



JURIDISKA FAKULTETEN
vid Lunds universitet

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Horizontal Direct Effect of Directives

Examensarbete
20 poäng

Handledare
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Ämnesområde
EG-rätt

Termin
HT 1998

Table of Contents

ABSTRACT	3
PREFACE AND ACKNOWLEDGEMENTS	4
ABBREVIATIONS	5
TABLE OF CASES	6
1. INTRODUCTION	8
2. GENERAL ASPECTS OF THE EUROPEAN LEGAL SYSTEM	13
2.1 The Sources of EC Law	13
2.2 The Court's Methods of Interpretation	14
3. THE CONCEPT OF DIRECT EFFECT AND DIRECT APPLICABILITY	16
4. SUPREMACY OF EC LAW	17
4.1 France	17
4.2 Germany	18
5. HORIZONTAL DIRECT EFFECT	20
6. DIRECT EFFECT OF DIRECTIVES	22
6.1 'Grad' and 'van Duyn'	22
6.2 'Ratti', 'Becker' and 'Marshall'	22
7. INDIRECT EFFECT OF DIRECTIVES	24
7.1 'Von Colson' and 'Harz'	24
7.2 From 'Kolpinghuis Nijmegen' to 'Arcaro'	25
8. DAMAGES	28
8.1 'Francovich'	28

8.2 'Brasserie du Pêcheur' and 'Factortame III'	29
8.3 The Reception of the Preliminary Rulings in the National Courts	30
9. HORIZONTAL DIRECT EFFECT OF DIRECTIVES	32
9.1 Private Enforcement	32
9.2 Arguments for Introducing Horizontal Direct Effect of Directives	33
10. THE ADVOCATE GENERALS	37
10.1 Sir Gordon Slynn	37
10.2 Walter van Gerven	38
10.3 Francis G. Jacobs	39
10.4 Carl O. Lenz	40
11. SOME RECENT CASES	42
11.1 'Pafitis'	42
11.2 'El Corte Inglés'	43
11.3 'Ruiz Bernádez'	43
11.4 'CIA Security International'	44
12. CONCLUSION	46
APPENDIX	48
BIBLIOGRAPHY	50

Abstract

The Court's refusal to implement horizontal direct effect upon directives may, in some cases, lead to injustice. It can not be considered just and equitable that individuals who do not comply with provisions stemming from a supreme legal order are able to avoid retribution. This situation may be seen as further exacerbated by the fact that public funds are used to finance the shortcomings.

What is more, the absence of a uniform application of directives creates inequalities and may well disadvantage the competitive chances of some parties. For instance, the legal protection of citizens varies depending upon which Member State one happens to be in. Another dissatisfying effect is that not all of the European companies are placed upon an equal footing with one other. This is especially troublesome when considering the implications upon the Internal Market and in the context of the 'four freedoms'.

Things however do not have to be this way as a legal solution may be found.

This thesis will present some facts and arguments that suggest an opposite outcome. By groundbreaking judgements, such as 'van Gend en Loos', 'Simmenthal' and 'Francovich', the Court has paved the way for an ever-closer Union. However, the rulings of the Court have not always been very evolutive. Considering the topic of this thesis, degeneration is a more accurate description. The confusing and sometimes unclear rulings of the Court have lead to inconsistencies within EC law. This thesis will illustrate that the denial of 'horizontal direct effect of directives' is one such result.

Preface and Acknowledgements

I would like to thank my tutor, Professor Carl Michael Quitzow, for assistance and inspiration that made this thesis possible. I would also like to thank Craig Marshall and Carl Hofvendahl for reading the proofs of this thesis.

The law as it stood on 1 March 1998 is the basis for this thesis.

Joakim Swedenborg,
Lund, March 1998.

Abbreviations

AC	The British Law Reports, Appeal Cases
CML Rep.	Common Market Law Reports
CML Rev.	Common Market Law Review
ECHR	European Convention on Human Rights
ECR	European Court Reports
EL Rev.	European Law Review
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschaft- und Steuerrecht
ML Rev.	Modern Law Review
QB	The British Law Reports, Queen's Bench Division

Table of Cases

Cases before the European Court of Justice and the Court of First Instance

C-26/62	van Gend en Loos, [1963] ECR 1.
C-6/64	Costa v. ENEL, [1964] ECR 1141.
C-9/70	Grad, [1970] ECR 825.
C-11/70	Internationale Handelsgesellschaft, [1970] ECR 1125.
C-24/72	International Fruit Company, [1972] ECR 295.
C-34/73	Variola, [1973] ECR 981.
C-166/73	Rheinmülen-Düsseldorf, [1974] ECR 33.
C-41/74	Van Duyn, [1974] ECR 1337.
C-43/75	Defrenne II, [1976] ECR 455.
C-106/77	Simmenthal, [1978] ECR 629.
C-148/78	Ratti, [1979] ECR 1629.
C-44/79	Liselotte Hauer, [1979] ECR 3727.
C-102/79	Commission v Belgium, [1980] ECR 1473.
C-8/81	Becker, [1982] ECR 53.
C-104/81	Kupferberg, [1982] ECR 3641.
C-283/81	CILFIT, [1982] ECR 3415.
C-14/83	Von Colson, [1984] ECR 1891.
C-79/83	Harz, [1984] ECR 1921.
C-152/84	Marshall, [1986] ECR 723.
C-161/84	Pronuptia, [1986] ECR 353.
C-30/85	Teuling, [1987] ECR 2497.
C-69/86	Wünsche Handelsgesellschaft, [1986] ECR 947.
C-80/86	Kolpinghuis Nijmegen, [1987] ECR 3969.
C-222/86	Heylens, [1987] ECR 4097.
C-5/88	Wachauf, [1989] ECR 2609.
C-70/88	European Parliament v Council, [1990] ECR 2041.
C-262/88	Barber, [1990] ECR 1889.
C-92/89	Zuckerfabrik, [1991] ECR 415.
C-106/89	Marleasing, [1990] ECR 4135.
C-188/89	Foster, [1990] ECR 3313.
C-9/90	Francovich, [1991] ECR 5357.
T-24/90	Automec, [1992] ECR II 2223.
C-200/90	Dansk Denkavit, [1992] ECR 2217.
C-208/90	Emmott, [1991] ECR 4269.
C-1/91	EEA-agreement, [1991] ECR 6079.
C-271/91	Marshall II, [1993] ECR 4367.
C-91/92	Faccini Dori, [1994] ECR 3325.
C-128/92	Banks, [1994] ECR 1209.
C-46/93	Brasserie du Pêcheur, [1996] ECR 1029.
C-48/93	Factortame III, [1996] ECR 1029.
C-316/93	Vaneetveld, [1994] ECR 763.
C-441/93	Pafitis, [1996] ECR 1347.
C-129/94	Ruiz Bernádez, [1996] ECR 1829.

C-192/94	El Corte Inglés, [1996] ECR 1281.
C-194/94	CIA Security International, [1996] ECR 2201.
C-197/94	Bautiaa, [1996] ECR 505.
C-168/95	Arcaro, [1996] ECR 4705.
C-129/96	Wallonie, [http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en].

Cases before the national courts

France

Nicolo, decision of 20 October 1989, Recueil Dalloz Sirey 1990:135.

Germany

Unmittelbare Anwendungen der EG-Richtlinie 85/577 in Spanien, OLG Celle, Urteil von 28. 8. 1990 - 20 U 85/89. See also EuZW, 1990, p. 550-552.

United Kingdom

Garden Cottage Foods Ltd v Milk Marketing Board, [1984] A.C. p. 130.
Bourgoin S.A. v Ministry of Agriculture, [1986] Q.B. p.716.

1. Introduction

Basically the essence of this thesis could be summarized into the question; what is law?

According to the principle of *iura novit curia* the court knows the law.

But in order to bring consistency within the jurisprudence we recognise that some courts know the law better than others. Since the courts normally do not rule unanimously, we have also recognised that some judges know the law better than others. The benefits are that the courts are obliged to give a ruling and that it promotes predictability concerning the prospective jurisprudence. However, this pragmatic approach undermines the recognition of their knowledge.

There are dissenting opinions among the judges and there are different views expressed elsewhere in the society. Another fact is that courts of last resort are not normally bound by their own decisions.

This may bring us to adequately reformulate the first question to; what is the law likely to be?

An answer to that is due to the characteristics of every legal system.

The EC law is often characterized as *sui generis* - a legal system of its own. It has its own sources of law and methods of interpretation.

The manner in which EC law develops is another of its distinctive features. The European Court of Justice (hereafter referred as the Court) has a crucial role in this process. The latter is of profound significance to this thesis.

The rulings of the Court constitute the focal point.

The nature of the topic would benefit from different approaches, e.g. one based on political science. Since this thesis is made on law it will of course have shortcomings in that respect.

So considering the topic of this thesis where does this place us in the grand scheme of things?

The notion 'horizontal direct effect of directives' is a double-edged sword.

It creates rights and obligations. A natural or legal person can claim rights according to unimplemented directives and invoke them against each other.

The only conditions ought then to be that the concerned directive fulfils the criteria for 'direct effect' and that the transitional period has expired.

However, 'horizontal direct effect of directives' is recognised as a concept but not as a principle of law.

The leading hypothesis of this thesis is that the Court has to reconsider its position.

A basic premise for this thesis is that directives are intended to create rights and that these rights correlate to obligations. When not imposing obligations on individuals means that rights are circumscribed as well.

