

1994

Article

## HORIZONTAL EFFECT OF DIRECTIVES: A MISSED OPPORTUNITY

Takis Tridimas.

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Case: Faccini Dori v Recreb Srl Times, August 4, 1994 (ECJ)

Legislation: Council Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises

Keywords: Consumer protection; Contracts; Direct effect; EEC law

Abstract: Reasoning behind and implications of ECJ decision that Directives may not give rise to rights enforceable by one individual against another.

\*621 In its judgment in Faccini Dori, OFN1y the Court did not follow the Opinion of Advocate General Lenz and confirmed its previous case law that directives may not produce horizontal direct effect. The judgment comes after the Opinion of Advocate General Van Gerven in Marshall II OFN2y and the Opinion of Advocate General Jacobs in Vaneetveld OFN3y where, by way of obiter dicta, the Advocates General took the view that directives should be capable of producing horizontal direct effect. This note discusses the reasoning of the Court in Faccini Dori and the ramifications of the judgment.

The case law before Faccini Dori

Direct effect is one of "the essential characteristics of the Community legal order". OFN4y It might not be an exaggeration to say that it is the concept which has been most instrumental in the development of Community law, the cornerstone of the Community

law edifice. OFN5y The Court has taken a broad view of the notion of direct effect so much so that in his Opinion in *Banks*, Advocate General Van Gerven stated OFN6y:

"... in so far as a provision of Community law is sufficiently operational in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case."

\*622 Thus, the Court has taken the view that, if it is possible to determine minimum rights, a provision of a directive will produce direct effect even if Member States enjoy some discretion in its implementation. OFN7y In *Marshall II*, the Court held that even where a directive does not require the Member States to take a specific measure but leaves them free to choose between different solutions, the attainment of the objectives of the directive may mean that the national authorities have no degree of discretion in applying the chosen solution. On the circumstances of that case, the Court held that a person who had suffered loss as a result of discriminatory dismissal could rely on Article 6 of Directive 76/207 on the implementation of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OFN8y in order to set aside a national provision which imposed limits on the amount of the compensation recoverable by way of reparation. OFN9y However in *Banks*, departing from the Opinion of the Advocate General, the Court took a restrictive view with regard to direct effect in the context of the ECSC Treaty and came to the conclusion that Articles 4(d), 65 and 66(7) of that Treaty, which prohibited anti-competitive action, were not directly effective on the ground that they conferred on the Commission sole jurisdiction to establish whether specific action was compatible with the rules of the ECSC Treaty designed to protect free competition.

According to the established case law of the Court, directives may give rise to rights enforceable by an individual against the state in the national courts, but, unlike Treaty provisions OFN10y and regulations, OFN11y they may not give rise to rights enforceable by an individual against another individual. In other words, directives may produce vertical but not horizontal direct effect. The first case in which the Court made it clear that directives may not produce horizontal effect was *Marshall I*, OFN12y where the Court stated OFN13y:

"... it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for \*623 the possibility of relying on the directive before a national court, exists only in relation 'to each Member State to which it is addressed'. It follows 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."

The Court held that a directive may be relied upon against the state irrespective of the capacity in which it acts, i.e. in its capacity as employer or as public authority, on the

ground that ""in either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law". OFN14y

In subsequent cases, the Court confirmed that directives may not be relied on against individuals in national courts OFN15y but interpreted the notion of state for the purposes of direct effect broadly. In *Foster*, OFN16y it held that unconditional and sufficiently precise provisions of a directive may be relied on against organisations or bodies which are subject to the authority or control of the state or have special powers beyond those which result from the normal rules applicable to relations between individuals. It follows that the notion of state includes not only local and regional authorities and constitutionally independent authorities responsible for the maintenance of public order OFN17y but also privatised industries which offer public services such as that in issue in *Foster* and, even, self-regulatory authorities which exercise de facto public power. OFN18y

In *Marleasing*, OFN19y the question referred to the Court was effectively whether a company could rely against another company on Article 11 of the First Company Law Directive, OFN20y which had not been implemented within the requisite deadline in Spain. Referring to its judgment in *Marshall I*, the Court held that a provision of a directive may not be relied on as such against an individual. However, developing further the principle laid down in *Von Colson*, OFN21y it stated OFN22y:

""... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to \*624 interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

