Gerven's 2000 study states the following:

> It refers to the general right, and accompanying remedy, to have a court set aside national measures which conflict with the requirements of a directive, but may also refer to a specific right which a directive grants to private parties, and which, together with other conditions, gives rise […] to a right and an accompanying remedy for compensation in respect of harm sustained (507).

As is clear from the case law above, like direct effect, the notion of right turned out to be an ambiguous concept. The notion of 'right' defined by Van Gerven (2000) is not important to demonstrate the existence of direct effect; however, it is vital to determine the remedy. In the same respect, Prechal (2000) indicates that "[…] direct effect has been labelled, not least by the Court itself, as the right to rely on Community law provisions" (1057).

Coppel (1994) by using the *Hohfeldian* school of thought puts emphasis on the three identical and interrelated definitions of 'right'. 'Right' that is correlated with the existence of 'duties'; 'right' prior to 'duties' and finally, 'right' that is "prior to duties and necessitate the establishment of a list of duties which is open-ended, which may be added to (or reduced) as circumstances change, and according to what is necessary to secure the protection of the right in question" (866). In *Marshall* the Court refused to give horizontal direct effect to the Community directives, but stated that the AHA[14] was an emanation of an administrative authority, i.e. public body. The foundation of this judgement may be evaluated in the *Hohfeldian* school of thought. Individuals cannot have rights under directives against other individuals because the latter have no duties under directives (Coppel 1994: 867). In the Community part of the spectrum, it can be asserted that

[14] The facts of the Marshall case was given on the footnote 6, in Chapter 2 under the title of 'Subjective' direct effect.

only member-states have duties or obligations under directives, therefore, the only right that could be claimed is one that is against the state.

Prechal's 2000 study, on the other hand, focuses on the review of legality and immunity borrowed from the Hohfeld's analytical approach, and states that:

> […] a case in which an individual relies on Community law provisions for the purposes of legality review, whether in a proceeding against another individual or against the state, a successful case will result in an immunity: neither the private defendant nor the State could in turn rely on the national rules for their purposes (1058).

From the statements above, it is obvious that neither the rights issue nor the legality view itself are divorced from each other. Although legality review may not be considered as an alternative way to define the invocability of the Community law, it is still related with the specific conditions of the direct effect namely, sufficient precision and unconditionality.

3.3.2. Combining the Notion of Rights with Direct Effect

Like the notion of right, direct effect seems to have been diluted by the member-states. As is well known, German perceptions result in the development of two different notions of direct effect: Direct effect in a narrow sense, according to which direct effect relates to the notion of individual rights, and objective direct effect that depends on the precision and unconditionality test rather than putting individual rights as a precondition. When the broader definition is adopted, it involves the application of Community law before a national court of law by any private party or an administrative authority that may rely on Community provisions to review legality of member-state action, to control the use of discretion by member-states and as a defence in criminal proceedings.

The traditional usage of direct effect doctrine is that of the replacement of national laws that are against the Community law with the ones provided by the Community, i.e. the usage of Community directives instead of national measures that are incompatible with the former "[…] by way of *substitution*." (Prechal 2006: 304). This is a "positive claim" (Prechal 2000: 1059) and seems to be a positive application of a Community directive's related provisions to the national law. Secondly, by not applying the national laws that are against the Community law local judges may escape the application of Community law provisions. In this regard, after making a prior evaluation of concerned national law Dutch judges prefer not to use the national laws that are against the Community law. This is called disapplication of national laws that are incompatible with the Community law as a "negative sanction" (Prechal 2000:1060), "[…] thus by way of *exclusion*, it may suffice to resolve the Community law point." (Prechal 2006: 304). In other words, a process that reviews the national measures to see whether they are legal in the framework of Community law. Thirdly, an applicant, regardless of whether it is a private party or an administrative authority, may claim the questioning of a national law as to whether it is compatible with the Community law or not. This is called the legality review as mentioned above. In order to clarify the legality review, an applicant may ask, "Does a national measure on equal rights for women and men and the discrimination against women in the public administration go against the provisions of the Community directive concerned"? Nevertheless, in some cases it should be the national court, which legally examines the compatibility of a national law with the Community law. This is the case where a criminal proceeding is at hand. At the end of the day, what happens after the legality review is a declaration of legality that demonstrates whether the national measure questioned is compatible or whether it is incompatible with the Community provisions. To put the matter differently, like the exclusion method, review of legality or declaration is a negative sanction. According to some scholars, (Prechal

2000) the disapplication method is sufficient to achieve the results clarified by the Community.