It is important to have in mind that directives constitute the main tool in the process of harmonization of the Member States' laws. Insufficient or non-existent national implementational measures, which unfortunately are not

too rare, means that the subjects of EC law are forced to operate and live under heterogeneous conditions.

Introducing 'horizontal direct effect of directives' would contribute to uniform application and *l'effet utile* of EC law. It would also fit in well in the Courts recent focus on remedies and methods of enforcement of Community rights before the national courts. This would accentuate the trend of private enforcement, which places the individual in focus. Further it can be argued that 'horizontal direct effect of directives' is the logical conclusion of the principle of supremacy of EC law and the concept of 'direct effect'. Since 'direct effect' confers rights to individuals, national rules should not prevent them from exercising those rights.

It is also useful to compare the treatment of Treaty articles compared to that of directives. When conferring 'horizontal direct effect' to Treaty articles the Court focused on the content of the provisions rather than the addressee. When not conferring 'horizontal direct effect' to directives the Court focused on the addressee rather than the content of the relevant provision. From similar outsets the outcome has been the opposite.

The Court seems to have realized this contradictory matter of fact but its position is still in repudiation.

Instead it has compensated its shortcoming by other means that is by elaborating the concepts of 'direct effect' and 'indirect effect'. The question of 'horizontal direct effect of directives' was raised *obiter dicta* in 'Marshall'¹. It proved to be more of a match. The Court could not overcome the obstacles and the development of 'direct effect' in that direction had come to an end.

By using a side-track, 'indirect effect' as it was developed in 'Marleasing'², the Court has obtained results that are similar to those of 'horizontal direct effect of directives'.

None the less the Court still does not recognise the 'horizontal direct effect of directives' as a principle of law.

The effects of this, scrutinized in the light of recent case law, are a state of law that is unclear and confusing.

This thesis will present some facts and arguments that suggest that recognising 'horizontal direct effect of directives', as a principle of law, would be the most appropriate direction for the evolution of EC law. But before proceeding further, some general remarks will be presented.

Anyone attuned to the news media can not have failed to notice a new phenomenon in today's society; the European Union.

There are probably 370 million independent views of the Union³. As with art, beauty lies in the eyes of the beholder. Regardless of the opinion one

¹ C-152/84, Marshall, [1986] ECR 723.

² C-106/89, Marleasing, [1990] ECR 4135.

³ This is the number of citizens within the European Union, according to EUROSTAT.

has, one must accept that the Union has become a part of one's everyday existence.

First, in order to avoid misunderstandings, a clarification of what the European Union is.

The European Union is based on three pillars: firstly, the founding Treaties⁴ of the European Community⁵; secondly, Common Foreign and Security Policy; thirdly, Justice and Home Affairs.

The last two pillars were raised with the Treaty of the European Union⁶. The European Community law (hereafter referred as EC law or Community law) stems from the first pillar. Therefore it is more adequate to speak of EC law instead of European Union law.

It is often said that if you want to understand the present you have to know the past. A brief description of the European Community history is necessary.

European countries have had the bad habit of starting wars against each other. Europe sparked what nowadays is known as the two World Wars. Even before these, France and Germany clashed with each other during the Franco-Prussian War (1870-71). The consequences of all these wars were to be seen throughout Europe.

Either as a helping hand, or a bulwark against communism, the Marshall Plan was launched in 1947.

To administer the plan the United States required some sort of organ to be set up. The establishment of the Organization for European Economic Co-operation in 1948 made this possible. The co-operation was of an intergovernmental character.

The same period witnessed the onset of the Cold War. As a counter to Soviet hegemony, the North Atlantic Treaty Organization was created in 1947. Other important institutions to mention are the United Nations, 1945, and the Council of Europe, 1949.

The result of this was that co-operation between the Western European countries became institutionalized.

Among the citizens of Europe the desire to secure a lasting peace was strong. To achieve this, nationalism had to be replaced by European integration. The beginning of the end of the European wars was started by

⁴The European Coal and Steel Community (ECSC, 1952), the European Atomic Energy Community (EURATOM, 1957) and the European Economic Treaty (EEC, 1957). The 'Maastricht Treaty' renamed the EEC Treaty to the European Community Treaty.

⁵With the Merger Treaty (1965) the institutions were merged and shared by the three Communities. My personal view is that 'the European Community' instead of 'the European Communities' is more adequate since then.

⁶The Treaty was signed in Maastricht in February 1992. It is often mentioned as the 'Maastricht Treaty' but the original name is the Treaty of the European Union, TEU.

the French foreign minister, Robert Schuman. The Schuman-Declaration⁷ was a proclamation of peace, which led to the setting-up of the European Coal and Steel Community.

France, Germany, Italy and the Benelux countries signed the Treaty in 1952. The object of the Treaty was to control the use of important components for the arms industry, i.e. coal and steel. Supranational organs were created in order to meet the requirements.

The EURATOM and the EEC Treaty followed the evolution of European integration in 1957. While the two other treaties are quite specific in their provisions, the EEC Treaty is more of general character. It is a ramification treaty of economic co-operation and its content has to be 'fleshed out' according to the objectives and purposes of the Treaty.

Since the implications of the EEC Treaty are so great it has put the process of decision-making in focus. Altogether this has led to a struggle between intergovernmentalism and supranationalism. The anticlimax of this was the Luxembourg-crisis in 1965 when France obstructed the integration by introducing the notion 'very important interests'. An agreement to disagree over the voting methods in the Council was concluded. A unanimous vote upon anything tended to be hard to obtain and the period, which lasted for two decades, is thus described as 'Eurosclerosis'.

While the decision-making organs were paralyzed the European Court of Justice became an important actor. By teleological interpretations it spearheaded the integration of the European Community. With its rulings the Court laid down principles which strengthened the impact of EC law⁸.

As with any legal system, the European legal one has not been settled once and for all. The development of EC law has, to a great extent, taken place in the Court. However, the development can be described as a battle between political and judicial aspects. The result of this is yet to be seen in the future.

The European Union of today consists of fifteen Member States. The Union is built on economic federalism with the main objective being the completion of the Common Market. The process of economic integration has generated some by-products. One of those is that individuals have gained political and judicial rights. They are now regarded as natural components of EC law. The fact that citizenship⁹ in the Union has been introduced clearly accentuates this development.

⁷ In 9 May 1950 he presented aims and means for the plan. This day constitutes now the national day of the Community. Jean Monnet had drafted the Declaration. These two men are now regarded as the founding fathers of the European Community.

⁸ These principles and specific cases will be examined later on.

⁹ See the 'Maastricht Treaty', Art. B.

Directives have been and still are the main tool in harmonizing the Member States' different legal systems¹⁰. The denial of 'horizontal direct effect of directives' thus seems as a rather odd phenomenon in the context of European integration.

The thesis is to be viewed in the light of this.

¹⁰ Their position is rather secure since the principles of proportionality and subsidiarity have recently gained emphasis.

2. General Aspects of the European Legal System

Community law is said to be a legal order of its own often mentioned in the Latin term *sui generis*. It has its own sources of law and methods of interpretation. The EC law consists of primary and secondary law.

2.1 The Sources of EC Law

Primary law consists of the Treaties, general principles of law and international agreements. General principles of law diverge into fundamental rights and equity rights, e.g. right to judicial review, the principle of non-discrimination and legal certainty.

The status of the ECHR used to be poorly delineated. It has been regarded as an integral part of the general principles of law¹¹, but it has now been incorporated in the Maastricht Treaty, Art. F.

International agreements can be a component of the EC law although they are not directly applicable in a specific case¹². The normal procedure is contrary to the above, that is to say conventions refer to the jurisdiction of the Court¹³.

Secondary law consists of regulations, directives and decisions.

Opinions and recommendations are soft law. These are not binding in their nature but have indirect effects subject to interpretation. All acts from all of the institutions are open to interpretation. Unlike Swedish practice, preparatory works are not seen as law¹⁴.

The judgments of the Court are not formally considered as law¹⁵ and the Court is not bound by its case law. None the less they are in effect compatible to law. It is easy to argue for this fact.

The fact that the Member States can submit opinions under the procedure of a preliminary ruling guarantees that they can affect or at least draw

¹¹C-44/79, Liselotte Hauer, [1979] ECR 3727.

¹²C-24/72, International Fruit Company, [1972] ECR 295. This case should be compared with, C-104/81, Kupferberg, [1982] ECR 3641, where the Court held an international agreement to be directly effective.

¹³As may be illustrated by 'the Brussels Convention on jurisdiction and enforcement of civil and commercial judgments' and as well 'the Rome Convention on the applicable law to contractual obligations'.

¹⁴C-197/94, Bautiaa, [1996] ECR 505.

¹⁵'The decisions of the Court has no binding force except between the parties and in respect of that particular case', Statute of the Court, Art. 20.

awareness to the jurisprudence. If the non-referring courts were not bound, the uniform application of Community law would be undermined. Another factor which strengthens this position, is that a judgement of invalidity according to Article 177 of the EC Treaty (articles within the EC Treaty are hereafter abbreviated to Art.) has the same effect as an annulment under Art. 173.

The national courts can ask for a preliminary ruling concerning a previous judgement. A national court can also make a second reference for a preliminary ruling. This second reference can not be used to undermine the first preliminary ruling¹⁶.

Sometimes the Court sets out general principles even if they are unnecessary when determining the issue at stake.

It has been suggested that one should make the distinction between *obiter dicta* and *ratio decidendi*. This is unnecessary because the whole judgement expresses the will of the Court¹⁷.

