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## The Effectiveness of European Community Law with Specific Regard to Directives: The Critical Step Not Taken by the European Court of Justice

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## STUDENT NOTE

# THE EFFECTIVENESS OF EUROPEAN COMMUNITY LAW WITH SPECIFIC REGARD TO DIRECTIVES: THE CRITICAL STEP NOT TAKEN BY THE EUROPEAN COURT OF JUSTICE

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INTRODUCTION .....	457
I. THE ECJ'S STEPS TOWARDS MAKING EC LAW EFFECTIVE, INCLUDING THE IMPORTANT STEP IT HAS FAILED TO TAKE .....	460
A. <i>The Court's Establishment and Expansion of the         Direct Effect Doctrine</i> .....	462
B. <i>The Court's Decision to Limit the Expansion of the         Direct Effect Doctrine</i> .....	465
II. GETTING AROUND THE ECJ'S FAILURE TO IMPLEMENT HORIZONTAL DIRECT EFFECT FOR DIRECTIVES: EXPANDING THE DEFINITION OF A MEMBER STATE, INDIRECT EFFECT AND FRANCOVICH LIABILITY .....	466
A. <i>Expansion of the Definition of Member State</i> .....	467
B. <i>The Doctrine of Indirect Effect</i> .....	468
C. <i>Francoovich Liability</i> .....	472
III. THE POSITIVE AND NEGATIVE ASPECTS OF MAKING DIRECTIVES HORIZONTALLY DIRECTLY EFFECTIVE .....	474
A. <i>Arguments Against Horizontal Direct Effect         for Directives</i> .....	476
B. <i>Arguments in Favor of Horizontal Direct Effect         for Directives</i> .....	483
CONCLUSION .....	487

## INTRODUCTION

To say that European Community ("EC") law has direct effect means that individuals can, under certain conditions, assert EC law before national courts in order to invoke their Community rights.<sup>1</sup> The

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1. In 1963, the Court decided *Van Gend & Loos* in which it established the notion of direct effect. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*,

European Court of Justice (the "ECJ" or the "Court") first developed the concept of direct effect in *Van Gend & Loos*.<sup>2</sup> *Van Gend & Loos* gave individuals<sup>3</sup> the power to directly invoke EC law in the form of Treaty Articles<sup>4</sup> against a Member State in national courts.<sup>5</sup> Thereafter, the ECJ expanded the doctrine of direct effect by confirming that EC regulations are directly effective and also by establishing the direct effect of decisions and directives.<sup>6</sup> It became an accepted principle that directives, regulations, decisions and Treaty Articles are directly effective, at least against Member States. In other words, individuals can assert these four forms of EC law in national courts directly against Member States; this concept is known as vertical direct effect. Decisions, Treaty Articles and regulations can also be invoked directly by an individual in a national court against other individuals—i.e., they have horizontal direct effect.

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1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963). In *Van Gend & Loos*, the Van Gend & Loos company had imported chemical substances from Germany into the Netherlands. The company was charged by Customs and Excise with an import duty which the company alleged had been increased since the time of coming into force of the EEC Treaty, contrary to Article 12 of the EEC Treaty. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25, 1957, art. 12 (now art. 25), 298 U.N.T.S. 11 [hereinafter EEC TREATY]. The payment of the duty was appealed before the Dutch Tariefcommissie and the appellant raised Article 12 in its argument. *Van Gend & Loos*, 1963 E.C.R. at 17. The Tariefcommissie then referred two questions to the ECJ, one of which was whether nationals of a Member State can, on the basis of Article 12, lay claim to individual rights which must be protected by the courts. *Id.* The ECJ concluded that "[i]ndependently of the legislation of Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage." *Id.* at 12.

2. *Van Gend & Loos*, 1963 E.C.R. at 16. Although the concept of direct effect was established in *Van Gend & Loos*, the notion of direct applicability originates in Article 249 of the EC Treaty (ex art. 189). TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 173 (1997) [hereinafter EC TREATY]. Notably, there is some debate as to whether these are in fact two separate concepts. See, e.g., J. Steiner, *Direct Applicability in EEC Law—A Chameleon Concept*, 98 LAW Q. REV. 229 (1982); J.A. Winter, *Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425 (1972). For the purposes of this Note, when "ex art." appears in parentheses after a citation to an EC Treaty Article, this reference is to the former Article as it appeared in the EEC Treaty.

3. "Individual" denotes humans as well as legal entities like corporations.

4. Under EC law, Treaty Articles are a form of primary legislation, whereas regulations, directives and decisions are forms of secondary legislation, established by Article 249 of the EC Treaty. See EC TREATY art. 249 (ex art. 189).

5. "Member State" denotes every country that has signed on to the EC Treaty.

6. See Case 39/72, *Commission v. Italy*, 1973 E.C.R. 101, [1973] 3 C.M.L.R. 439 (1973) (confirming the direct applicability of regulations as established by Article 249 of the EC Treaty); Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, [1971] C.M.L.R. 1 (1971) (establishing the direct effect of decisions); *Van Gend & Loos*, 1963 E.C.R. 1 (establishing the direct effect of directives). Notably, a directive can only be directly effective if the Member State in question has seriously mis-implemented the directive into national law or if it has failed to implement the directive altogether. See Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5408, 2 C.M.L.R. 66 (1991).

