

Notes on Directives and Indirect Effects

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Issues relating to the meaning and effect of EU law arise in the course of litigation in the courts of the EU Member States. Direct effect is one way this can happen: EU law can be the source of a right that a person can sue in national court to enforce if the conditions for direct effect are satisfied. An employee can sue her employer to enforce her rights to equal pay under Art 157.

As we have seen, though, directives do not of themselves produce horizontal direct effects. A litigant can bring a claim in a national court to enforce rights under a directive against a state or an emanation of the state (Foster) as we see in Marshall. We will look later at the evolution of anti-discrimination law in the EU later. For now let's focus on consumer protection.

Directives give consumers a range of rights that the Member States are supposed to ensure. If a Member State implements the directive rights properly a consumer who was trying to enforce their rights would cite to the national implementing measure as the source of their rights (although if there were uncertainties as to the correct interpretation of the rights this could involve a preliminary reference to the Court of Justice for an interpretation of the EU directive on which the national measures are based). Let's imagine that in January 2015 in Ruritania (an imaginary Member State of the EU) a consumer, Alma, enters into a contract to buy a series of dancing lessons from DanceCo after a salesperson turns up at her home and persuades her to agree to the contract. The salesperson does not tell Alma that she has a right to cancel the contract. After the salesperson leaves she realizes she has no interest in dancing lessons. DanceCo contacts her and asks for payment. When she refuses they sue her for payment for the lessons she has agreed to buy. In the litigation she wants to argue that she has a right to cancel the contract.

Article 9 of the 2011 Consumer Rights Directive¹ provides:

1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2)² and Article 14.³
2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days from:
 - (a) in the case of service contracts, the day of the conclusion of the contract...

Article 10 specifies a 12 month cancellation period where the customer is not informed of the

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1> .

Member States were required to implement the directive by 13 December 2013. Implementing measures were to take effect from 13 June 2014.

² Article 13(2) deals with delivery costs over the standard delivery cost.

³ Article 14 specifies what obligations a consumer has on the return of goods.

cancellation right at the time of contracting.

Alma did not cancel the contract within the 14 day period but because she was not informed of her right to cancel under the directive she should have a year in which she should be able to cancel the contract.

Assume DanceCo is not an emanation of the state. The directive should have been implemented and the implementing measures should be in force by 2015. The provisions of this directive are the sort of provisions that should be able to be directly effective - they are clear and unconditional. In most respects Member States do not even have discretion to provide for protection for consumers that goes beyond the provisions of the directive (it is mostly a maximum standards directive).⁴

Ruritania has a statute which specifies that consumers may withdraw from contracts such as the one Alma entered into within a reasonable time. The courts in Ruritania have interpreted this reasonable time to be a period of 7 days (the cancellation period EU law mandated before the 2011 directive) and they have not allowed any extra time with respect to failures to notify customers of cancellation rights. Alma could argue that the court should interpret this reasonable time to include the additional period.

If there is no provision in the national law that can be interpreted to give Alma the rights she should have under the directive the doctrine of indirect effects cannot help her (in a case called Faccini Dori the court said “in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.”)

If Alma could not persuade the Ruritanian court to interpret Ruritanian law to give effect to her rights under the directive she would have a claim for damages against the Ruritanian state under Francovich.

⁴ Article 4 of the directive provides: “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.” Member States are allowed some options however, such as the option to impose language requirements to ensure consumers can understand the disclosures under Art 6(7).