As a general rule the effects of a judgement are *ex tunc*. This means that it has a retroactive effect. In very unclear cases the judgement may be temporally limited. The entitled are only those who already have brought an action.

Several billion-ECU consequences are not sufficient on their own to justify temporal limitation¹⁸. This is logical; two wrongs make not a right.

2.2 The Court's Methods of Interpretation

A general guide to the Court's interpretative methods is to be found in the CILFIT-case¹⁹, where the Court held that:

'To begin with, it must be borne in mind that Community legislation is drafted in *several languages* and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

It must also be borne in mind; even where the different language versions are entirely in accord with one another, that Community law uses *terminology* which is peculiar to it. Furthermore, it must be emphasized that *legal concepts* do not necessarily have the same meaning in Community law and in the law of various Member States.

Finally, every provision of Community law must be placed in its *context* and interpreted in the *light of the provisions of Community law as a whole*, regard being had to the *objectives* thereof and to its *state of evolution* at the date on which the provision in question is to be applied'. [Italics by author]

The Court is emphatic about explaining the difficulties when interpreting Community law. It has also been eager in securing its position as the exclusive interpreter of Community law²⁰.

¹⁶C-69/86, Wünsche Handelsgesellschaft, [1986] ECR 947.

¹⁷E.g. C-152/84, Marshall I, [1986] ECR 723.

¹⁸C-200/90, Dansk Denkavit, [1992] ECR 2217.

¹⁹C-283/81, CILFIT, [1982] ECR 3415. The case concerned the obligation to refer for a preliminary ruling. In addition to the doctrine of *Acte clair* and *Acte éclairé* the Court set out the characteristics of Community law.

Another aspect of interpretation is that the EC Treaty is drafted in general terms. In order to 'flesh out' the Treaty the Court has used a teleological or purposive approach. By doing this, the Court became the *primus motor* of European integration during the period of 'Eurosclerosis'. Nowadays the Court tends to focus on remedies and methods of enforcement of Community rights before the national courts. An explanation to this may be that the Community institutions are more active in developing the substantive law. In addition to this, the growth of case law restricts the margin of discretion for the Court.

The proceedings will explain some of the crucial principles of Community law, which have been laid down by the Court.

²⁰E.g. C-1/91, EEA-agreement, [1991] ECR 6079, where the Court used Art. 219 to confirm that its jurisdiction is exclusive.

3. The Concept of Direct Effect and Direct Applicability

‘Direct effect’ is often confused with ‘direct applicability’. The latter term refers normally to provisions that do not require any national measures for being effective. Concerning regulations, which are directly applicable, there is even a prohibition against national measures²¹. The main distinction relates to the fact that directly effective provisions confer rights, which can be invoked and enforced by individuals before their national courts. Since the Court held that directives could have ‘direct effect’²² this distinction is no longer necessary to draw. A provision can be directly applicable but does not necessarily have to be directly effective; the reverse is also true.

There is however another meaning conferred upon the term ‘direct applicability’. This relates to the way international norms become integrated into the legal systems of the Member States that are signatories to the Treaty.

A common procedure is to use the monist or dualist approach. The monist approach means that once a Treaty is signed, it confers rights and duties to the citizens, which they can plead and have enforced before their national courts.

Some of the Member States of the EU normally adopt the dualist approach. This requires that the provisions have to be implemented into the national legal system before their citizens can invoke them. They are binding on the State only.

In its famous decision from the ‘van Gend en Loos’²³ case, the Court stated that:

‘... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.’

This groundbreaking judgement introduced the concept of ‘direct effect’.

²¹C-34/73, Variola, [1973] ECR 981.

²²C-41/74, Van Duyn, [1974] ECR 1337.

²³C-26/62, van Gend en Loos, [1963] ECR 1, at para. 12.

4. Supremacy of EC Law

The ruling in the ‘van Gend en Loos’ case may have been a kick-start but yet it was only a glimpse of what was to come. Soon the Court declared that EC law takes precedence over national law of any rank²⁴ and whenever it is enacted²⁵.

The implications of supremacy of EC law, i.e. ‘direct effect’, could be predicted long before. Actually as early as in 1964 the Court stated that:

*‘...the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question’*²⁶. [Italics by author]

The constitutional claims of the Court literally took the Member States by complete surprise and they were initially unable to come to terms with the ruling. When the full ramifications began to fall into place, they realised that they just conceivably had spawned a two-headed snake, which threatened to strike at their own sovereignty.

It may seem like much ado about nothing. After all they had to face the facts and take the responsibility of the actions of their own offspring.

The recognition of ‘direct effect’ and supremacy of EC law was made at last. It was reluctant and not without conditions.

These historic events may have implications even in the future. How the rulings were received by some of the Member States will therefore be presented.

When reading the rulings of the highest national courts it is important to bear in mind that supremacy of EC law affects their sovereignty as well. Limiting the state sovereignty means also transfer of jurisdiction. Supremacy of EC law has actually put the Court in a position where it can act as a ‘Constitutional Court of Europe’.

4.1 France

As in many other countries, the judicial system in France is divided into several branches. Therefore it is not surprising that there are two supreme courts. Cour de Cassation is the highest of the ordinary civil courts and Conseil d’Etat is the supreme administrative court.

²⁴C-11/70, Internationale Handelsgesellschaft, [1970] ECR 1125.

²⁵C-106/77, Simmenthal, [1978] ECR 629.

²⁶C-6/64, Costa v. ENEL, [1964] ECR 1141.

Cour de Cassation recognised the supremacy of EC law in 1975. However, it took another 14 years for Conseil d'Etat to do the same. So, due to certain jurisdictional rules, the question was not entirely solved until 1989.

The Conseil d'Etat declared its position in 'Nicolo'²⁷. The chief problem was the principle of the separation of powers. According to the French Constitution only the Conseil Constitutionnel was granted the power to judicial review. Administrative courts in France were not allowed to review the validity of laws. To accept supremacy of EC law would tilt the balance. However, a solution could be found within the foundations of the Constitution itself. Superiority of treaties over statutes was actually stated in its Art. 55. It would be illogical to restrict its sovereignty and at the same time uphold the supremacy of national law.

The judgment of the Conseil d'Etat is very laconic, i.e:

'The rules set out above, laid down by the Act of 7 July 1977, are not incompatible with the clear stipulations of the abovementioned Article 227 (1) of the Treaty of Rome'²⁸.

The underlying motives can be found in the reasoning of its Commissaire, Frydman. It is only after having scrutinized this that we can appreciate the extent of the French recognition.

Mr Frydman does not exclude the possibility of a double judicial review. The provisions must ultimately comply with the French Constitution.

'...the review which the Court [Conseil d'Etat] may be asked to apply to legislation to see that it is compatible with earlier treaties cannot in all cases constitute a genuine review of the *constitutionality* of laws...the question whether this could be described as a review of constitutionality is, in truth, only of interest from the viewpoint of the Constitutional Council itself, whose power it determines'²⁹.

This should be read in conjunction with:

'...the Court of Justice of the European Communities...has not hesitated for its part to affirm the obligation to refuse to apply in any situation laws which are contrary to community measures...I do not think you can follow the European Court in this judge-made law which, in truth, seems to me at least open to objection. Were you to do so, you would tie yourself to a supranational way of thinking which is difficult to justify, to which the Treaty of Rome does not subscribe expressly and which would quite certainly render the Treaty unconstitutional, however it may be regarded in the political context'³⁰.

It is evident that the implications of these statements could undermine the principle of supremacy of EC law. So, although the principle was recognised it was not made on a solid ground.

4.2 Germany

²⁷ Decision of 20 October 1989, Recueil Dalloz Sirey 1990:135. See also (57) CML Rep. 1990, p. 173-192.

²⁸ See (57) CML Rep. 1990, p. 173-192, at p. 191.

²⁹ Ibid, at p. 179-180.

³⁰ Ibid, at p. 190.

In Germany, the supremacy of EC law was attacked from a different angle. Already from the outset it was substantive issues that concerned the Bundesverfassungsgericht, the Federal Constitutional Court. Especially the undefined status of fundamental rights within Community law. Although Article 24 of the German Constitution allows transfer of powers they may never result in a contravention of the basic principles of the Constitution itself. This position was given expression in a ruling in 1974.

However, the Court's recognition of fundamental right as an integral part of Community law allowed the Bundesverfassungsgericht to give the following ruling:

'In view of these developments, it must be held that, so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution'³¹.

This case and the previous case will from here on be referred to as the 'Solange'-cases. The principle of supremacy of EC law is recognised *so long as* the provisions of Community law fulfil the requirements of the German Constitution.

The Constitutional courts in France and Germany upheld the fiction that the national courts were transposed to servants. In effect, they were still the masters.

The symbolic value of this should not be underestimated. It may have increased the credibility and acceptance of the Community as a whole.

In fact the principle of supremacy of EC law has enormous implications. Every national court is now in a position where it may set aside national provisions that are contravening Community law under less stringent conditions than their own constitution provides for else. This fact may require some changes within the Constitutions of the Member States.

³¹ For further comments to this and the previous case, see Gráinne de Búrca & Paul Craig, 'EC law: text, cases and materials', Oxford, 1997, at p. 258-260.

5. Horizontal Direct Effect

In following sections focus will be placed upon directives. However, the EC law consists of other binding provisions as well. The treatment of these compared to directives is of utmost difference. This has resulted in the 'horizontal direct effect' of the concerned provisions.

At this stage, only the Court's arguments will be examined.

In 'Defrenne'³², the Court conferred 'horizontal direct effect' to Art. 119. The Court began by stating that the Community is not purely an economic union. It is also intended to strengthen the rights of its citizens.