The Court has resisted establishing horizontal direct effect for directives, however, a decision that has limited the potency of EC law. For example, the Court has stated that directives are only binding on the Member State to whom they are addressed and therefore they cannot be used against individuals or non-state entities.<sup>7</sup> However, considering that Treaty Articles are also addressed to Member States only and the Court has interpreted Treaty Articles to be directly effective against individuals and non-Member State entities, the Court's reasoning is somewhat disingenuous. Additionally, it has been argued that there cannot be horizontal direct effect for directives, because individuals do not have notice of directives.<sup>8</sup> However, most directives are now required to be published in the Official Journal, a fact which renders this argument without merit.<sup>9</sup> These less-than-convincing positions taken by the Court indicate a reluctance by the Court to make directives as effective as other forms of EC law.

Under current EC case law, an individual who is wronged due to an unimplemented or seriously mis-implemented EC directive has a cause of action if the perpetrator is a Member State, but does not have a cause of action if the perpetrator is an individual or a non-state entity. In this way, the lack of horizontal direct effect for directives makes EC law less powerful because it limits access to potential defendants and arbitrarily leaves some plaintiffs without a cause of action.

The purpose of this Note is to investigate the European Court of Justice's less expansive treatment of directives as compared to other forms of EC law through its failure to apply horizontal direct effect to directives. More specifically, this Note attempts to answer two questions which arise from the current status of ECJ jurisprudence: First, why has the Court been reluctant to implement horizontal direct effect for

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7. See Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 749, 1 C.M.L.R. 688 (1986). Helen Marshall, an employee of the Health Authority, was dismissed in 1980 on the ground that she had passed the normal age of retirement applicable to women. Under the Authority's written policy, female employees were to retire at age 60 and male employees at 65. Under national legislation, women became eligible for a state pension at 60, whereas men did not become eligible until the age of 65. However, the national legislation did not impose any obligation on women to retire at 60, because payment of the state or occupational pension would be deferred until actual retirement. Ms. Hampton brought a case before the Industrial Tribunal complaining that her dismissal violated the 1976 Equal Treatment Directive. The Court held that the binding nature of a directive exists only as against the state or states to which it is addressed and therefore could be used by Ms. Marshall as against the Health Authority only insofar as it was an emanation of the state.

8. See *id.* at 735 (Opinion of Advocate General Slynn); see also Jason Coppel, *Rights, Duties and the End of Marshall*, 57 MOD. L. REV. 859, 876 (1994) (noting that the legal certainty argument is weakened by reforms to Article 191 (now Article 254) which now make it obligatory for most directives to be published in the Official Journal).

9. See EC TREATY art. 254 (ex art. 191).

directives, especially in light of other actions it has taken to increase the potency of EC law? Second, given the alternative steps taken by the ECJ, is it still necessary to establish horizontal direct effect for directives in order to maximize the effectiveness of EC law? There are various possible explanations for the Court's reluctance to establish horizontal direct effect for directives, but only one outcome of this reluctance; namely, less-than-maximum effectiveness of EC law. The Court's failure to establish horizontal direct effect of directives has caused a gap in the potency of EC law which the Court has unsuccessfully attempted to fill through the implementation of alternative measures. Thus, horizontal direct effect for directives needs to be established by the Court in order to fill this gap and maximize the effectiveness of EC law.

Section I of this Note explains the legal difference between directives, regulations, decisions and Treaty Articles and discusses the evolution of the doctrine of direct effect. Subsection I-A discusses the ECJ's development of the doctrine of direct effect and how it has expanded over time to maximize the potency of EC law. Thereafter, Subsection I-B discusses the Court's decision to put a limit on this expansion of the effectiveness of EC law.

Next, section II describes the steps the Court has already taken to make directives more powerful through techniques such as expanding the definition of a state and creating indirect effect. It also attempts to explain why the Court has been reluctant to implement horizontal direct effect for directives and analyzes whether horizontal direct effect for directives is still necessary considering the steps the Court has already taken to enhance the potency of EC law. Finally, this Note concludes by proposing that the effectiveness of EC law will not be maximized until horizontal direct effect for directives is established.

## I. THE ECJ'S STEPS TOWARDS MAKING EC LAW EFFECTIVE, INCLUDING THE IMPORTANT STEP IT HAS FAILED TO TAKE

Although the ECJ does not at all times strictly adhere to the wording of the EC Treaty ("EC Treaty") in its decisions, the Court's differing treatment of EC Treaty provisions, regulations, and decisions from directives seems to stem from the power granted to each of these forms of legislation by the language of the EC Treaty. To begin with, the EC Treaty does not spell out who is bound by Treaty Articles or to what extent Treaty Articles are binding.<sup>10</sup> Secondary legislation, like directives and regulations, on the other hand, is provided for by Article 249 of the

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10. See MARGOT HORSPOOL, *EUROPEAN UNION LAW* 133 (1998).

EC Treaty.<sup>11</sup> Article 249 states that a decision is “binding in its entirety upon those to whom it is addressed,” but no mention is made in the EC Treaty as to the direct applicability of decisions.<sup>12</sup> The EC Treaty also contrasts a regulation, which “shall be binding in its entirety and directly applicable in all Member States” with a directive, which “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.”<sup>13</sup> This difference in the Treaty’s language has been interpreted by the Court to require the national implementation of directives by Member States, while allowing regulations to be incorporated directly into national law without requiring any extra measures for implementation.<sup>14</sup>

Given the language of Article 249, it is not surprising that the Court has been much more reluctant to give direct effect to directives than to regulations and decisions.<sup>15</sup> It takes some manipulation of the wording of the EC Treaty to argue that directives should have direct effect, especially considering that directives leave implementation up to Member States and are therefore necessarily less specific than regulations. Since Member States have substantial leeway in implementing directives, it is difficult to enforce a directive as presented by the EC—i.e., if it is not implemented by the Member State. Also, if the Member State has taken steps to implement the directive, it is difficult to challenge the proper implementation of the directive when the Member State alone has the flexibility to implement the directive as to its form and methods. The ECJ faced these two issues when it expanded the doctrine of vertical direct effect to apply to directives.