In certain circumstances, the obligation imposed on national courts to interpret national law so as to conform with a directive may lead to the same result as that which would be achieved if the directive were capable of producing horizontal effect. However, the two remain distinct. In the case of direct effect, it is the provision of the directive which is enforced. By contrast, where a national court has recourse to the *Marleasing* principle, it is the rule of national law which applies. The national court retains some discretion in the interpretation of national law. It is clear that *Marleasing* does not require the national court to follow a contra legem interpretation of national law. OFN23y In his Opinion, Van Gerven A.G. pointed out the limits imposed by the general principles of legal certainty and non-retroactivity. OFN24y In a subsequent case, OFN25y the Court held that the obligation imposed on national courts by *Marleasing* applies in particular where a Member State considers that its existing legislation complies with the requirements of a directive and on that ground has not introduced measures in order to implement it. In another case, Advocate General Jacobs stated that, where the period prescribed for the implementation of a directive has not yet expired, the national courts are still required to interpret, as far as possible, in conformity with the directive any national measures already in force which are intended to implement it. In such a case, the duty of interpretation incumbent upon the national court arises not from the expiration of the

time-limit for the implementation of the directive but from the duty of the national court to co-operate with the other national authorities in their endeavour to implement the directive and is founded on Article 5 EC. OFN26y

Where the provisions of national law are not capable of being interpreted so as to conform with the requirements of a directive, a claim in damages may lie against the state pursuant to the principle established in Francovich. OFN27y \*625 Although, as a remedy, an action in damages against the state has a residual character, it may often be the only means of redress for the aggrieved individual. That is illustrated by Wagner Miret, OFN28y where the limitations of the Marleasing principle were clearly shown. The Court was concerned with the interpretation of Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OFN29y which requires the payment of unpaid wage claims by guarantee institutions to be set up by the Member States. Article 5 provides that Member States must lay down detailed rules for the organisation, financing and operation of those institutions. When Spain acceded to the European Communities, it did not consider it necessary to adopt implementing legislation since a guarantee fund had been instituted by Article 33 of the Law on Employees of March 10, 1980. Mr Wagner Miret was a director of the undertaking CEP Catalana SA. Following its insolvency, he brought an action against that guarantee fund claiming payment of his unpaid salary. His claim was rejected on the ground that company directors were not covered by the law of March 10, 1980. In answer to a reference for a preliminary ruling, the Court held that company directors could not be excluded from the scope of application of the directive. It then examined the question whether company directors could claim payment of unpaid salaries from the guarantee fund set up under Spanish law for other categories of employees or whether they could claim damages against the state for failure to implement the directive. Recalling its judgment in Francovich, the Court held that Article 5 of the directive granted to the Member States a broad discretion with regard to the guarantee institutions and did not require them to set up a single institution for all categories of employees. It followed that persons employed as company directors could not derive a right directly from the directive to claim payment of their unpaid salaries from guarantee institutions set up for other categories of employees. The Court stated that, according to the order for reference, the provisions of Spanish law in force could not be interpreted in conformity with Community law, i.e. so as to include company directors in the categories of employees covered by the existing guarantee fund. According to the principle laid down in Francovich, therefore, it fell upon the state to make good the damage suffered by company directors as a result of its failure to implement the directive correctly. Although there were good reasons why a right against the existing guarantee fund could not be founded on the provisions of the directive, OFN30y from the point of view of the individual, the result was not wholly satisfactory since he would have to embark on new litigation against the Spanish State.

\*626 Marshall II and Vaneetveld

In his Opinion in Marshall II, Advocate General Van Gerven stated by way of obiter dicta that directives should be accorded horizontal effect. OFN31y Subsequently, the Advocate General developed his views in greater detail extrajudicially. OFN32y In his view, if directives were capable of producing horizontal effect, distortions and inconsistencies which arose from the incremental development of the case law would be removed. Thus, the broad interpretation of the notion of state for the purposes of direct effect means that directives may impose obligations on public bodies but not on private bodies, even though sometimes a public body cannot be blamed for the failure of the state to implement the directive any more than a private body and despite the fact that public bodies are often in competition with private ones. Also, acceptance of the principle that directives may produce horizontal effect would relieve the national courts from the obligation to interpret national laws so as to conform with Community law. That obligation has given rise to uncertainty and may have a distortive effect on national law in that it may require the national court to abandon the normal methods of interpretation in order to achieve a result more amenable to Community law. OFN33y It places the national judge in an awkward position since, in effect, it requires him to perform the function of the legislator in transposing the directive into national law. OFN34y In the view of Advocate General Van Gerven, the possibility of state liability in damages for failure to implement a directive does not change the fact that individuals who operate in a Member State which has implemented a directive, and are bound by the obligations contained in it, are in a disadvantageous position vis-à-vis individuals who operate in a Member State which has not yet correctly implemented the directive. OFN35y

In his Opinion in Vanetveld, OFN36y Advocate General Jacobs also took the view that directives should be capable of producing horizontal effect. In that case, that Tribunal de Commerce of Huy (Belgium) requested a preliminary ruling on the interpretation of the Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motorvehicles. OFN37y Article 3 of the Directive prohibits the exclusion from compulsory insurance of the members of the family of the insured person in respect of their personal injuries. The referring court sought to know whether that prohibition created rights for an individual vis-à-vis an insurance company and if so from what date. In the circumstances of the case, an examination of the issue whether directives might produce horizontal effect was not necessary: the accident which gave rise to the main proceedings had occurred before the expiry of the time-limit for the transposition of the directive into national law. In answer to the questions referred, the Court simply stated that the directive did not create rights for individuals before the date by which the implementing measures had to be applied. Although Advocate General Jacobs advised the Court not to examine the issue of horizontal effect, he discussed it on the ground that it had been raised by the questions of the national court. He came to the conclusion that, as a general rule, directives should be capable of producing horizontal effect.