If the provisions were not uniformly applicable, some members would score a competitive advantage over other Member States.

The fact that the Article only expressly refers to the Member States did not deter the Court. The effectiveness of the provision requires that individuals should be able to enforce their rights directly.

It is irrelevant whether the defendant is a public or private body.

Another field where Treaty articles have 'horizontal direct effect' is in matters of competition. For instance the application of Art. 85 (1) produces such effects³³.

It is quite clear, especially with the former case in mind that the Court focuses on the content of the provision rather than the addressee.

The same could also be applied to general principles of law.³⁴ The Court has held that Member States are bound by these principles when they implement Community legislation³⁵.

This implies that provisions within directives, which merely express such principles, are capable of 'having horizontal direct effect'.

It follows from 'Heylens'³⁶ that decisions from an authority, whatever its kind, are subordinate to the right of judicial review. In that particular case, the principle was enshrined in a directive.

In addition to this, one can see that the ruling in 'Defrenne' is clearly based on the principle of non-discrimination.

³² C-43/75, Defrenne II, [1976] ECR 455.

³³ C-161/84, Pronuptia, [1986] ECR 353.

³⁴ See also Peter Oliver, 'General Principles of Community Law and Horizontal Effect', *EuZW* 1993, p. 393.

³⁵ C-5/88, Wachauf, [1989] ECR 2609.

³⁶ C-222/86, Heylens, [1987] ECR 4097.

However, the question remains whether these principles can be invoked on their own or if they have to be enshrined in specific directives.

It is a balancing act between the significance of the fundamental right in question and the constitutional traditions of the Member States.

6. Direct Effect of Directives

As a preliminary, attention will be drawn to the term ‘direct effect of directives’. A directive as a whole does not normally fulfil the requirements for being directly effective. It is the particular provisions of a directive that are held to be directly effective.

The underlying objective for conferring ‘direct effect’ to directives is to promote integration and strengthen the legal protection of the citizens. The Court has used different arguments to defend this theory. The different justifications have altered the concept of ‘direct effect’.

A brief and at this stage only descriptive outline of the relevant cases will illustrate this.

6.1 ‘Grad’ and ‘van Duyn’

In ‘Grad’³⁷ the Court held that a third party, i.e. the citizens, could invoke decisions, addressed to a Member State, against the state. To support its conclusion the Court stated as follows:

‘It would be incompatible with the binding effect attributed to decisions by Art. 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision... the effectiveness “l’effet utile” of such a measure would be weakened if the nationals of that State could not invoke it in the courts’³⁸.

This was combined with an analogous reading of Art. 177. By that, the Court deduced that individuals could invoke all acts of the institutions before their national courts.

From this judgement it was a short step to confirm that even directives could be directly effective. In 1974³⁹ the Court proceeded on the paved way. Yvonne van Duyn, a Dutch national, was allowed to invoke a directive against the Home Office in the United Kingdom. The Court repeated its arguments used in ‘Grad’. However the Court was a bit cautious. As a back-up support the Court pointed out that the obligation imposed on the Member States derogates from one of the fundamental principles of the Treaty⁴⁰.

6.2 ‘Ratti’, ‘Becker’ and ‘Marshall’

³⁷C-9/70, Grad, [1970] ECR 825.

³⁸Ibid, p. 837, para. 5.

³⁹C-41/74, Van Duyn, [1974] ECR 1337.

⁴⁰Ibid, p. 1348, para. 13.

In ‘Ratti’⁴¹ the Court made some changes for the theoretical base of ‘direct effect’. They referred to Art. 189 and the principle of effectiveness but longer took any recourse to Art. 177. Instead they introduced the principle of *estoppel* in favour of ‘direct effect’.

‘Consequently a Member State which has not adopted the implementing measure required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entail’⁴².

This approach was later confirmed in ‘Becker’⁴³. In this case the Court clearly sets out the criteria for ‘direct effect’. First of all, the period of implementation must have elapsed. A directive intended to create rights for individuals is then directly effective if its subject matter is unconditional and clearly precise.

Despite a massive impact, the ‘direct effect’ proved to have certain shortcomings. In ‘Marshall’⁴⁴ the Court ruled that:

‘.. a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual’⁴⁵.

The Courts denial to give directives ‘horizontal direct effect’ was primarily based on a literal reading of Art. 189.

The principle of *estoppel* proved to be a useful tool for the Court when strengthening the impact of ‘direct effect’.

By interpreting the concept of ‘State’ in a functional manner it soon encapsulated a wide range of bodies.

‘.. a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event’⁴⁶.

Later on, the cases will be examined in the light of ‘horizontal direct effect of directives’.

⁴¹ C-148/78, Ratti, [1979] ECR 1629.

⁴² Ibid, p. 1642, para. 22.

⁴³ C-8/81, Becker, [1982] ECR 53.

⁴⁴ C-152/84, Marshall, [1986] ECR 723.

⁴⁵ Ibid, p. 749, para. 48.

⁴⁶ C-188/89, Foster, [1990] ECR 3313.

7. Indirect Effect of Directives

'Indirect effect of directives' has a narrower but yet broader scope than 'direct effect'. Its scope is narrow since it only affects the interpretation of national legislation. This restriction makes it dependent upon national provisions. Another cause that makes it narrow is its very nature. Since it affects interpretation it is only one factor, albeit important, among others that have to be considered by the national judges.

In another sense it is broader. Unlike 'direct effect of directives' it is not restricted to vertical relations. It is capable of producing horizontal effect.

The cases will be dealt with in a rather descriptive manner. As with the section above the analysis comes later on.

7.1 'Von Colson' and 'Harz'

The setbacks of 'direct effect of directives' forced the Court to introduce the obligation of construction. The national judges became aware of this phenomenon in 1984. The reasons and content of the obligation was set out in 'von Colson'⁴⁷. The obligation was derogated from the binding character of directives combined with the principle of loyalty according to Art. 5. This principle encompasses the national courts as well.

Concerning the content of the obligation, the Court stated as follows:

'...in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189'⁴⁸.

This should be read in conjunction with:

'It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law'⁴⁹.

These two paragraphs suggest that the obligation encompasses only national implementing measures.

What the Court was faced with in 'von Colson' was a vertical relation. That means that it was an individual relying on a directive against an emanation of the state. Quite soon they had to deal with the horizontal aspects of

⁴⁷ C-14/83, von Colson, [1984] ECR 1891.

⁴⁸ Ibid, p. 1909, para. 26.

⁴⁹ Ibid, p. 1909, para. 28.

‘indirect effect’. In ‘Harz’⁵⁰ both the litigant and the defendant were private parties. The Court repeated its arguments in ‘von Colson’ and added an interesting aspect.

‘Although that provision [Art. 189, § 3] leaves Member States free to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation, imposed on all the Member States to which the directive is addressed, to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues’⁵¹.

What seems to underlie this is a keenness of the Court to safeguard the uniform application and the principle of effectiveness.

7.2 From ‘Kolpinghuis Nijmegen’ to ‘Arcaro’

For a certain period of time there was an uncertainty concerning the ambit of national measures which should be interpreted. Different opinions were also expressed within the Court.

Sir Gordon Slynn, Advocate General in ‘Marshall’, was reluctant to give ‘indirect effect’ a wide interpretation. He emphasizes the absurdities in construing pre-existing statutes whether they are from 1975 or 1875. He concludes that Community law does not impose such an obligation to the national courts⁵².

On the other side of the road stands Walter van Gerven. He ventilated his ideas as the Advocate General in ‘Barber’⁵³.

Mr van Gerven was of the opinion that ‘indirect effect’ affects all national legislation. To support his conclusion he refers to the supremacy of EC law. He also draws a distinction between interpretation and application. The national courts apply national law but interpret it according to EC law.

Before the Court’s solution to the raised problem will be delivered another aspect of the ‘indirect effect’ will be attached.

In ‘Kolpinghuis Nijmegen’⁵⁴ the Court set out certain limitations to the ‘indirect effect’.

‘...that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity’⁵⁵.

What attracted more interest is the following paragraph:

‘... it makes no difference to the answers set out above if on the material date the period which the Member State had in which to adapt national law had not yet expired’⁵⁶.

⁵⁰ C-79/83, Harz, [1984] ECR 1921.

⁵¹ Ibid, p. 1939, para. 15.

⁵² C-152/84, Marshall, [1986] ECR 723, at p. 733.

⁵³ C-262/88, Barber, [1990] ECR 1889, at p. 1936.

⁵⁴ C-80/86, Kolpinghuis Nijmegen, [1987] ECR 3969.

⁵⁵ Ibid, p. 3986, para. 13.

⁵⁶ Ibid, p. 3987, para. 16.

Important to bear in mind is that the question arose during a criminal proceeding. None the less the meaning of this has caused some debate⁵⁷. Paul Craig seems to be of the opinion that ‘indirect effect’ starts as soon as the directive has been adopted⁵⁸. While Gráinne de Búrca holds that ‘indirect effect’ starts after the period of expiry. I am in favour of the latter’s view, due to the principle of legal certainty. The most plausible meaning of the Court’s answer is only discernible if it is placed in its context. The ruling means then, that ‘indirect effect’ can never be used to aggravate the liability in criminal law.

Returning to the question set out above concerning the extent of the obligation. In ‘Marleasing’⁵⁹ there was a dispute between two private parties. The litigant was seeking to nullify a contract according to Spanish law, which was adopted before the directive. The defendant relied on an unimplemented directive in his defence.