Subsection I-A discusses the ECJ’s development of the doctrine of direct effect and how it has expanded over time to maximize the potency

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11. EC TREATY art. 249 (ex art. 189).

12. *Id.* This Note focuses primarily on the distinction between regulations and directives, because decisions tend to have a narrower scope since they are enforceable upon the people to whom they are addressed only. Therefore, it is often more useful and interesting to compare directives and regulations only so as to figure out why the Court draws the lines it does in deciding the cases before it.

13. *Id.*

14. See generally PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 186 (2d ed. 1998).

15. Regulations are not necessarily given direct effect by the EC Treaty as the doctrine of direct effect is now understood, because it is possible for regulations to require further legislation by the Member States. They are, however, automatically valid in the Member States. See HORSPOOL, *supra* note 10, at 134; see also Paul P. Craig, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation*, 22 EUR. L. REV. 519 (1997) (“the reluctance to admit that directives can have direct effect is also in part because while Article 189 [now art. 249] states that regulations are directly applicable, this phraseology is not used in relation to directives” (emphasis added)).

of EC law. Thereafter, Subsection I-B discusses the Court's decision to put a limit on this expansion of the effectiveness of EC law.

*A. The Court's Establishment and Expansion  
of the Direct Effect Doctrine*

As stated earlier, the Court originally developed the doctrine of direct effect with respect to Treaty Articles. In *Van Gend & Loos*, the ECJ held that under Article 12 (now Article 25) nationals of a Member State can claim individual rights which the domestic courts must protect.<sup>16</sup> The Court took a teleological approach to the case, concluding that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights . . . and the subjects of which comprise not only Member States but also their nationals."<sup>17</sup> The Court did not conclude that all Treaty articles are directly effective. Rather, a Treaty provision which is capable of direct application must be "clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure."<sup>18</sup> However, as this Note later discusses in more detail, "the criteria of precision, unconditionality, and the absence of a need for further implementing measures have not been closely adhered to by the Court."<sup>19</sup>

Notably, *Van Gend & Loos* involved vertical direct effect only; it concerned an action by an individual asserting EC law against emanations of the state, not against other individuals.<sup>20</sup> The Court first considered horizontal direct effect, which occurs when EC law is asserted in a national court by any individual as against another individual,

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16. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I, 7, [1963] 2 C.M.L.R. 105 (1963).

17. *See id.* at 12. Notably, as this Note will point out, the ECJ has continued to take an interpretive approach like this in its subsequent cases, although it has put limits on this approach regarding issues like horizontal direct effect. *See CRAIG & DE BURCA, supra* note 14, at 166.

18. *CRAIG & DE BURCA, supra* note 14, at 168.

19. *Id.* at 169. The book goes on to cite *Defrenne v. Sabena* as an example of the Court relaxing these standards in regard to EEC Treaty Article 119 (now Article 141) which addressed Member States only. *See id.* at 171-72 (citing Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne*, 1976 E.C.R. 455, 2 C.M.L.R. 98 (1976), *modified*, Case 50/96, *Deutsche Telekom v. Schroder*, 2000 E.C.R. I-743 (ruling that the date limitations on direct effect resulting from *Defrenne* do not apply to a national equal treatment provision creating retroactive membership in a pension scheme)). In *Defrenne*, a Belgian flight attendant brought an action against Sabena, a Belgian airline, claiming she received less pay than male flight attendants who did the same work. Sabena's practice was in violation with the "equal pay for equal work" provision contained in EEC Treaty art. 119 (now Article 141). *See Defrenne*, 1976 E.C.R. at 457.

20. *Van Gend & Loos*, 1963 E.C.R. at 17.

in *Defrenne v. Sabena*.<sup>21</sup> The Court held that the fact that certain Treaty Articles are addressed to Member States only “does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.”<sup>22</sup>

In addition to Treaty Articles, the Court considered the direct effectiveness of decisions, regulations and directives. As to regulations, the Court confirmed their direct effect was established by Article 249 and criticized any attempt by a Member State to alter or dilute the requirements of a Community regulation.<sup>23</sup> This holding was later narrowed by *Amsterdam Bulb*, a case in which the Court indicated that a national measure to implement a regulation is invalid only if it “alters, obstructs or obscures the nature of the Community regulation.”<sup>24</sup>

The Court addressed the direct enforceability of decisions in *Franz Grad*.<sup>25</sup> Concluding that decisions have direct effect, the ECJ stated that: “It would be incompatible with the binding effect attributed to decisions . . . to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision.”<sup>26</sup> The Court also concluded that the obligation imposed by the decision in question was sufficiently clear, precise and unconditional so as to meet the *Van Gend & Loos* standards. Thus, at least some decisions are capable of meeting the *Van Gend & Loos* criteria for direct effectiveness. Notably, the question of horizontal direct effect of regulations and decisions has not been specifically addressed by the Court. However, decisions, by their very nature, have direct effect in regard to anyone to whom they are addressed. Also, regulations, by virtue of being “binding in their entirety,” have direct effect against any individual or entity that they address.<sup>27</sup>

The Court’s decisions regarding the direct effectiveness of Treaty provisions, regulations and decisions creates doubts regarding its discourse on directives. *Van Duyn* established the direct effect of directives.<sup>28</sup> In that case, the Court concluded that the possibility of

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21. *Defrenne*, 1976 E.C.R. at 455.