Advocate General Jacobs criticised the judgment in Marshall I on the ground that, as an argument against horizontal effect, the Court relied exclusively on the wording of Article 189. Reliance on the wording of the Treaty has not generally been decisive in the Court's interpretation of it. If literal interpretation had prevailed, it would have been impossible

to interpret Article 119 EC as imposing obligations on individuals. If directives can impose obligations only on states it is difficult to justify the imposition of obligations on bodies such as a local health authority. Once it is accepted that directives may produce direct effect, it is also difficult to sustain a distinction between directives and other binding provisions of Community law, such as Treaty provisions and regulations, which may impose obligations on individuals. OFN38y Advocate General Jacobs continued OFN39y:

""There are sound reasons of principle for assigning direct effect to directives without any distinction based on the status of the defendant. It would be consistent with the need to ensure the effectiveness of Community law and its uniform application in all the Member States. It would be consistent, in particular, with the recent emphasis in the Court's case law on the overriding duty of national courts to provide effective remedies for the protection of Community rights. It is perhaps because a new approach to directives is required by the Court's recent case-law that the views of commentators have tended, recently, to advocate assigning horizontal effect to directives. As for the argument based on the need for uniform application of Community law, the case is self-evident; but it is necessary to ensure that Community legislation is \*628 uniformly applied not only as between Member States but within Member States. Distortions will obviously result, both between and within Member States, if directives are enforceable, for example, against employers or suppliers of goods or services in the public sector but not in the private sector. It is no answer to suggest that such distortions will be removed if the directive is properly implemented; the situation which has to be envisaged is one in which the directive has not been properly implemented."

Even if horizontal effect was not accepted as a general proposition, the Advocate General took the view that, at least on the circumstances of the case, the directive in issue should be accorded horizontal effect after the expiry of the period by which the implementing measures were to be applied. He noted that compulsory insurance for liability for motor accidents was an area where there was an obvious public interest in individuals being able to rely on a system of insurance which was effective and which applied uniformly throughout the Community. Insurance undertakings, being large corporations accustomed to operate in a highly regulated framework, could be presumed to be familiar with obligations which Community legislation in the form of directives intended to impose upon them. There was no valid reason why they should escape liability by taking advantage of a Member State's failure to implement the directive in question. OFN40y

Faccini Dori

In Faccini Dori, the Court was concerned with the interpretation of Directive 85/577/EEC on the protection of the consumer in respect of contracts negotiated away from business premises, OFN41y the underlying purpose of which is to protect consumers against unfair commercial practices in respect of doorstep selling. According to Article 1(1), the directive applies, *inter alia*, to contracts under which a trader supplies goods or services to a consumer and which are concluded ""during an excursion organized by the trader away

from his business premises". In relation to those contracts, Article 4 provides that traders are required to give consumers written notice of their right of cancellation at the time of the conclusion of the contract. Article 5 provides that the consumer has the right to cancel the contract by sending notice within a period of not less than seven days from receipt of the notice of cancellation in accordance with the procedure laid down by national law. The exercise by the consumer of the right of cancellation has the effect of releasing him from any obligations under the contract. On January 19, 1989, Miss Dori concluded a contract with Interdiffusion Srl to follow a course in English language by correspondence. The contract was concluded at the \*629 initiative of Interdiffusion in the central railway station of Milan. Some days later, Miss Dori changed her mind and wrote to Interdiffusion by registered letter dated January 23, 1989, to cancel the contract. Having been informed by Interdiffusion that it had assigned its claim to Recreb Srl, Miss Dori wrote to that company confirming her wish to cancel the contract and invoking her rights under Directive 85/577. Recreb brought an action before the Giudice conciliatore di Firenze for an order against Miss Dori for repayment of the sum agreed under the contract. When the contract was concluded, Italy had not yet implemented the directive although the deadline for its implementation had expired. The Giudice requested a preliminary ruling effectively on two questions. The first was whether the provisions of the directive were sufficiently precise as to be capable of producing direct effect. The second was whether they could be relied on by individuals against other individuals. In answer to the first question, the Court pointed out that Article 2 of the directive defined the terms "consumer" and "trader" with precision and that no implementing measures were needed by the Member States in that context. Article 2 was sufficiently precise to enable the national court to determine upon whom and for whose benefit the obligations contained in the directive were imposed. With regard to Articles 4 and 5, the Court stated that, although they granted to the Member States a margin of discretion, that did not affect the minimum content of rights which the directive intended to grant to consumers. Articles 1(1), 2 and 5 of the directive were unconditional and sufficiently precise, and therefore capable of producing direct effect, with regard to the determination of the persons for whose benefit they were adopted and the minimum period within which notice of cancellation had to be given.