The Court stated that:

‘...in applying national law whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible... It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question’⁶⁰.

From now on it is clear that all national legislation is affected by the ‘indirect effect’. The obligation for the national courts is quite severe. Although it is restricted to ‘as far as possible’ the Court none the less holds that they ‘must’ interpret their law in a certain way. In fact this ruling is very near to the application of national law rather than an interpretation of EC law.

The ruling attracted much criticism and had to be clarified. This was done in ‘Arcaro’⁶¹, a case similar to ‘Kolpinghuis Nijmegen’. Both were criminal proceedings and the Court rejected the recourse to unimplemented directives, i.e. when it comes to the detriment of the defendant. However, the Court expressed itself somewhat differently this time.

‘when interpreting the relevant rules of its national law reaches a limit where such an interpretation leads to an imposition on an individual of an obligation laid down by a directive which has not been transposed or, more

⁵⁷Paul Craig, *Directives: ‘Direct Effect, Indirect Effect and the Construction of National Legislation’*, (22) *EL Rev.* 1997, p. 519-38, at p. 525. For the opposite view see Gráinne de Búrca, *‘Giving Effect to European Community Directives’*, (55) *ML Rev.* 1992, p. 215-240, at p. 218. For further references see Sacha Prechal, *‘Directives in EC law: a study of directives and their enforcement in national courts’*, Oxford, 1995, at p. 23.

⁵⁸ Takis Trimidas supports this interpretation as well. See his article, *‘Horizontal effect of directives: a missed opportunity?’* (19) *EL Rev.* 1994, p. 621-36, at p. 624.

⁵⁹ C-106/89, *Marleasing*, [1990] ECR 4135.

⁶⁰ *Ibid.*, p. 4159, paras. 8 and 9.

⁶¹ C-168/95, *Arcaro*, [1996] ECR 4705.

especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law⁶².

This ruling can be interpreted in many ways⁶³. As with 'Harz' the most plausible reading is that the Court does not mean that any obligation can be imposed on an individual.

These cases show that the 'indirect effect' affects situations, which are horizontal and vertical, but excludes the reversed vertical effect. Substantive law as well as procedural rules⁶⁴ can be affected.

In the light of 'horizontal direct effect of directives', some of the cases will be dealt with once again.

⁶² Ibid, p. 4730, para. 42.

⁶³ Examples of different interpretations can be found in Paul Craig's article, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', (22) EL Rev. 1997, p. 519-38, at p. 527.

⁶⁴ E.g. C-208/90, Emmott, [1991] ECR 4269.

8. Damages

Both the ‘direct effect’ and ‘indirect effect’ have certain shortcomings. For instance there are not always any national measures that can be interpreted in the light of the relevant Community provisions. This is especially troublesome during litigation between individuals.

First of all one has to know that there are three major legal families within the EU: the Romanistic, the Germanistic and the common law⁶⁵. These families have different legal traditions and their tort law is different as well.

I will exemplify this by illustrating two English cases.

The law of tort in the common law families is based on particular interests that are worthy of protection. In ‘Garden Cottage Foods’⁶⁶, a private company versus an extension of the State, the House of Lords awarded damages according to a breach of a statutory duty. Most likely the case was unique, at the time it was delivered, since it conferred ‘horizontal direct effect’ to Art. 86 and added the possibility of claiming damages.

However in a subsequent case, the English judiciary took a different view. In ‘Bourgoin’⁶⁷, a private company versus one of the United Kingdom’s ministries, the Court of Appeal held that a breach of Art. 30 was to be considered as misfeasance in public office. This makes the awarding of damages conditional upon fault of the Member State.

My thesis is not the place to do a comparative view⁶⁸ but it is clear that the legal systems of the Member State had different solutions. This is so, even within the same national legal order.

8.1 ‘Francovich’

In ‘Francovich’⁶⁹ the Italian government had failed to implement a directive. The directive concerned the protection of employees in the event of insolvency of the employer. It clearly pointed out the beneficiaries but it did not identify the responsible person for unpaid claims. Since its provisions were not unconditional it could not be relied upon directly against the State. However, the directive was clearly intended to confer rights to individuals.

⁶⁵ The following lines are based on the article of Walter van Gerven, ‘Bridging the Gap between Community and Member State Laws: towards a principle of homogeneity in the field of legal remedies?’, (32) CML Rev. 1995, p. 679-702.

⁶⁶ Garden Cottage Foods Ltd v Milk Marketing Board, [1984] A.C. p. 130.

⁶⁷ Bourgoin S.A. v Ministry of Agriculture, [1986] Q.B. p.716.

⁶⁸ For further reading see, Schockweiler, ‘Le régime de la responsabilité extra-contractuelle du fait d’actes juridiques dans la Communauté européenne’, (27) RTDE 1990, p. 30-51.

⁶⁹ C-9/90, Francovich, [1991] ECR 5357.

The Court took this opportunity to lay down another principle of Community law. It held that individuals could claim damages against the State. They motivated this invention⁷⁰ by referring to supremacy of EC law, the principle of effectiveness and the principle of loyalty according to Art. 5. Thus, they concluded that this possibility was inherent in the system of the Treaty⁷¹.

The Court set out conditions for State liability and minimum requirements concerning the extent of damages.

'The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties'⁷².

The conditions and extent of state liability were fine-tuned in 'Brasserie du Pêcheur' and 'Factortame III'⁷³.

8.2 'Brasserie du Pêcheur' and 'Factortame III'

The factual conditions of these cases were somewhat different to those of 'Francovich'.

Would the principle of state liability be applicable to legislative measures that infringe Community law?

In principle the Court confined itself to repeating its arguments from 'Francovich'. Therefore it is worth taking a closer look at the opinion of the Advocate General, Tesouro. It contains extensively and well-reasoned arguments. In addition to the other aspects, he highlights what damages are about, i.e. securing the protection of individuals and proper implementation of Community law⁷⁴.

The Court set out the following criteria for obtaining damages:

'the rule of law infringed must intend to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link.'⁷⁵

The crucial point here is what constitutes 'sufficiently serious'. Contrary to other occasions the Court was very particular in explaining the content of this term.

'... the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or

⁷⁰ If you consider the arguments used in 'Francovich' and 'Brasserie du Pêcheur' it is not really an invention.

⁷¹ Ibid fn 62, p. 5414, para. 35.

⁷² Ibid fn 62, p. 5415, para. 40.

⁷³ Joined cases, C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame III, [1996] ECR 1029.

⁷⁴ Ibid, p. 1080.

⁷⁵ Ibid, p. 1149, para. 51.

inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practises contrary to Community law. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgement finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement⁷⁶.

A necessary condition, albeit not sufficient in itself, is that the infringed provisions are directly effective. Secondly, if damages are going to be awarded or not is dependent of the Member State's margin of discretion. Lastly, clear cases are those which fall under the doctrine of *Acte clair* and *Acte éclairé*⁷⁷.

The period, for which reparation may be awarded, corresponds to the criteria mentioned above.

Although the cited section may suggest the opposite, liability is not conditional upon fault⁷⁸.

Concerning the national procedural rules the Court set a minimum level of adequacy that they have to attain. They shall be treated similarly as claims based on domestic law and it shall not be impossible or excessively difficult to obtain reparation. The Court can of course scrutinize these later on.

Finally, damages awarding loss of profit are not excluded⁷⁹.

Do these rulings mean that we have equal judicial protection within the Member States?

The answer will most likely be negative. The Court set out only minimum guarantees.

8.3 The Reception of the Preliminary Rulings in the National Courts

Let us see what happened to 'Brasserie du Pêcheur' in the German court.

The brought proceedings of the company related to the prohibition of certain imports. Two national measures were contested: firstly, the prohibition of the designation 'Bier'; secondly, the prohibition of additives. Due to this, the company had to refrain from exporting beer to Germany during the period 1981-87. The first prohibition was clearly contrary to the principle of mutual recognition. However, the latter could be justified as an exemption according to Art. 36. The Court ruled on the matter in 1987 and held that prohibition to be contrary to Art. 36. Until this point it could not constitute a 'sufficiently serious' breach. Therefore it had to be determined what constituted the causal link. The Bundesgerichtshof expressly stated that it was applying German rules of causation and could not award any damages.

⁷⁶ Ibid, p. 1150, paras. 55-57.

⁷⁷ See, C-283/81, CILFIT, [1982] ECR 3415.

⁷⁸ Joined cases, C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame III, [1996] ECR 1029, at p. 1155, para. 80.

⁷⁹ Ibid, p. 1159, para. 93.

The outcome of the case may not be that surprisingly. It could already be found in the Opinion of the Advocate General, Tesouro⁸⁰.

It is also rather ironic that no financial compensation was awarded to the litigant in the 'Francovich' case either.

There is another aspect of damages, hitherto not mentioned.

Ought a Community standard, concerning damages between private parties, be introduced?

Advocate General van Gerven was clearly in favour of this. In his Opinion in 'Banks'⁸¹ he stated that this was the logical conclusion of 'horizontal direct effect'. He also referred to the success of private enforcement in the United States concerning federal anti-trust rules. Unfortunately the national court could not rule on the matter. The Court held that the concerned questions, relating to decisions in competition-matters, were solely within the competence of the Commission⁸².

⁸⁰ Ibid, p. 1126.

⁸¹ C-128/92, Banks, [1994] ECR 1209, at p. 1250.

⁸² Ibid, p. 1276, para. 23.