22. *Id.* at 475. Following *Defrenne*, the Court established the direct effect of various other Treaty Articles, many of which were held to have vertical as well as horizontal direct effect. See HORSPOOL, *supra* note 10, at 136 (referring to EC Treaty Articles 28, 29, 30, 31, 39, 43, 49, 81 and 82 as Treaty provisions which the ECJ has concluded have vertical and horizontal direct effect.)

23. See Case 39/72, *Commission v. Italy*, 1973 E.C.R. 101, 114, [1973] 3 C.M.L.R. 439 (1973).

24. See CRAIG & DE BURCA, *supra* note 14, at 177 (citing Case 50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, 1977 E.C.R. 137, 146, 2 C.M.L.R. 218 (1977)).

25. Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, [1971] C.M.L.R. 1 (1971).

26. *Id.* at 837.

27. EC TREATY art. 249 (ex art. 189).

28. See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1 C.M.L.R. 1 (1975).



relying on directives directly before national courts cannot be ruled out; each provision must be examined in context to determine whether the obligation it imposes or the right it creates is sufficiently clear and concise to be capable of being applied directly by a national court.<sup>29</sup> At first glance, it does not appear that a directive should be capable of meeting the standards for direct effectiveness set out in *Van Gend & Loos*, namely that an EC law provision be clear, precise, unconditional and independent of any national implementing measure.<sup>30</sup> A directive may leave some discretion to the Member State, it will always require further implementation according to the explicit terms of Article 249, and it might not be sufficiently precise to allow for proper national judicial enforcement.<sup>31</sup> In fact, if the Court had adhered to the initial standard set out in *Van Gend & Loos*, directives could not be capable of direct effect, because by their nature they are dependent on national implementing measures. However, as mentioned earlier, the Court relaxed the *Van Gend & Loos* standards over time, which allowed it to conclude in *Van Duyn* that directives could have direct effect.<sup>32</sup> After *Van Duyn*, a directive needs only to impose a clear, precise and complete obligation on a Member State in order to be directly effective; a Member State may exercise discretion without eliminating the possibility that the directive be directly effective as long as the clear, precise and complete criteria are met.<sup>33</sup>

The Court's rationale in *Van Duyn* for concluding that directives can be directly effective seems to be generally its desire to make directives a more powerful form of EC law.<sup>34</sup> A more specific line of reasoning was later added by the Court, namely the estoppel rationale.<sup>35</sup> The estoppel

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29. *See id.* Several questions were presented to the ECJ, including whether direct effect could apply to Directive 64/221. *See id.* *See also* Council Directive 64/221, 1952–67 O.J. SPEC. ED. (L 850/64) 117.

30. *See* CRAIG & DE BURCA, *supra* note 14, at 186.

31. *See id.*

32. *See id.*

33. *See id.* at 187.

34. *See id.* at 188 ("What comes through most strongly in *Van Duyn* is the Court's desire to make directives an effective form of Community law . . .").

35. *See id.* at 188–89 (quoting Case 148/78, *Pubblico Ministero v. Tullio Ratti*, 1979 E.C.R. 1629, 1642, 1 C.M.L.R. 96 (1980) (holding that "a Member State which has not adopted the implementing measures 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 entails")). The Court also concluded that a directive will only have direct effect at the end of the prescribed period of implementation and only in the event of a Member State's default. *See id.* *See also* Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 499 (1982) (holding that if difficulties arise in enforcing a sufficiently precise and clear directive after the end of the implementation period, those difficulties would be the result of the Member State's failure to implement the directive within the specified period). *Cf.* Ethel R. Theis, *Implementation, Compliance and Effectiveness: Emerging Issues on*

rationale is that a Member State cannot rely on its own failure to implement a directive by refusing to recognize the binding effect of a directive in a case where it is pleaded against the Member State.<sup>36</sup> After the implementation date has expired, the national court must enforce a directive that it has failed to properly implement if the directive is pleaded against the Member State, even if it is contrary to existing national law.<sup>37</sup> Under these conditions, directives produce similar effects to regulations.<sup>38</sup>

*B. The Court's Decision to Limit the Expansion  
of the Direct Effect Doctrine*

So far this Note has discussed actions taken by the ECJ to enhance the effectiveness of EC law by expanding the doctrine of direct effect to cover ever more types of EC legislation. Following *Van Gend & Loos* and *Van Duyn*, however, the Court limited this expansion, namely with its decision in *Marshall*.<sup>39</sup> The case involved a conflict between a local policy and an EC law directive where the local Health Authority was acting in accordance with its policy and not the EC directive.<sup>40</sup> The ECJ concluded that the direct effect of a directive can only be pleaded by an individual against the Member State which failed to implement it and not against a non-state entity or individual who failed to observe it.<sup>41</sup> In other words, directives have vertical direct effect but not horizontal direct effect.<sup>42</sup> The Court reasoned that the binding nature of a directive exists only in relation to the Member States to which it is addressed.<sup>43</sup> "It follows that a directive may not of itself impose obligations on an

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*Compliance and Effectiveness within the European Union*, 91 AM. SOC'Y INT'L L. PROC. 159, 161-62 (1997) (stating that the doctrinal basis for direct effect of directives was not initially clear, but the Court now relies on an estoppel theory).