In answer to the second question, Advocate General Lenz pleaded in favour of horizontal effect on the basis of arguments similar to those submitted by the Advocates General in *Marshall I* and in *Vaneetveld*. In his view, the most important argument in favour of horizontal effect was that of equal conditions of competition. In the absence of horizontal effect, individuals operating in a Member State which complies with the requirements of directives are in a disadvantageous position vis-à-vis individuals operating in a Member State which does not so comply. The resulting discrimination is unacceptable, especially in the light of the Treaty on European Union which stresses the importance of the internal market and provides for the establishment of citizenship of the Union. OFN42y The Advocate General examined the arguments which are usually submitted against the horizontal effect of directives. In his view, arguments based on the wording of Article 189 and the nature of directives were not persuasive. He saw horizontal effect as deriving from the binding character and the effect utile of directives. An argument which is sometimes advanced against horizontal effect is that \*630 concerning the democratic

deficit in the Community legislative process. It is said that, if directives were capable of imposing obligations on individuals, that would accentuate the problem of democratic deficit since a directive would be capable of imposing obligations on individuals without control being exercised by the national parliaments in the passing of implementing legislation. Advocate General Lenz pointed out the gradual democratisation of the Community legislative process, referring to the powers granted to the Parliament by the Single European Act and the Treaty on European Union. He also stated that, although the national legislature exercised a degree of discretion in implementing a directive within the limits laid down in its provision, that discretion did not affect those provisions which were sufficiently precise as to be capable of producing direct effect. OFN43y Advocate General Lenz found the issue of the compatibility of horizontal effect with the requirements of the principle of legal certainty more problematic. He stated that a legislative act may not impose obligations on individuals unless it is published, its publication having a constitutive character. Since until the entry into force of the Treaty on European Union there was no requirement to publish directives, directives adopted until then could not impose obligations on individuals. In his view, the consistent practice of publishing directives in the Official Journal made no difference since it had a purely declaratory character. It followed that Miss Dori could not rely on Directive 85/577. By contrast, Advocate General Lenz considered that directives adopted after the entry into force of the Treaty on European Union should be capable of producing horizontal effect. OFN44y It is notable that in *Vaneetveld*, Advocate General Jacobs dismissed the absence of an obligation to publish directives before the entry into force of the Treaty on European Union as an argument against horizontal effect given the invariable practice of publishing all legislative directives. He took the view that, if a directive had not been published, the absence of publication would have prevented it from producing legal effects. OFN45y

The Court also came to the conclusion that, in the absence of implementing measures, Miss Dori could not rely on Directive 85/577 but on grounds fundamentally different from those of the Advocate General. Referring to its judgment in *Marshall I*, it held that a directive may not be relied on as such against an individual. It confirmed as the underlying reason of direct effect of directives that a state should not be allowed to take advantage of its own failure to comply with Community law. OFN46y Also, the Court appeared to take \*631 the view that Community law provided individuals with adequate alternative remedies. It referred to the duty imposed upon national courts by *Marleasing* and also to the liability of Member States in damages pursuant to *Francovich*. In what follows, the reasoning of the Court will be examined in more detail.

### The distinction between directives and regulations

It is submitted that the argument according to which the *raison d'être* of direct effect of directives is to prevent the state from taking advantage of its own failure to implement Community law is not persuasive. It is clear that that argument does not justify the broad interpretation of the notion of state. Indeed, it is difficult to see how a local health



authority can be held responsible for the failure of the national legislature to comply with Community law. As Advocate General Jacobs stated, ""the well-known attempt at a rationale for assigning direct effect to a directive as against a Member State, namely that a Member State ought not to be allowed to rely upon its own failure to implement a directive, is singularly inapposite in relation to such a body, which has no responsibility for that failure". OFN47y In *Faccini Dori*, following its judgment in *Marshall I*, the Court effectively took the view that directives, by their very nature, are incapable of imposing obligations on individuals. It stated that, under Article 189, a directive is binding only in relation to ""each Member State to which it is addressed". It continued OFN48y:

""The effect of extending [the case-law on direct effect of directives] 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."