9. Horizontal Direct Effect of Directives

As have been stated earlier, the underlying objective for conferring ‘direct effect’ to directives is to promote integration and strengthen the legal protection of the citizens. Conferring ‘horizontal direct effect’ to directives would hardly contravene this objective.

The subjects of EC law live in one Europe but none the less with different applications. The time has come for the Court to reconsider its position concerning directives. This would fit in well with the Court’s recent emphasis on effective remedies and ascertaining the judicial protection.

9.1 Private Enforcement

In 1978 the Commission stated that it intended to take legal action against every breach of the Treaties⁸³. If the objectives had been properly pursued it would have increased the protection of the citizens’ Community rights. On the other hand it may have diminished the awareness of EC law.

However, an ever-increasing workload prevented the Commission from fulfilling its intentions. Especially troublesome was the enforcement of competition rules, which forced the Commission to change its policy. This was done with its ‘Notice on Co-operation between National Courts and the Commission in applying Articles 85 and 86 EEC’⁸⁴. Thus the Commission made clear that it intended to give priority to cases and questions with a Community interest. This was recognised by the Court in ‘Automec’⁸⁵, where it held that:

‘...the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it under Community law’⁸⁶.

This may have contributed to the fact that the development of EC law of today rests on private enforcement⁸⁷. This is done by litigation in the national courts, which co-operate with the Court according to Art. 177.

⁸³See Carl Michael Quitzow, ‘Private Enforcement: EG-rätten – en studie av medlemsstaternas skadeståndsansvar i samband med överträdelse av gemenskapsregler’, *Juridisk Tidskrift* 1996/97:3, p 682-700, at p. 695.

⁸⁴O.J. 1993, C 39/6.

⁸⁵T-24/90, *Automec*, [1992] ECR II 2223.

⁸⁶*Ibid*, p. 2275, para. 77.

⁸⁷The Community rules on public procurement contain directives, which expressly rely on private enforcement. For a comprehensive overview see Adrian Brown, ‘The extension of the Community public procurement rules to utilities’, (30) *CML Rev.* 1993, p. 721-748.

The system of preliminary ruling has a chief objective, i.e. to ensure uniform application of EC law. This purpose was expressed in ‘Rheinmülen-Düsseldorf’⁸⁸:

‘Article 177 is essential for the preservation of the Community character of law established by the Treaty and has the object of ensuring in all circumstances the law is the same in all States of the Community’.

The Court interprets while the national courts apply Community law. Most definitely this has increased the awareness of EC law among the citizens of the Union.

In the context of this it is unfortunate that individuals are not entrusted to enforce unimplemented directives against each other, especially since directives constitute the main tool in the process of harmonization of the Member States’ laws.

9.2 Arguments for Introducing Horizontal Direct Effect of Directives

The rejection of the Court is primarily based on a literal interpretation of Art. 189. In ‘El Corte Inglés’ the Court repeated its argument from ‘Faccini Dori’.

‘The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations’⁸⁹.

This approach seems to be inconsistent with the Court’s previous case law.

Let us see what the conditions for ‘direct effect of directives’ are.

The subject matter must be unconditional and clearly precise. In addition to this, the relevant provisions must be intended to create rights for individuals. These rights correspond to certain obligations.

Since ‘Ratti’⁹⁰, the theoretical base for ‘direct effect’ has been the principle of effectiveness and the principle of *estoppel*. The application of the latter principle has been accompanied by a broad construction of the concept of ‘State’. From that on the obligation on the Member States - of not take advantage of their own failure - constituted the individuals’ rights. However, the construction of ‘State’ has made it impossible to derogate any responsibilities on the subject, which is held to be responsible. Thus, the Court’s basic premise has been displaced by a rights-obligations relationship.

⁸⁸C-166/73, Rheinmülen-Düsseldorf, [1974] ECR 33.

⁸⁹ C-192/94, El Corte Inglés, [1996] ECR 1281, at para. 17.

⁹⁰C-148/78, Ratti, [1979] ECR 1629.

The right of one subject of Community law is correlative to an obligation on another. The central question is therefore whether directives are intended to create rights. Once this has been established the logical conclusion must then be ‘horizontal direct effect of directives’. However, a different approach could be taken. Sacha Prechal⁹¹ argues that the existence of a right and the way it is protected are two separate issues. He distinguishes between content and quality of a provision. Thus, the former relates to the creation of rights while the latter relates to ‘direct effect’.

This is a rather theoretical distinction with absurd consequences. A more pragmatic approach suggests that rights have to be legally enforceable.

If this is true, focus must be put on the content of the provisions rather than the addressee. The premises laid down in ‘Defrenne II’ would then also apply to directives. In this particular case the Court laid down the principles for conferring ‘horizontal direct effect’ to provisions of the Treaty.

‘Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties laid down.

The effectiveness of this provision can not be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.

In fact, since Article 119 is mandatory in nature, the prohibition on discrimination, between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as contracts between individuals⁹².

The Court’s purposive interpretation in this case is not exceptional. In fact it is very seldom that only the wording of a provision put restraints on the Court⁹³.

What worries the Court may be that the distinction between regulations and directives disappears.

This is not true since the distinguishing features will remain. Firstly, directives opposed to regulations do not necessarily have to encompass all Member States. Secondly, another essential characteristic of directives is that they leave the addressees free in their choice of form and methods of implementation. Lastly, the ‘horizontal direct effect’ of a directive is conditional upon the date of expiry. Until that time, the Member States do not have to adopt any implementing measures⁹⁴.

⁹¹ See Sacha Prechal, ‘Directives in EC law a study of directives and their enforcement in national courts’, Oxford, 1995, at p. 129.

⁹² C-43/75, Defrenne II, [1976] ECR 455, at paras. 31, 33 and 39.

⁹³ Another illustrative example is C-70/88, European Parliament v Council, [1990] ECR 2041, where the Court granted the Parliament standing according to Art. 173 although it was not mentioned in the provision.

⁹⁴ In a recent judgement the Court has held that the Member States must abstain from introducing measures, which can compromise the directive’s prescribed result. See, C-129/96, Wallonie. It has not been reported yet to the ECR but it can be found on the internet at [<http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en>]. This case can be compared with the Opinion of the Advocate General, Mancini, in C-30/85, Teuling, [1987] ECR 2497, where he expressed similar ideas.

The Court has initiated the principle of State liability as supplementary to 'direct effect' and 'indirect effect'. It is indeed useful but it has also certain shortcomings. Although the Court was rather specific when setting the conditions for liability, the principle of non-discrimination and minimum criteria of effectiveness govern the extent of damages. Thus, the legal protection of the Union's citizens will differ. Another aspect is that the criteria for obtaining damages are not identical to those of 'direct effect'. Two proceedings might also be required for obtaining damages. This could hardly constitute an effective judicial protection of the subjects of Community law.

It follows from this that the effective protection of Community rights must be guaranteed unless overriding principles require otherwise. For instance, fundamental principles, such as legal certainty and the protection of legitimate interests, must be upheld.

Concerning legal certainty, it is useful to have the implications of 'indirect effect' in mind. It is uncertain when the obligation of construction starts and its content is unclear as well.

It is doubtful whether the national courts can deduce the substance of 'indirect effect' from the Court's rulings, especially in the context of the rulings in 'Arcaro' and 'Marleasing'. Even if they would know the content of their obligation the outcome in the individual case is not clear. The obligation is viz. conditional upon 'as far as possible'.

What are the implications of this?

To stretch the limitations imposed on normal methods of interpretation could barely strengthen the legal protection of the Union's citizen.

A fundamental requirement of Community legislation is that it must be clear and predictable for those who are subject to it. Concerning national implementing measures it would not be legitimate to expect such domestic legislation to not comply with EC law. However, the opposite view could be taken concerning previous statutes.

Conferring 'horizontal direct effect to directives' would be a much better solution. Awareness of EC law has increased already and directives have to be published now, according to Art. 191. Thus the national courts can allow private parties to enforce rights that are sufficiently clear and precise. This effectively eases their burden.

Actually this has already been done in Germany⁹⁵. The case in question has been criticized and therefore it probably does not represent the present state of law in Germany. None the less, it is interesting to see that 'horizontal direct effect of directives' has been applied in the national courts.

⁹⁵Unmittelbare Anwendungen der EG-Richtlinie 85/577 in Spanien, OLG Celle, Urteil von 28. 8. 1990 - 20 U 85/89. See also EuZW, 1990, p. 550-552.

The principle of 'horizontal direct effect to directives' is a natural emanation from the principle of supremacy of EC law and 'direct effect'. A judgment of this kind would of course only have prospective effects. It ought to be restricted only in reversed vertical relations. This correction constitutes the right application of the principle of *estoppel*.

10. The Advocate Generals

The majority within the Court has never explicitly conferred ‘horizontal direct effect’ to directives. Since the Court operates in a collegial manner you will never find any dissenting opinions. The judgments are unanimous and anonymous.

Although the denial in principle its rulings have none the less had implications with a far-reaching ambit.

In this section, the activities beyond the curtain will be examined that is to say the Opinions of the General Advocates.

The role of the Advocate General is to provide the Court with a suggestion for a ruling. This is preceded by a thorough examination of the state of law. When the Advocate General declares his Opinion, he does it freely and extensively. It is not unusual that it contains replies, which are of *obiter dicta* character. Therefore it is very useful to attach some attention to the Opinions of the General Advocates. They show that the approach to ‘horizontal direct effect of directives’ differs widely within the Court.

The cases are chosen from the angle of this thesis.