Disapplication of national laws by exclusion instead of applying the Community law by substitution sometimes results in a lacuna—according to Prechal (2000) in order to fill this gap "it may be necessary for the domestic court to be able to apply a Community law provision instead in order to resolve the case before it." (1060). Application or substitution of Community law instead of national measures may produce individual rights. The Court's judgement in the *Becker* case is based on objective direct effect; to put the matter differently, since the provisions of the concerned directive are sufficiently precise and unconditional they are relied upon against any national measure that is incompatible with the directive by individuals. In addition to this, individuals may rely on the provisions of the directive concerned if provisions involve rights for the benefit of individuals 'against the state'.

In this perspective, it would be appropriate to examine the notion of rights and direct effect regarding the existence of individual rights against another individual—non-existence of individual rights against the state or the public authorities unlike the *Marshall* case. Although individual rights do exist against another individual, since horizontal direct effect has already been denied by the Court, an individual whose rights are violated may not rely on provisions of a Community directive against another individual. To put the matter differently, rights have been created but the mere existence of individual rights is not sufficient for a directive to produce direct effect. On the other hand, in order to create individual rights there is no need for direct effect. It is obvious from the above definition that the creation of rights does not equal to the production of direct effect, i.e. in some cases a Community provision may be directly effective without conferring rights to individuals or in some other cases a Community provision at hand, which is not directly effective, may confer rights to individuals. However, in some other cases, a Community provision, which is directly effective, may confer rights on individuals at the same time.

However, exclusion is not falling into the line of Community point of view because the national measure that is against Community provisions, although disapplied, stays wherever it is without the positive application—or substitution as Prechal (2006) calls it—of Community law. Therefore, it is necessary to enable the application of Community law at least by substitution instead of exclusion, which is a way of escaping the application of Community law before the national courts.

3.3.3. The Discretion Issue: In Search of Direct Effect

As is very well known, although directly effective Community provision often result in the creation of rights, individual rights should not be considered as a natural outcome of direct effect. An individual may invoke Community provisions before a national court either for a legality review or for claiming rights. The importance and the fulfilment of the well-known conditions of the objective direct effect may vary depending on the situation. Regarding the legality review, a national court may ask the ECJ whether a Community provision at hand satisfies the conditions for direct effect or not. Actually, when the issue relates to the review of legality, as A.G. Léger (2000) indicates, "[…] the need to ensure that the directive is precise is less important…" (qtd. in Prechal 2006: 306). When the result is against the national measure, i.e. national law is incompatible with the Community law; the Community provision will replace the national one by way of substitution. On the other hand, when the issue is concerned the claiming of right, Community provision 'should' be sufficiently precise and unconditional. In addition to the precision and unconditionality, right should be claimed against a state or an emanation of state, i.e. public authority. It is clear from those applications that direct effect necessitates a number of conditions which must be satisfied when the case relates to the claiming of rights. One other specific point, which is necessary to state here, is that the traditional use of direct effect may be excluded by the existence of member-states' discretion.

Accordingly, regarding the creation of individual rights, national courts cannot decide whether it is necessary to replace the national measure—by way of substitution—, which is incompatible with the Community provision, if the issue at hand falls under the discretion of executive or legislative. If this is the case— if, there is an existence of member-states discretion—the role of the national courts is very limited. The courts' and the ECJ's role is arguably limited with the judicial control of the executive and the legislative whether their actions are incompatible with the Community law. In other words, a Community provision that falls under the member-state's discretion is conditional, therefore inapplicable and seems to be not directly effective. The notion of discretion involves a choice, which is held by the legislator or by the executive. As a result, as one scholar puts it, "the mere existence of discretion was generally considered to be an obstacle to direct effect." (Prechal 2006: 307). Although the courts have a limited role in such a division; it is the national courts' and the ECJ's duty just to review the legality of the discretion. On the other hand, the courts' role is clearer when the case involves the review of legality, i.e. whether the national laws or measures issued by the legislative or by the executive are applicable with the objectives set out by the Community provision. Discretion, in legality review, will not be an obstacle. The member-states may be free to choose the methods to achieve the objectives of a Community provision, but when it comes to the results, the provisions are binding as to the objective achieved by the member-state that enjoys the high degree of discretion given to it. A Community provision, which entrusts discretion to the member-states—one relates with the public policy for example—is still subjected to the judicial control of the courts that checks whether the public authorities remain within the boundaries drawn by the Community provision. Not only the actions by executive or by the legislative are under the control of the courts but also national measures can be subjected to the judicial control of the courts to ensure they remain within the limits set out by the concerned Community provision.