However, as Advocate General Jacobs pointed out in *Vaneetveld*, arguments based on the wording of Article 189 are not decisive. In any event, Article 189 does not preclude the possibility of derived obligations arising for persons other than Member States. OFN49y Once it is accepted that a provision of a directive can be sufficiently precise as to provide a clear and unconditional right, and a corresponding obligation on an individual, it can no longer be said to be addressed solely to a Member State. Nor is it correct to say that the refusal to grant horizontal effect protects the legitimate interests of the individual on whom the obligation is imposed. Since the content of the obligation is made clear in the directive and since the time-limit by which that obligation must take effect has expired, the inability to enforce it in the national courts gives no more than a windfall benefit to the individual on \*632 whom the obligation is imposed. Considerations of legal certainty can hardly be relied on to exclude, in general, the horizontal effect of directives. At least following the entry into force of the Treaty on European Union which provides for the compulsory publication of directives, OFN50y there is no reason why they should be refused horizontal effect. In any event, the argument that directives, by reason of their nature, may not impose obligations on individuals is undermined by the *Marleasing* principle. The duty of national courts to interpret national legislation so as to conform with the requirements of directives pursuant to *Marleasing* may in effect lead to directives imposing obligations on individuals by the back door. OFN51y

It is not correct to say that, if directives were capable of producing horizontal effect, that would make them similar in all respects to regulations. OFN52y Apart from the obvious difference that directives may only give rise to rights after the time-limit for implementation has expired, the main difference between regulations and directives would remain unaffected: under Article 189, regulations impose obligations of conduct whereas directives impose obligations of result. To recognise that the provisions of a directive may be directly effective against an individual, where a Member State has failed to implement it or has implemented it incorrectly, does not affect the obligation of Member States to take the necessary implementing measures. The Court has emphasised that the effect of directives provides a minimum guarantee which does not absolve a Member State from taking the appropriate implementing measures in due time. OFN53y

The reasoning of the Court in *Faccini Dori* contrasts with its reasoning in *Marleasing*. There, the Court saw the relationship between a directive and the provisions of national law not as one of norms emanating from separate legal orders but as one of norms which belong to the same legal order where the constitutional higher norm takes precedence. OFN54y By contrast, in *Faccini Dori*, the Court reverted to an approach more inspired by international law and less influenced by federalist considerations. In effect, by refusing horizontal effect to directives, the Court transposed to Community law the weakness of international law under which a treaty may not be enforceable in the national courts even if its provisions are sufficiently precise and unconditional. OFN55y As already stated, to make the ability of an individual to enforce a right granted to him by a directive against another individual dependent on \*633 the taking of implementing measures by the state does not protect the rights of the individual upon whom the obligation is imposed. By contrast, it compromises the primacy of Community law. In effect, it gives precedence to none other than the very interests which the notion of direct effect was developed to challenge: those of the recalcitrant Member State. Acceptance of the doctrine of horizontal direct effect implies a shift of emphasis. Where it comes to relations between individuals, the reason why directives should be able to produce horizontal effect is not that a Member State must not be allowed to derive an advantage from its own failure to implement Community law but that the effective protection of Community rights must be guaranteed unless overriding principles (for example, legal certainty, nonretroactive application of criminal laws) require otherwise. That is the rationale underlying *Marleasing*. OFN56y The issue of the horizontal effect of directives should be seen in the wider context of the Court's recent case law on remedies, OFN57y the underlying objective of which is to ensure the effective protection of Community rights in national courts.

### The argument of alternative remedies

In *Faccini Dori* the Court referred to its judgments in *Marleasing* and *Francovich*. It is not correct to say, however, that the principles laid down in those judgments, which are undoubtedly of great importance in the field of judicial protection, provide sufficient alternative remedies from the point of view of the individual so as to render horizontal effect of directives superfluous. The limitations of the *Marleasing* principle became evident in *Wagner Miret*. It is not always easy, and in some cases it will be plainly impossible, to interpret a national provision pre-dating a directive in such a way as to grant to an individual the same right which the directive is intended to grant. There can be no denying that the judgment of the Court in *Francovich* enhanced the protection which individuals may derive from Community law. However, state liability in damages for breach of Community law remains a new and as yet undeveloped remedy. OFN58y So far, the Court has not had the opportunity to elaborate on the principles that it laid down in its judgment in *Francovich*. OFN59y In *Faccini Dori*, the Court went out of its way to repeat the conditions which must be fulfilled in order for a state to be liable in damages for failure to implement a directive. These are the following OFN60y: the result

prescribed by the directive should entail the grant of rights to individuals; it should be possible to identify the content of those rights on the basis of the provisions of the directive; there must be a causal link between the breach of the state's obligation and the damage suffered by the injured parties. After recalling those conditions, the Court stated that the directive concerning contracts negotiated away from business premises was undeniably intended to confer rights on individuals the minimum content of which could be determined by its provisions. Where it was alleged that damage had been suffered and that the damage was due to a breach by the state of its obligation, it was for the national court to uphold the right of aggrieved consumers to obtain reparation in accordance with national law on liability. OFN61y Thus, the Court effectively held that the first two conditions of liability were fulfilled with regard to the directive concerning contracts negotiated away from business premises. The inclusion of that finding in the judgment is notable because the questions referred by the national court did not concern state liability in damages for breach of Community law. However, from the point of view of an individual, the possibility of state liability in damages does not provide a sufficient alternative to the horizontal effect of directives.