10.1 Sir Gordon Slynn

The Opinion in ‘Marshall’⁹⁶ by the Advocate General, Sir Gordon Slynn, is clearly reluctant to introduce ‘horizontal direct effect of directives’.

His opinion is marked by its focus on obligations. These can only be imposed on the Member States since they are the only addressees.

He is also concerned by the fact that directives, contrary to regulations, do not formally have to be published.

What underlies his considerations may be the legal protection of citizens. He did not want to impose obligations on individuals on grounds of legal certainty. Nor did the Court. It based its ruling on a literal interpretation of Art. 189. Thus it concluded that directives do not impose obligations on individuals.

It went on by elaborating the concept of ‘State’. According to the principle of *estoppel*, the directive could be invoked against certain emanations of the State.

However there is a flip side to this coin; obligations are correspondent to rights. This means that the individuals have their rights circumscribed.

⁹⁶ C-152/84, Marshall, [1986] ECR 723, at p. 734.

10.2 Walter van Gerven

The outcome of the above mentioned case is to be compared with the Opinion of the Advocate General, van Gerven, in ‘Barber’⁹⁷. The parties in this litigation were individuals.

The reasoning starts by rephrasing the question.

May an individual take advantage of the Member State’s failure to comply with a directive?

In order to answer that, he examines the Court’s elaboration of the principle of *estoppel*. The broad application of the concept of ‘State’ has made it hard to derogate the failure to the body, which is none the less held responsible. The Court has in fact conferred third-party effects to directives.

This means that the provisions impose obligations on others, although they are not contractually parties.

Mr van Gerven argues in favour of extending the principle of *estoppel* to apply in general. The effect of this is a prohibition against taking advantage of another’s default. Applied to this case, it means that ‘the Guardian’ should not be allowed to deny Barber to benefit from his Community rights.

However, he did not suggest this solution for the case.

He explains this by referring to the Court’s case law. The principle of *estoppel* has been restricted to situations where the State has a certain degree of responsibility. Although the State tolerated and conferred tax advantages to the concerned redundancy scheme, it was not conditional upon any outright discriminatory measures. Thus, van Gerven distinguishes this case from ‘Marshall’⁹⁸.

On later occasions van Gerven has confirmed his position. I will present his main arguments for introducing ‘horizontal direct effect of directives’. Firstly, he is opposed to the broad construction of ‘State’ and the related use of the principle of *estoppel*. It is a solution, which is unsustainable from a theoretical point of view. In addition, this leads to competitive disadvantages between the enterprises. Secondly, the obligation to interpret national legislation in conformity with Community law may stir the limitations of judicial powers within the Member States. Lastly, the possibility to obtain damages from the State is not enough. This could create a climate whereby Member States can no longer maintain an equal level of competitive potential with one another.

⁹⁷ C-262/88, Barber, [1990] ECR 1889, at p. 1938.

⁹⁸ C-152/84, Marshall, [1986] ECR 723, at p. 733.

Since van Gerven has written some well reasoned articles on this topic⁹⁹ he should not be discredited. However, the Opinions of two other Advocates Generals deserve, on their own merits, to be presented.

10.3 Francis G. Jacobs

In 'Vaneetveld'¹⁰⁰ Advocate General, Mr Jacobs, took the opportunity to express his views on the matter under consideration.

The Opinion contains a thorough evaluation of the arguments that the Court had used in previous rulings. He starts with 'Marshall'¹⁰¹, where the Court exclusively relied on the wording of Art. 189 when not conferring 'horizontal direct effect to directives'.

First of all, Jacobs criticized this method of interpretation. Normally, other criteria are decisive as well, e.g. the provisions have to be placed in their context and construed in the light of the Treaty as a whole. Secondly, he argued that the wording of Art. 189 does not exclude that obligations could be imposed on others besides the Member States. Such an interpretation was made in 'Defrenne'¹⁰², where 'horizontal direct effect' was conferred to Art. 119.

The distinction between directives and regulations would still exist. A directive has to be implemented and its effects will be obtained first after the transitional period has expired.

Jacobs agrees with van Gerven that the construction of 'State' has undermined the principle of *estoppel*.

Further, the obligation of construction that is imposed on the national courts could threaten the legal certainty of individuals.

Jacobs agrees also with van Gerven that damages are insufficient, but on different grounds. In order to facilitate that citizens will benefit from their Community rights, the Court has recently put emphasis on the need of effective remedies. The enforcement of unimplemented directives can not rely on damages only. This may require two proceedings and would be inconsistent with the Court's approach, concerning effective remedies.

Jacobs concludes that 'horizontal direct effect of directives' ought to be introduced but excludes them in reversed vertical relations. This means that the State can not use them against individuals neither in civil nor in penal actions.

⁹⁹ Walter van Gerven, 'The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords', in Deirdre Curtin & Ton Heukels (ed.), *Institutional Dynamics of European Integration*, 1994, p 335-353 and 'Bridging the Gap between Community and Member State Laws: towards a principle of homogeneity in the field of legal remedies?', (32) CML Rev. 1995, p. 679-702.

¹⁰⁰ C-316/93, Vaneetveld, [1994] ECR 763, at p. 770.

¹⁰¹ C-152/84, Marshall, [1986] ECR 723.

¹⁰² C-43/75, Defrenne II, [1976] ECR 455.

10.4 Carl O. Lenz

'Faccini Dori'¹⁰³ provided Advocate General, Mr Lenz, the opportunity to express himself.

I consider his Opinion to be the most extensively and well-reasoned thus far. His main argument is that the denial to confer 'horizontal direct effect to directives' creates competitive inequalities. Individuals who comply with Community law ought not to be disadvantaged.

Mr Lenz elaborates the principle of prohibition against discrimination. The rules, which an individual is subject to, change whether the contractual party is to be subordinated under the concept of 'State' or not.

He disapproves of this - in fact, he finds it to be inconsistent with the above set principle. The same reasoning could be applied analogously to the situations between the Member States, especially when you have the completion of the Internal Market in view. He emphasizes this by referring to the introduction of Union citizenship¹⁰⁴.

Art. 189 does not constitute a problem according to Lenz. The obligation on the Member States to achieve the results starts with the adoption of the directive. Until the time of expiry, they remain at liberty to choose their form and methods of implementation. It is only after the transitional time that the directives can be invoked in horizontal relations. Thus, the distinction between regulations and directives can be upheld.

The main obstacle to Lenz is the objections raised on the rule of law. A condition for imposing obligations on individuals is that they must be published in a constitutive manner. The 'Maastricht Treaty' resolved this problem since it requires directives to be published in the Official Journal of the Community¹⁰⁵. Considering the rulings in 'Marleasing' and 'Foster' this evolution would be beneficial for the sake of legal certainty.

Lenz sets only one limit to 'the horizontal direct effect to directives'. He proposes that the judgment should be temporally limited.

That was not necessary, neither were the other arguments.

The Court was still stuck in its old tracks around Art. 189. I will quote the Court in verbatim:

'The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'¹⁰⁶.

¹⁰³ C-91/92, Faccini Dori, [1994] ECR 3325, at p. 3339.

¹⁰⁴ This was introduced with the 'Maastricht Treaty', Art. B.

¹⁰⁵ Art. 191.

¹⁰⁶ C-91/92, Faccini Dori, [1994] ECR 3325, at p. 3357, para. 24.

This ruling is the latest whereby the General Advocates have properly scrutinized the issue of 'the horizontal direct effect to directives'.

Had the affirmatives hit their heads on the wall with the ruling in 'Faccini Dori'?

In order to reply to that question, the rulings that were to come will be examined.

11. Some recent Cases

As far as directives are concerned, the delimitation between EC law and national law has traditionally been that the former sets out the substantive rules and the latter is free to choose form and methods of implementation. However, the enforcement of Community rights may be dependent on procedural rules as well. Unsatisfactory results from the national courts have forced the Court to intervene. In order to promote uniform application of Community law and ensure the effectiveness it has expropriated some of the national competence¹⁰⁷. In 'Pafitis'¹⁰⁸ this cause of action produced odd consequences.

11.1 'Pafitis'

The merits of the case were as follows:

In the beginning of the Eighties' a bank in Greece was in trouble. Its capital was eroded and it risked having its license withdrawn, the consequence of which would probably have been liquidation. Due to this, the bank was put under supervision of an administrator. He was appointed by the State and was vested with all the powers and competencies of the organs of the bank. He, or the administrators jointly, had exclusive competency concerning the management of the bank.

His first action was to increase the capital by issuing new shares and amending the company's statutes. The tender was made in the daily press, according to national rules.

Later on the old shareholders started proceedings, in which they contested both measures. They claimed that a general meeting of the company could only do the latter. The former should have been made individually so that they could properly exercise their pre-emptive rights.

They based their claims on the provisions of a Community directive.

The defendants, i.e. the new shareholders, replied that the appellants' pleas would constitute 'an abusive exercise of rights' according to national procedural rules.

The Court held that the provisions of the concerned directive were capable of producing 'direct effect'. Thus it precluded the application of national legislation which allowed the increase of capital without calling a general meeting. Further, it held that the old shareholders must receive the tender individually.

¹⁰⁷ See e.g. C-208/90, Emmott, [1991] ECR 4269 and C-271/91, Marshall II, [1993] ECR 4367.

¹⁰⁸ C-441/93, Pafitis, [1996] ECR 1347.

Concerning ‘an abusive exercise of rights’ the Court states:

‘the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States’¹⁰⁹.