The crucial point here is that the test for the well-known conditions of direct effect itself is not very important. As Prechal's 2000 study states, "[…] testing the conditions is obsolete." (1064). Member-states are obliged to satisfy the objectives of the rules that are ascertained them. At domestic level, public authorities enjoy a high degree of discretion to achieve the objectives of concerned obligations. Though since the national courts, in cooperation with the ECJ, have a right to control whether the public authority concerned or state as a whole, fulfil the conditions of concerned provision in conformity with the Community law. For example, a public authority may have a certain degree of discretion, but the Court may still assert that the directive is directly effective. Even if the Court's discretion is limited, it may still decide that there is a possibility of state liability.

Unfortunately, as Prechal (2000) states the existence of a need for the satisfaction of conditions, i.e. the Community provision concerned should be sufficiently precise and unconditional is useless. If the conditions are not satisfied, an individual may not invoke the provisions before the courts. Actually, the invocability of the provision at hand depends on the question asked to the Court. As mentioned above, if it is for the legality review, the existence of well-known conditions are less important; on the contrary, if it is for claiming rights, the conditions must be satisfied. An individual may either ask for the annulment of a decision or to use the Community provision for a defence in a criminal proceeding. For substitution to take place for an individual to claim a right—this was already named as a positive claim—conditions must be ensured; for the second one—review of legality—conditions are less important. In the first case, the existence of member-states' discretion is an obstacle; for the second one, on the other hand, the discretion cannot be considered as an obstacle. The court of law may hold that the national measure should be annulled; but it is up to the legislative or executive to replace it, which should take into consideration that its decisions are subjected to judicial control of the courts.

Prechal's 2000 study, by making an analogy between the state of courts in national law and the situation of them within the community law,

gives a clue as to why the conditions of direct effect are obsolete in particular and why the direct effect doctrine is an obstacle for the development of Community law in general. In this regard, it is necessary to briefly explore the situation of a national measure in the domestic level. In national law, some legal norms cannot be evaluated by the courts since they are subject to further elaboration by the legislature. At the end of the day, courts could have a very limited role in the application of concerned legal norms because administrative authorities may have a very high degree of discretionary powers on a legal norm. When this is the case, the role of the courts may just be to review the assessments of the national authorities. This review may even declare that the interpretation made by the governmental authorities on the national measure is against the constitution, i.e. there are errors in the assessment of the legal norm. Similarly, the governmental bodies claim that they are taking measures in conformity with the instructions given to them. In this case, national courts enjoy the rights given to them, by reviewing the legality of the measures taken by the executive or the legislative. To put the matter differently, the courts control whether the measures taken by the governmental bodies are applicable and remain within the limits determined by the instructions. In none of these cases are national courts limited by the conditions, namely whether the legal norms at hand are unconditional or sufficiently precise.

Prechal (2000) by insisting on this analogy, claims that at Community level, the test for conditions of direct effect is meaningless and unnecessary in deciding whether a directive in particular or any Community provision in general relied upon by an individual against a state authority or whether the national measures concerned, is in conformity with the Community law. To conclude the discussion on discretion it is sufficient to say that although the legislative or executive decisions are subject to judicial control, the Court's role is still very limited. However, it is also obvious that the Courts' role is gaining more importance in the last decades. National courts, in cooperation with the ECJ, are gaining strength against the state authorities. At least the review role of the courts is expanding. The

Community system is based on the rule of law; the actions taken by the state authorities are subject to the judicial control of the courts. National laws that are initiated by the executive and legislative should be in conformity with the Community law.