Direct effect enables an individual to use a provision of Community law not only as a sword but also as a shield, that is to say, as a defence in proceedings initiated against him. In a case such as *Faccini Dori*, refusal to accord horizontal effect means that the action brought by the trader against the consumer will be upheld. The consumer will then have to embark on new litigation against the state hoping to recover damages. He will have to incur considerable expenses and to spend considerable time pursuing a cause the achievement of which is by no means certain. From the point of view of an individual in the position of Miss Dori, an action in damages against the state is clearly a poor alternative. More generally, the possibility to claim damages against the state is not an adequate substitute for the direct enforcement of the directive. That is so especially where a directive imposes obligations on an individual, in which case, by definition, the state is not the proper defendant. As Advocate General Jacobs noted in *Vaneetveld*, it would often require the plaintiff to bring two separate sets of legal proceedings, either simultaneously or successively, one against the private defendant and the other against the public authorities, which "would hardly be compatible with the requirement of an effective legal remedy". OFN62y Actions against the state differ to a considerable extent from actions between private parties. They are usually heard by different courts and are subject to different procedural rules. An individual who obtains a judgment against a state may well encounter added difficulties in enforcing it. Moreover, an action for damages against the state stands only with one leg on Community law. With the other, it stands on national law. In *Francovich*, and in *Faccini Dori*, the \*635 Court made it clear that the state must make reparation for the loss caused by its failure to comply with Community law in accordance with the rules of national law on liability. It follows that, although the conditions of state liability in damages for breach of Community law are defined by Community law, the procedural and substantive conditions which must be satisfied in order for a claim against the state to succeed are primarily a matter of national law. The limits which Community law imposes are that those conditions must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation. OFN63y The

case law in this context is evolving OFN64y and the Court has not always followed a consistent approach. OFN65y Suffice it to say that state liability in damages for breach of Community law may differ from state to state because of its dependence, at least to some degree, on national law. By contrast, the minimum content of a right which a directly effective provision of a directive confers upon an individual is uniform throughout the Community.

In the light of the above, it is clear that neither the principle laid down by the Court in *Marleasing* nor the liability of Member States in damages for breach of Community law provides adequate substitute for the direct enforcement of directives. They should be seen as supplementary and not as alternative remedies to horizontal effect.

### Concluding remarks

The refusal of the Court to accord horizontal effect to directives in *Faccini Dori* was not the result of a careful assessment of horizontal effect as a remedy for the failure of a Member State to comply with Community law vis-à-vis other such remedies. Nor was it the result of compelling legal arguments. It was rather the result of the Court's reluctance to depart from the text of the Treaty. Following a period of judicial activism, the fruits of which included *Marleasing* and *Francovich* and the apotheosis of which was the *Chernobyl* case, OFN66y since 1992 the Court has experienced a period of consolidation. That can be seen as a reflection of the economic and political climate prevailing in Europe, the scepticism with which the Treaty on European Union was received in many Member States, and the uncertainty surrounding the institutional structure of an enlarged union due to be discussed as early as 1996. The judgment in *Faccini Dori* can be seen as a product of the current period of consolidation. It can find support in Roscoe Pound's dictum that "judges ... must go with the main body, not with the advance \*636 guard", OFN67y or, at least, they should do so in transitional periods. It is submitted that the acceptance of horizontal effect of directives would be a desirable development: it would make the case law more coherent, enhance the judicial protection of individuals, and promote the uniform application of Community law. It should be acknowledged, however, that the recognition of horizontal effect of directives at the present stage in the development of Community law is much less necessary than the recognition of their vertical effect more than 20 years ago. The persistent references in *Faccini Dori* to state liability in damages indicate the importance which the Court attaches to that remedy as a means of securing the effective protection of Community rights. The case law in this area can be expected to develop and the results are anxiously awaited.

OFNa1y. Référendaire, Court of Justice of the European Communities. All views expressed are personal. My thanks to Paul Farmer for helpful comments in an earlier draft.

OFN1y. Case C-91/92, Faccini Dori v. Recreb S.r.l., judgment of July 14, 1994, (Full Plenum). The Opinion of the Advocate General was delivered on February 9, 1994.

OFN2y. Case C-271/91, Marshall [1993] E.C.R. I-4367; [1993] 3 C.M.L.R. 295.

OFN3y. Case C-316/93, Vaneetveld v. SA Le Foyer [1994] E.C.R. I-763; [1994] 2 C.M.L.R. 852.

OFN4y. Opinion 1/91, Draft Agreement relating to the creation of the European Economic Area [1991] E.C.R. I-6079, para. 21.

OFN5y. See G. F. Mancini and D. T. Keeling, "'Democracy and the European Court of Justice', (1994) 57 M.L.R. 175 at p. 183: "'Without direct effect, we would have a very different Community today--a more obscure, more remote Community barely distinguishable from so many other international organizations whose existence passes unnoticed by ordinary citizens."