36. See CRAIG & DE BURCA, *supra* note 14, at 188. As will be discussed *infra*, this reasoning makes little sense in light of the ECJ's more recent case law.

37. See *id.* at 190.

38. See *id.* ("Article 249 (old 189) does not declare directives to be directly applicable . . . but they may produce 'similar effects' to regulations when the time limit for their implementation has expired and the [Member] State has incorrectly implemented them or has failed altogether to implement them.").

39. See Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 1 C.M.L.R. 688 (1986).

40. See *id.* As it turned out in *Marshall*, only vertical direct effect was at issue because the Court determined that the local Health Authority was a public authority. See *id.* at 749.

41. *Id.*

42. The ECJ confirmed its *Marshall* holding in *Faccini Dori v. Recreb*, in which Dori sought to rely on a right contained in a non-implemented directive to resist the enforcement against her of a contract she had entered into with Recreb. See Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, 1 C.M.L.R. 665 (1995).

43. See *Marshall*, 1986 E.C.R. at 749.

individual and that a provision of a directive may not be relied upon as such against such a person.”<sup>44</sup> This holding is inconsistent with the Court’s ruling in *Defrenne v. Sabena* that Article 119 (now Article 141) applies to individuals as well as to Member States, although it was expressly addressed only to Member States.<sup>45</sup> Therefore, it is worth questioning the viability of the Court’s holding that directives do not have horizontal direct effect.

## II. GETTING AROUND THE ECJ’S FAILURE TO IMPLEMENT HORIZONTAL DIRECT EFFECT FOR DIRECTIVES: EXPANDING THE DEFINITION OF A MEMBER STATE, INDIRECT EFFECT AND *FRANCOVICH* LIABILITY

As a result of the Court’s failure to establish horizontal direct effect for directives, the Court took an alternative route to enhance the potency of EC law. This alternative route included: 1) the expansion of the definition of a Member State, which allows for a larger pool of potential defendants;<sup>46</sup> 2) the development of the principle of indirect effect, under which Member State courts are required to read domestic legislation in light of EC law, even if the domestic law was created before the EC law directive;<sup>47</sup> and 3) *Francovich* liability, which is the principle that Member States can be liable in damages for a breach of EC law, including the failure to implement or the serious mis-implementation of a directive.<sup>48</sup>

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44. *Id.*

45. See Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne*, 1976 E.C.R. 455, 2 C.M.L.R. 98 (1976), *modified*, Case 50/96, *Deutsche Telekom v. Schroder*, 2000 E.C.R. I-743.

46. See, in chronological order: *Marshall*, 1986 E.C.R. 723 (concluding that the Health Authority constituted an organ of the State; therefore, the directive could be enforced against the Health Authority); Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839, 3 C.M.L.R. 239 (1989) (concluding that if the directive is of such a nature that an individual may rely on it as against a Member State, the individual may also rely on it as against all organs of the administration, including decentralized authorities such as municipalities); Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, 2 C.M.L.R. 833 (1990) (holding that an individual can rely on a directive against any body that is responsible for providing a public service under the control of the State, if such directive could be relied upon as against the Member State itself).

47. See, in chronological order: Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 2 C.M.L.R. 430 (1984); Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 1 C.M.L.R. 305 (1992).

48. See *Francovich*, 1991 E.C.R. I-5357. The ECJ held that although the provisions of the directive were not precise enough for the directive to be directly effective, the directive nevertheless clearly intended to confer rights of which these individuals had been deprived through the State’s failure to implement it. See *id.* Notably, *Francovich* liability applies to directives that are not otherwise directly effective, as well as to those that are. Although *Francovich* concerned a directive that did not have direct effect, *Brasserie du Pêcheur* con-

This Section will describe each of these principles and analyze their impact on the effectiveness of EC law.

### A. Expansion of the Definition of Member State

The Court embarked on its expansion of the definition of a Member State in *Marshall*.<sup>49</sup> In *Marshall*, both the Advocate General and the ECJ itself concluded that the Health Authority constituted an organ of the State; therefore, the claimant in that case could rely on the directive in question against the Health Authority.<sup>50</sup> More generally, the Advocate General was of the opinion that the term Member State “must be taken broadly, as including all the organs of the State.”<sup>51</sup> The ECJ held that it does not matter in what capacity the Member State is acting.<sup>52</sup> A subsequent case broadened the definition of a state even more. In *Fratelli Costanzo*, the ECJ concluded that “when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.”<sup>53</sup>

The Court furthered this line of reasoning in *Foster v. British Gas* where it held that:

[The provisions of a directive capable of having direct effect] . . . may be relied upon in a claim for damages against 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.<sup>54</sup>

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cluded that *Francovich* liability extended to directly effective directives as well. See *Francovich*, 1991 E.C.R. at I-5385 (holding that a Member State can be liable in damages to individuals for failing to give effect to a non-directly effective directive); Case C 46/93, *Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029, 1 C.M.L.R. 889 (1996) (holding that a Member State can be liable in damages to individuals for failing to give effect to a directly effective directive).

49. *Marshall*, 1986 E.C.R. 723.

50. *Id.*

51. *Id.* at 735 (Opinion of Advocate General Slynn).