4. Conclusion: New Prospects in the Search of Direct Effect

So much has been said in this paper, on the overlap between the conditions of direct effect and the existence of individual rights. In summary, it can be asserted from the above mentioned discussions that a Community provision may be sufficiently precise and unconditional as to be directly effective and may at the same time confer rights on individuals. However, that does not mean, whenever there is a directly effective provision at hand it naturally brings individual rights with it. The existence of individual rights and the acceptance of direct effect should not be equated. The direct effect doctrine itself is a very complex and diluted phrase. Therefore, adding a new condition to direct effect will make the existence of direct effect more difficult. As is well known, a directly effective Community provision may result in the creation of individual rights but this should only be considered as the consequence of it. There is no need to add a new condition to direct effect. The creation of rights as a result of the existence of direct effect is an issue which must be decided by national courts; thus, it is under the discretion of member-states. However, a national court may still ask the opinion of the ECJ on the interpretation of the case that seems to create individual rights. In fact, what makes a Community provision directly effective is whether the conditions of sufficient precision and unconditionality are satisfied. In general, there is no room for the creation of individual rights as a precondition. However, one can argue that even the necessity of conditions for direct effect is obsolete and an obstacle to the positive development of the Community law. Conditions seem to be restrictive regarding the development of Community law as a law of the land in the member-states.

Traditionally, the national courts have been left out of some fields including the foreign relations on the grounds of public security and public policy. The role of the courts is limited in those fields. However, it should also be stated that the role of the courts and the ECJ gains some importance when international relations involve a certain degree of individual rights.

The limits of the power of courts and their limited role in international relations has been determined from the very beginning of the international relations starting from the foundation of the nation-state. Admittedly as with many other concepts in international relations, the role of the courts has evolved and been modified lately. In particular, the unavoidable existence of the Community after two world wars, the changing relations in international conjuncture in general and increasing interdependencies in particular have added crucial developments to the constitutional position of the courts especially in the Community. Courts have become as influential as the governmental organs. While there is an eventual and positive development in the courts influence, the evolution of direct effect doctrine *vis-à-vis* the situation of the courts remains slower.

In the European Communities where the rule of law is enhanced, it is almost impossible to prevent the rise of the national courts and the ECJ, which have enormous powers to control not only the actions of state organs but also the national laws and the transposed Community provisions as well to ensure they are in conformity with the Community law. This right to review the legality of actions and the legality of national measures is to see whether they are compatible with the instructions and whether the obligations are the sole duty of both the national courts of the member-states and the ECJ. Actually, as Prechal (2000) indicates there is no need for such conditions in a system where rule of law reigns. Like the national courts in domestic legal systems, which have the duty and right to check the justiciability of the measures without any need for further conditions, the ECJ and the national courts of the member-states in the Community level, should also have the right to review the legality of the national measures and rely upon the Community provisions without questioning whether the concerned Community provision is directly effective, i.e. the provisions are sufficiently precise and unconditional.

The direct effect doctrine has a number of meanings that make the situation more complex. There are plenty of definitions regarding to the concept, ranging from direct effect to indirect effect, from subjective direct

effect to objective direct effect, from vertical direct effect to horizontal direct effect and finally from incidental direct effect to administrative direct effect, which seen identical but however are not same in their natures. In a community where the rule of law is embraced and where EC law has become the law of the land, the wide existence of a broad theory of direct effect and the necessity of its conditions is meaningless and can be considered as an obstacle to the development of the Community law.

Additionally, as Prechal points out in her 2000 study, the existence of direct effect doctrine underlines the "foreign origin" (1068) of the concept. In this regard, the existence of direct effect doctrine psychologically reminds the European minds that the Community law is coming from outside powers. In a Community where EC law is considered as the law of the land, this existence is inconvenient, if not unacceptable.

European sceptics and the hardcore realists must also be aware of the fact that when Community law reigns without direct effect doctrine—or at least where, for the direct effect of Community provisions there is no further need for sufficient precision and unconditionality—it will not bring the automatic application or transposition of the Community law into the domestic legal systems. On the contrary, the state organs will still execute the review of Community law, as if they review national measures in the light of public security or public policy. To put the matter differently, like national courts, which are not the sole sovereigns in every field at domestic level, the ECJ will not be the sole power in every field, and it will remain in its limits. The non-existence of direct effect will not result in the non-existence of discretion of the executive or legislative. Therefore, the courts will still make the judicial review of the executive or legislative actions. There is no reason to hesitate since the non-existence of direct effect will not harm the nation-states but bring more uniformity to the Community where the rule of law reigns.

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