OFN6y. Case C-128/92, Banks & Company Ltd v. British Coal Corporation, Opinion delivered on October 27, 1993, para. 27 of the Opinion (emphasis in the original). [1994] E.C.R. I-1209; [1994] 5 C.M.L.R. 30.

OFN7y. See, e.g. Joined Cases C-19 and C-20/90, Karella and Karellas [1991] E.C.R. I-2691, paras. 17-21; [1993] 2 C.M.L.R. 865; Faccini Dori, op. cit., n. 1, para. 17 and see infra.; see also Joined Cases C-6 and C-9/90, Francovich and others [1991] E.C.R. I-5357, paras. 17, 20-22; [1993] 2 C.M.L.R. 66.

OFN8y. [1976] O.J. L39/40. Art. 6 provides that Member States must take the necessary measures to enable all persons who consider themselves wronged by sex discrimination to pursue their claims by judicial process.

OFN9y. For a discussion of the judgment, see B. Fitzpatrick and E. Szyszczak, "'Remedies and Effective Judicial Protection in Community Law", (1994) 57 M.L.R. 434.

OFN10y. See Case 43/75, Defrenne v. Sabena [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98; Case 36/74, Walrave v. Union Cycliste Internationale [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320; Case 13/76, Donà v. Mantero [1976] E.C.R. 1333. See also Joined Cases C-92/92 and C-326/92, Phil Collins [1993] E.C.R. I-5145; [O1993] 3 C.M.L.R. 773.

OFN11y. The capacity of regulations to impose obligations on individuals derives from their character as binding in their entirety and directly applicable in all Member States (Art. 189).

OFN12y. Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority [1986] E.C.R. 723; [1986] 1 C.M.L.R. 688.

OFN13y. *ibid.*, para. 48 of the judgment.

OFN14y. *ibid.*, para. 49 of the judgment.

OFN15y. See Joined Cases 372 to 374/85, *Ministère Public v. Traen* [1987] E.C.R. 2141, para. 24; Case C-221/88, *ECSC v. Busseni* [1990] E.C.R. I-495, paras. 23-26.

OFN16y. Case C-188/89, *Foster and Others* [1990] E.C.R. I-3313, para. 18; [O1990] 2 C.M.L.R. 833.

OFN17y. See, e.g. Case 103/88, *Fratelli Constanzo v. Commune di Milano* [O1989] E.C.R. 1839; [1990] 3 C.M.L.R. 239; Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651; [1986] 3 C.M.L.R. 240.

OFN18y. Such as the Panel on Take-Overs and Mergers in the United Kingdom.

OFN19y. Case C-106/89, *Marleasing* [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305.

OFN20y. Directive 68/151/EEC, [1968] O.J. Spec. Ed. 41. Art. 11 contains an exhaustive list of the cases in which a company falling within the scope of the directive may be declared null.

OFN21y. Case 14/83, *Van Colson and Kamann v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891; [1986] 2 C.M.L.R. 430.

OFN22y. *Marleasing*, *supra*, n. 19, para. 8 of the judgment.

OFN23y. This is implicit from the judgment in Case C-334/92, *Wagner Miret* [O1993] E.C.R. I-6911, see *infra*. See also Case C-262/88, *Barber v. Royal Exchange Assurance Group* [1990] E.C.R. I-1889 at p. 1937; [1990] 2 C.M.L.R. 513, per Van Gerven A.G. and Case C-37/89, *Weiser* [1990] E.C.R. I-2395 at p. 2410 per Darmon A.G. See further T. Tridimas, "The Case-Law of the European court of Justice on Corporate Entities", (1993) 13 Y.E.L. (forthcoming).

OFN24y. [1990] E.C.R. I-4147.

OFN25y. *Wagner Miret*, *op. cit.*, n. 23, para. 21. See further Case C-373/90, *Complaint against X* [1992] E.C.R. I-131, para. 7.

OFN26y. Case C-156/91, *Hansa Fleisch Ernst Mundt* [1992] E.C.R. I-5567 at pp. 5585-5587. See also Case C-212/91, *Angelopharm v. Hamburg* [1994] E.C.R. I-171 at pp. 196-197 per Jacobs A.G.

OFN27y. Joined Cases C-6 and C-9/90, *Francovich and others* [1991] E.C.R. I- 5357; [1993] 2 C.M.L.R. 66.

OFN28y. *Supra*, n. 23.

OFN29y. [1980] O.J. L283/23.

OFN30y. See [1993] E.C.R. I-6922, 6923 per Lenz A.G.

OFN31y. [1993] E.C.R. I-4387, 4388.