52. See *id.* at 749.

53. Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839, 3 C.M.L.R. 239 (1989). The issue in *Fratelli Costanzo* was whether a municipal authority was bound by an EC directive if it was determined that the Italian law in question was found to be incompatible with the directive. The ECJ held that it was so bound. See *id.*

54. Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, I-3349, 2 C.M.L.R. 833 (1990). The issue in *Foster* was whether British Gas—a privatized, yet nationalized industry with responsibility for and a monopoly of the gas-supply system in Great

Although the Court's holding in *Foster v. British Gas* is expansive, it is also quite vague. It is unclear after *Foster v. British Gas* what other bodies and institutions may be held legally responsible when they fail to comply with unimplemented directives.<sup>55</sup> Nevertheless, it is clear that the ECJ was increasing the number of plaintiffs who could directly invoke EC law when a State fails either to implement a directive or to implement a directive without serious mis-implementation. In other words, it was looking for one way to fill the gap left by its refusal to apply horizontal direct effect to directives.

The ruling's ambiguity, however, increases the uncertainty of liability for private and public entities alike.<sup>56</sup> In contrast, the establishment of horizontal direct effect for directives would put individuals and quasi-public entities on notice of potential liability under EC law, and thereby eliminate the ambiguity and unpredictability as to whom could be held liable.

### B. The Doctrine of Indirect Effect

At the same time that the Court was expanding the definition of a Member State, it developed the principle of indirect effect. This principle requires national law to be interpreted in light of EC directives. "By urging national courts to read domestic law in such a way as to conform to the provisions of directives, the Court attempted to ensure that directives would be given some effect despite the absence of proper domestic implementation."<sup>57</sup> The principle of indirect effect was first established in *Von Colson*, where the Court held that "in applying the national law . . . national courts are required to interpret their national law in the light of the wording and the purpose of the Directive . . ."<sup>58</sup> Interestingly, the

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Britain—was a body of the type against which the provisions of a directive could be invoked. The Court ruled that it was.

55. See CRAIG & DE BURCA, *supra* note 14, at 197.

56. See Gerrit Betlem, *Medium Hard Law—Still No Horizontal Direct Effect of European Community Directives After Faccini Dori*, 1 COLUM. J. EUR. L. 469, 488 (1995) ("Thus the concept of public authority in Community law can be seen to have a chameleon character: sometimes it is the 'State' and sometimes it is the 'individual.'").

57. CRAIG & DE BURCA, *supra* note 14, at 198.

58. Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 1909, 2 C.M.L.R. 430 (1984). The case involves a claim by applicants to a German prison that they were discriminated against on grounds of sex in violation of the 1976 Equal Treatment Directive. The question was whether the directive required the appointment of the complainants to a post, because under German law, which purported to implement the directive, the complainants were allowed reliance loss only. (In this case, the reliance loss was reimbursement of one of the plaintiffs' travelling expenses.) The Court ruled that appointment to a post was not necessary, but that the directive did require German law to provide an adequate and effective remedy. See *id.* at 1907–09.

directive in question in *Von Colson* was insufficiently precise to have direct effect.<sup>59</sup> Therefore, by requiring the national courts to read the domestic legislation in light of the directive, the Court gave effect to a directive that would not otherwise have been enforceable by individuals as against even a public authority.

The Court expanded upon its *Von Colson* ruling by holding in a subsequent case that national law must be interpreted in light of an EC directive whether the national law is enacted before or after the directive.<sup>60</sup> In so holding, however, the Court used language which has been construed by some to limit its *Von Colson* ruling.<sup>61</sup> The Court stated that the national court is to interpret the directive "as far as possible" in light of the wording and purpose of the directive.<sup>62</sup> Some argue that this language really leaves it entirely within the Member State courts' discretion whether or not to read the national law in light of the EC directive.<sup>63</sup> Others contend that *Marleasing* does not require a national court to override an inconsistent provision of national law in light of a directive—i.e., "as far as possible" requires that national law be read in light of a directive only if the directive is consistent with the national law.<sup>64</sup> Yet another interpretation is that it is not clear just what *Marleasing* requires, because the "as far as possible" language is surrounded by language implying that the duty to interpret national law in light of a

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59. See CRAIG & DE BURCA, *supra* note 14, at 199; Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 307, 326 (1999) (stating that *Von Colson* illustrates that indirect effect applies in cases in which a directive has no direct effect because it fails the *Van Gend & Loos/Van Duyn* criteria).

60. Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, I-4159, 1 C.M.L.R. 305 (1992) ("[I]n 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, in the light of the wording and the purpose of the directive . . ."). *Marleasing* involved two non-state companies in which the plaintiff company sued the defendant company in order to have the defendant company's articles of association declared void as having been created for the sole purpose of defrauding and evading creditors, including *Marleasing*. Under the Spanish Commercial Code, "lack of cause" is a ground for nullity of articles of association; however, "lack of cause" is not a ground for nullity under Council Directive 68/151, which should have been implemented by Spain. Spain had determined that its existing Commercial Code sufficiently implemented the directive. The Court declared that all Member States have a duty to take all appropriate measures to fulfill their obligations under the Treaty and to abstain from any measure which could jeopardize the attainment of Treaty objectives.

61. See *id.*; cf. Nick Maltby, *Marleasing: What Is All The Fuss About?*, 109 LAW Q. REV. 301, 305-07 (1993).

62. *Marleasing*, 1990 E.C.R. at I-4159.

63. See Rene Valladares, *Franovich: Light at the End of the Marshall Tunnel*, 3 U. MIAMI Y.B. INT'L L. 1, 32 (1995) ("The principle of indirect effect has been perceived as being too dependent on the willingness and capacity of the national court to identify its Community obligations.")

64. See Maltby, *supra* note 61, at 301, 305; cf. Coppel, *supra* note 8, at 873.

directive is an absolute obligation.<sup>65</sup> Therefore, due to the numerous interpretations that can be gleaned from it, the overall effectiveness of *Marleasing* is questionable.