To avoid misunderstanding, the Court expressly said that the uniform application and the full effectiveness of Community law would be undermined if the appellants were prevented from relying on the provisions.

Strangely, the case has not attracted much comment. What the ruling in effect does, is to actually confer ‘horizontal direct effect to directives’. However, the Court would not agree with me. Its position is still in renunciation. This was confirmed in ‘El Corte Inglés’¹¹⁰.

11.2 ‘El Corte Inglés’

Although this is a previous case to ‘Pafitis’ it must be regarded as representing the opinion of the Court. If the Court intends to change its jurisprudence, this is often made in a plenary sitting or otherwise indicated expressly.

In this particular case, a directive had not been implemented and there was a *lacuna* of national legislation. Thus, the ‘indirect effect’ could not be achieved. Admittedly there was a distinction between this case and the earlier ones. The relevant directives were adopted before the SEA and the ‘Maastricht Treaty’¹¹¹. What further complicated the situation was that Art. 129, which constituted the base for the directive, was limited in its scope. Thus, it was doubtful at the time if the Article itself could have been capable of having ‘direct effect’.

11.3 ‘Ruiz Bernádez’

Another case, which perfectly follows the contradictory development of ‘direct effect’, is ‘Ruiz Bernádez’¹¹².

It was precipitated by a road accident whereby an intoxicated driver collided with the victim. According to Spanish law then, an insurance company was able to set contractual conditions in their insurance for motor vehicles, which affected the rights of a third-party victim. This was what the concerned directive prevented. To be more accurate, the directive’s objective was to create extensive protection and ensure reimbursement to

¹⁰⁹ Ibid, p. 1382, para. 68.

¹¹⁰ C-192/94, El Corte Inglés, [1996] ECR 1281.

¹¹¹ See Lenz’ Opinion in ‘Faccini Dori’.

¹¹² C-129/94, Ruiz Bernádez, [1996] ECR 1829.

the victims. A national body had to pay compensation for those instances where the victim had no legitimate claim against the insurer.

A Criminal Court in Seville ordered Mr Ruiz to make reparation for the caused damages. On the other hand it absolved the insurance company from any liability. Hardly surprisingly, the Spanish Treasury Department appealed against the latter part of the judgment.

In the light of the provisions of the directive the Court came to a different conclusion. They held the insurance company to be responsible for covering the third party, even if their insurer was intoxicated at the time. Little comfort to the insurance company that the directive did not preclude the possibility to claim recovery from the insurer.

How shall one categorize this case?

From the outset, the outcome of the case could be regarded as reversed vertical direct effect. However the same result would have been achieved if the injured party had started civil actions against the insurance company. This case can be compared with 'Vaneetveld' where the Court denied reversed vertical direct effect in criminal proceedings.

11.4 'CIA Security International'

Another recent case, which confirms the trend towards private enforcement, is 'CIA Security International'¹¹³. The merits of the case were as follows:

CIA was a firm, which marketed a particular burglar alarm system in Belgium. Neither the firm nor the alarm system had been authorised in Belgium. Rival companies claimed that the alarm system did not fulfil the requirements according to Belgian law. CIA applied to the national court, requesting that it should require their rivals to cease their unfair methods of trading. These in their turn lodged counterclaims, trying to obtain an injunction against CIA continuing its business as well as to impose financial penalties upon the company.

In order to facilitate the free movement of goods, obstacles to trade must be eliminated or at least restricted. To categorize what constitutes technical barriers to trade can be rather tricky. Therefore a notify-procedure had been set up. Directive 83/189 was adopted to ascertain that the concerned parties at Community level, i.e. the Commission and the other Member States, had been provided with information. This would enable them to propose amendments to the concerned provisions. It is also clear from the provisions of the directive that the entry into force of national legislation is subject to the Commission's agreement or lack of opposition.

¹¹³ C-194/94, CIA Security International, [1996] ECR 2201.

The relevant provision, from the perspective of this thesis, was the provision that concerned the alarm system as such. Contrary to the Directive 83/189, it had not been notified to the Commission before it was adopted.

Without much ado the Court found the concerned provision of the directive to be unconditional and sufficiently precise in terms of its content. Thus, it held that:

‘...individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive’¹¹⁴.

Surprisingly, the Court did not make any remarks on the ‘horizontal direct effect of directives’. However, the General Advocate tries to uphold the distinction¹¹⁵.

Mr Elmer argues that the situation is compatible with a criminal proceeding. He points out that a prosecutor or consumer ombudsman could have brought the proceeding.

‘It is the State which lay down rules on penalties, prohibitions on marketing, etc. and it is the courts which must impose such sanctions regardless of who, under the national rules of procedure, might have brought the case’¹¹⁶.

The side effect of this is that the national court may have to uphold CIA’s claims against its competitors. This creates some other theoretical problems.

Does not any obligation stem from the state in one way or the other?

None the less, relying exclusively on the wording of the concerned directive Mr Elmer finds that it aims only to impose obligations on the Member States. Thus, he distinguishes this case from ‘Faccini Dori’.

These cases, which have been presented, have not undergone much debate. The interpretation of these cases is of crucial importance for the introduction of ‘horizontal direct effect of directives’. It can be deduced from the above mentioned cases that it is permitted to prejudice a person’s rights under national law.

Is not that an obligation in itself?

¹¹⁴ Ibid, p. 2248, para. 55.

¹¹⁵ Ibid, p. 2226.

¹¹⁶ Ibid, p. 2226, para. 69.

12. Conclusion

There may be differing opinions as to whether the European integration should be accomplished by uniform or by just harmonizing measures. But once you have decided you have to face the consequences.

Supposedly, the Member States are well aware of their actions when they sign the directives. These are intended to create uniform rights albeit through different methods of implementation.

Uniform application would place all those subject to EC law on an equal footing. It is important to have in mind that this encompasses the Member States, undertakings (of whatever form) and individuals. Heterogeneous application leads to inequalities and competitive disadvantages.

By developing the concept of 'direct effect' the Court has done much to secure the uniform application, *l'effet utile* and the protection of rights under EC law. However, the resistance to introduce 'horizontal direct effect of directives', as a principle of law, has been consistent from 'Marshall and onwards. Instead have similar effects been obtained, primarily, by elaborating the concept of 'indirect effect' with its landmark in 'Marleasing'. Recent case law supports the introduction of 'horizontal direct effect of directives' in its effects but still not as a principle of law. The Courts equivocal position is hard to explain.

Why does the Court abstain from bringing its case law to its logical conclusion?

It seems that the Court suffers from a backlash from accusations of judicial activism. It is also clear from the written and oral submissions in 'Faccini Dori' that the majority of the Member States regards the distinction made in 'Marshall' to be sufficient. Thus, they are content to suffer the consequences of their inactivity, i.e. they know that they are obligated to pay damages for unimplemented directives.

Their standpoint is rather astonishing.

An explanation of their irrational behaviour can only be speculative. One could say that it is all a matter of power in one way or another. Unfortunately it is the European taxpayers that have to pay for the aspirations of their governments.

An illustrative example is the opinion of the Constitutional Court in Germany concerning the 'Maastricht Treaty'¹¹⁷. It is opposed to the abusive treatment of Art. 235, the doctrine of implied powers and the far-reaching effects of the principle of effectiveness. Further, it stresses that the transfer of sovereign powers encompasses only limited purposes. This implies that the discretion of the Court is restricted. Thus, it concludes by stating that

¹¹⁷ See Gráinne de Búrca and Paul Craig, 'EC law: text, cases and materials', Oxford, 1997, at p. 262.

interpretations of the Court, which are equivalent to an extension of the Treaty, will not produce any binding effects for Germany.

This opinion emphasizes what I mentioned in the 'Introduction' that the development of EC law could be described as a battle between political and judicial aspects. It is probable that the solution to the topic of this thesis is to be found in the political rather than in the legal sphere. Hopefully, however, this thesis has provided you with enough arguments regarding the benefit of introducing 'horizontal direct effect of directives'.

Appendix

Article 5

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 jeopardize the attainment of the objectives of this Treaty.

Article 177 (*)

(*) As amended by Article G (56) TEU.

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a. the interpretation of this Treaty;
- b. the validity and interpretation of acts of the institutions of the Community and of the ECB;
- c. the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 189 (*)

(*) As amended by Article G (60) TEU.

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Overall assessment of the operation of the Single Market*

Report from the Commission on the state of the Single Market in 1995

1. The completion of the Single Market is of central importance for the Union given its potential to contribute to European growth and jobcreation. In 1995 a growing awareness has emerged of the Single Market's centrality in paving the way for Economic and Monetary Union, strengthening European industry's competitiveness and stimulating economic growth on the basis of sustainable development.

Indeed, the Competitiveness Advisory Group, chaired by Mr. Ciampi, emphasised the urgency of accelerating the Single Market process. The prosperity of our citizens and the improvement in their quality of life depends on its full realisation.

2. Even if, taken as a whole, the Single Market is working, there are still problems in specific areas. In 1995 we have seen steady progress towards the achievement of the Single Market. Evidence from many quarters clearly shows that most companies believe that the Single Market is bringing them benefits. Concerns remain, however: they include continuing technical barriers to trade; incomplete legislation on key issues such as taxation and company law; *uneven or over-bureaucratic enforcement of legislation*; the need to continue to reinforce competition policy, in particular in the area of state aids and the liberalisation of public utilities; and demands for compensatory measures arising from monetary disturbances. Even more important, *the Single Market has not yet been sufficiently focused on the needs of the citizens*, who often are not fully aware of the opportunities it offers to them. [Italics by author]

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