OFN32y. See W. Van Gerven, "The Horizontal Effect of Directive Provisions Revisited - The Reality of Catchwords", (1993, Institute of European Law Public Lecture Series, University of Hull). See also in favour of horizontal effect, F. Schockweiler, "Effets des directives non transposées en droit national à l'égard des particuliers" in *Hacia un Nuevo Orden Internacional y Europeo (Estudios en homenaje al Professor Don Manuel Diez de Velasco)* (1993, Madrid), pp. 1201-1220. See also F. Emmert and M. Pereira de Azevedo, "L'effet horizontal des directives. La jurisprudence de la CJCE: un bateau ivre?" (1993) R.T.D.E. 503.

OFN33y. Van Gerven, *supra*, n. 32, p. 11.

OFN34y. *ibid.* See further C. Lewis and S. Moore, "Duties, Directives, and Damages in European Community Law", (1993) Public Law 151.

OFN35y. [1993] E.C.R. I-4388.

OFN36y. Vaneetveld, *supra*, n. 3.

OFN37y. Directive 84/5/EEC, [1984] O.J. L8/17.

OFN38y. Vaneetveld, *supra*, n. 3, paras. 20-22 of the Opinion.

OFN39y. *ibid.*, para. 29 of the Opinion (footnotes omitted).

OFN40y. *ibid.*, para. 35 of the Opinion.

OFN41y. [1985] O.J. L372/31. The directive was adopted on the basis of Art. 100 EEC.

OFN42y. Faccini Dori, *op. cit.*, n. 1, paras. 50-53 of the Opinion.

OFN43y. See also Vaneetveld, *supra*, n. 3, para. 23 of the Advocate General's Opinion.

OFN44y. Art. 191 EC (as amended by the Treaty on European Union) provides for the compulsory publication of directives adopted in accordance with the procedure of Art. 189b and also of directives adopted by the Council or by the Commission which are addressed to all Member States.

OFN45y. *cf.* Marshall I, *supra*, n. 12, per Slynn A.G. at p. 734.

OFN46y. Faccini Dori, *supra*, n. 1, paras. 22-23.

OFN47y. Vaneetveld, *supra*, n. 3, para. 20 of the Opinion. See also F. Schockweiler, *supra*, n. 32, at 1219-1220.

OFN48y. Faccini Dori, *supra*, n. 1, para. 24 of the judgment.

OFN49y. Vaneetveld, *supra*, n. 3, para. 20 of the Opinion.

OFN50y. For the reasons stated by Jacobs A.G. in Vaneetveld, it is to be doubted whether the absence of a requirement to publish directives in the EEC Treaty is a valid reason to refuse, in general, horizontal effect.

OFN51y. See also, in this context, Fratelli Costanzo, *supra*, n. 17.

OFN52y. In Marshall I, Slynn A.G. stated that if directives were given horizontal effect that ""would totally blur the distinction between regulations and directives which the Treaty establishes in Articles 189 and 191" ([1986] E.C.R. 734).

OFN53y. See, e.g. Case C-208/90, Emmott [1991] E.C.R. I-4269, para. 20.

OFN54y. See P. Mead, (1991) 16 E.L.Rev. 490 at p. 499, T. Tridimas, *supra*, n. 23.

OFN55y. See the comments of Jacobs A.G. in Vaneetveld, *supra*, n. 3, paras. 26-28 of the Opinion.

OFN56y. See also Faccini Dori, *supra*, n. 1, per Lenz, A.G., paras. 55-56 of the Opinion.

OFN57y. See, e.g. the judgments in Marleasing, Francovich, Marshall II and see also Case C-213/89, Factortame and Others [1990] E.C.R. I-2433.

OFN58y. See, in general, P. Craig, ""Francovich, Remedies and the Scope of Damages Liability", (1993) 109 L.Q.R. 595.

OFN59y. See, however, the judgment in Banks, *supra*, n. 6 and the Opinion of Van Gerven A.G., especially paras. 36-54 of the Opinion.

OFN60y. Francovich, *supra*, n. 27, para. 40 of the judgment; Faccini Dori, *supra*, n. 1, para. 27.

OFN61y. Faccini Dori, n. 1, paras. 28-29.

OFN62y. *Supra*, n. 3, para. 30 of the Opinion.

OFN63y. Francovich, *supra*, n. 27, para. 43 of the judgment.



OFN64y. See, e.g. the Opinion of Jacobs A.G. in Case C-312/93, S.C.S. Peterbroeck v. Belgian State, delivered on May 4, 1994.

OFN65y. Compare Emmott, *supra*, n. 53, with Case C-338/91, Steenhorst-Neerings [1993] E.C.R. I-5475.

OFN66y. Case C-70/88, Parliament v. Council [1990] E.C.R. I-2041.

OFN67y. Roscoe Pound, *Justice according to Law*, (1963, New York), p. 278 quoted by F. Dumon, *The Case-law of the Court of Justice--A critical examination of the methods of interpretation*, (1976, Luxembourg), p. III-92.  
EURLR 1994, 19(6), 621-636

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