In view of case law following *Marleasing*, it appears that the most accurate interpretation of *Marleasing* out of those suggested above is that the decision to interpret national law in light of a directive is solely within national courts' discretion. Cases after *Marleasing* restricted the doctrine of indirect effect that it broadened. The ECJ "seemed to leave it to the discretion of the national court whether or not an interpretation in conformity with a Directive was possible."<sup>66</sup>

Also, the Court went so far as to dissuade national courts from interpreting directives in a way that would cause them to have horizontal direct effect.<sup>67</sup> In *Luciano Arcaro*, the Court recited a national court's obligation under *Marleasing*<sup>68</sup> and concluded that:

[The] . . . obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads

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65. See Grainne de Burca, *Giving Effect to European Community Directives*, 55 MOD. L. REV. 215, 227 (1992) (stating that the meaning of "as far as possible" is not clear given the fact that other parts of *Marleasing* are phrased in terms of an absolute obligation on national courts to construe domestic law in conformity with directives). The article additionally indicates that if an absolute obligation to read national law in light of a directive is established by *Marleasing*, this would obviate the distinction between the national court's obligation to interpret the directive and the direct enforcement of directives against individuals. It would do this without addressing the policy concerns the ECJ seems to have with horizontal direct effect. See *id.* Such a contention implies that either the Court is being very disingenuous or it necessarily is not requiring an absolute obligation to interpret national law in light of a directive.

66. CRAIG & DE BURCA, *supra* note 14, at 203. The book goes on to cite three cases, *Wagner-Miret*, *Faccini Dori* and *El Corte Ingles* and explains that in each of these cases the ECJ accepted the limits of interpretation found by the national courts. See *id.* at 203 (citing Case C-192/94, *El Corte Ingles v. Cristina Blazques Rivero*, 1996 E.C.R. I-1281, 2 C.M.L.R. 507 (1996); Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, 1 C.M.L.R. 665 (1995); and Case C-334/92, *Wagner-Miret v. Fondo de Garantia Salarial*, 1993 E.C.R. I-6911, 2 C.M.L.R. 49 (1995)).

67. CRAIG & DE BURCA, *supra* note 14, at 204. The authors propose that:

[T]he Court can be seen not simply leaving it to national courts to decide how far they wish to go in interpreting national law in the light of directives, but apparently dissuading them from seeking such a harmonious interpretation where the end result might be seen as a form of horizontal direct effect.

*Id.* at 204.

68. The obligation in question here is to interpret national law in light of the EC directive as far as possible. See Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 1 C.M.L.R. 305 (1992).

to the imposition on an individual of an obligation laid down by a directive which has not been transposed . . . .<sup>69</sup>

This conclusion attempts to minimize the potency of the doctrine of indirect effect established in *Marleasing* because it explicitly limits national courts' obligation to read national law in light of EC law.<sup>70</sup>

However, it is possible to distinguish *Luciano Arcaro* from *Marleasing*, because *Marleasing* concerned a legal disadvantage or detriment to a party, whereas *Luciano Arcaro* discusses the imposition of an obligation on a party.<sup>71</sup> Also, *Luciano Arcaro* may not have as much precedential weight as *Marleasing*, considering the decision in that case was given by a very small chamber of the Court.<sup>72</sup> At a minimum, *Luciano Arcaro* and other cases following *Marleasing* call into question the continuing strength of indirect effect as an alternative method of achieving maximum effectiveness of EC law.

In any case, considering that *Marleasing* involved one individual asserting EC law against another individual, indirect effect under *Marleasing* is a surrogate for horizontal direct effect for directives.<sup>73</sup> It is at least possible after *Marleasing* to obtain the results of horizontal direct effect for directives without a formal acceptance of the horizontal direct effect doctrine by the ECJ. However, since indirect effect is strictly dependent on the interpretation of the national court in question, obtaining results that are comparable to the result that would be obtained if horizontal direct effect were applied to directives is at the whim of the national court. Thus, indirect effect does not fill the gap in the effectiveness of EC law left by the lack of horizontal direct effect of directives.

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69. C-168/95, Criminal Proceedings Against Luciano Arcaro, 1996 E.C.R. I-4705, I-4730, 1 C.M.L.R. 179 (1997).

70. As Craig & de Burca point out, "At first glance, the Court appears to have come full circle in *Luciano Arcaro*." CRAIG & DE BURCA, *supra* note 14, at 205.

71. *Id.* at 206.

72. *See id.* at 204.

73. *See* Betlem, *supra* note 56, at 489 ("This canon of interpretation functions as a substitute for horizontal direct effect. In fact the interpretive obligation amounts to a kind of surrogate horizontal direct effect . . . ."); Maltby, *supra* note 61, at 302; *cf.* Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEGAL. F. 135, 145 (1992) ("The result, in *Marleasing*, is a preliminary ruling which in essence directs the national courts to recognize the horizontal direct effect of article 11 of the First Company Law Directive. In this manner, horizontal effects are introduced, so to say, through the back door.")



### C. *Francovich* Liability

A third doctrine created by the Court to make EC law more powerful, thereby circumventing its rejection of horizontal direct effect for directives, is *Francovich* liability.<sup>74</sup> In *Francovich*, the Court held that the State could be liable to an individual in damages for loss caused by its failure to implement a directive.<sup>75</sup> Keeping in line with its efforts to make EC law more effective, the Court concluded that:

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member-State can be held responsible.<sup>76</sup>

Therefore, instead of attempting to enforce a directive against another private party in violation of a directive, an individual can seek damages from the Member State for failure to implement the directive altogether or for serious mis-implementation.<sup>77</sup> In this way, *Francovich* liability serves as an alternative to the lack of horizontal direct effect for directives.<sup>78</sup> As O'Keefe puts it, indirect effect and *Francovich* liability "allow individuals to claim remedies based on a directive even in a horizontal

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74. See CRAIG & DE BURCA, *supra* note 14, at 210.

75. Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, 2 C.M.L.R. 66 (1991).

76. *Id.* at I-5414.

77. "Rather than attempting to enforce the provisions of a directive against the private party on whom the obligation contained in those provisions should be imposed if it were properly implemented, the individual can choose instead to bring proceedings for damages against the State for failing so to implement it." CRAIG & DE BURCA, *supra* note 14, at 210; see also Coppel, *supra* note 8, at 861-62 ("Individuals unable to enforce the terms of an unimplemented or imperfectly implemented directive horizontally should . . . pursue a more indirect course and seek damages from the state, which was responsible for its implementation."); Valladares, *supra* note 63, at 46 (stating that under *Francovich* an individual is able to sue a Member State for damages sustained at the hand of another individual due to the non-implementation of a directive). As stated earlier, *Francovich* liability applies regardless of whether the directive does or does not have direct effect. See note 48, *supra*.

78. See Valladares, *supra* note 63, at 50 ("While an individual cannot claim rights under an unimplemented directive against another because of the lack of horizontal direct effect of directives, *Francovich* offers the powerful solution of obtaining damages from the real culprit: the Member State which has failed to fulfill its Community obligations."); Ian Ward, *Fairness, Effectiveness and Fundamental Rights: The Case for a Unified Administrative Law Within The European Community*, 5 *TOURO INT'L L. REV.* 279, 317-18 (1994) (stating that *Francovich* "extended private law liability to public law bodies and, in doing so, further armed the individual in his attempt to effect his rights within a member state").

situation such as that in *Marleasing*, thus avoiding the denial of the remedy established by *Marshall I*.<sup>79</sup>

However, *Francovich* does have its limits. Member State liability is subject to the fulfillment of various conditions. For example, three conditions must be fulfilled under *Francovich* in order for liability to attach to a Member State: 1) the purpose of the directive must be to grant rights to individuals; 2) it must be possible to identify the content of those rights on the basis of the provisions of the directive; and 3) there must be a causal link between the breach of the State's obligation and the damage suffered.<sup>80</sup> Also, Member State liability does not exist for every kind of infringement of EC obligations, but only for "sufficiently serious" violations.<sup>81</sup> As Swaine has argued, "the Court's incorporation of the requirement that breaches be 'sufficiently serious' will certainly leave many injured claimants uncompensated."<sup>82</sup> Although subsequent cases have helped to make the *Francovich* criteria less ambiguous,<sup>83</sup> the basic conditions established in *Francovich* persist. Therefore, the explicit language of the doctrine itself places limits on its applicability.

In addition, a Member State's breach of an unimplemented directive is remedied in the absence of a Community rule by applying national remedies and procedures with respect to Member State liability.<sup>84</sup> Since national rules on Member State liability are unlikely to be uniform, the

79. David O'Keeffe, *Judicial Protection of the Individual By The European Court of Justice*, 19 FORDHAM INT'L L. J. 901, 905-06 (1996). O'Keeffe's reference to *Marshall I* is the same case referred to in this Note as *Marshall*. There is a counterpart to the *Marshall* case concerning damages only, which O'Keeffe addresses in his article and which explains the distinction he makes between *Marshall I* and *Marshall II*. See *id.*

80. *Francovich*, 1991 E.C.R. at I-5414-15.

81. *Id.* at 5414.

82. Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L. J. 1, 80 (2000).

83. See Case C 46/93, *Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029, 1 C.M.L.R. 889 (1996) (establishing factors to be considered to determine a serious breach under *Francovich* where transposition of the directive has been imperfect); Joined Cases C-178-79/94 & C-188-190/94, *Dillenkofer v. Germany*, 1996 E.C.R. I-4845, 3 C.M.L.R. 469 (1996) (concluding that failure to transpose a directive altogether automatically constitutes a sufficiently serious breach under *Francovich*). The factors established by *Brasserie du Pêcheur* to be considered in determining whether a breach is sufficiently serious include: 1) the clarity and precision of the rule breached; 2) the measure of discretion left by that rule to national or Community authorities; 3) whether the infringement and the damage caused was intentional or involuntary; 4) whether any error of law was excusable or inexcusable; 5) the fact that the position taken by a Community institution may have contributed towards the omission; and 6) the adoption or retention of national measures or practices contrary to Community law. See *Brasserie du Pêcheur*, 1996 E.C.R. at I-1150.

84. See *Francovich*, 1991 E.C.R. at I-5415-16; cf. de Burca, *supra* note 65, at 238 (stating that *Francovich* repeats limitations set out in earlier cases, because it requires that the procedural rules and conditions of the damages remedy: 1) are to be governed by national law; 2) are to be no less favorable than those governing similar domestic actions; and 3) should not render an award practically impossible to secure).

nature and effectiveness of the available remedies for enforcement is likely to vary from Member State to Member State.<sup>85</sup> Therefore, "[i]nequality and unfairness in the protection of individual rights conferred by Community law is a likely result."<sup>86</sup>

Finally, it is important to reconsider the strength of *Francovich* because issues may arise, for example, as to whether alternative remedies like indirect effect under *Marleasing* must be exhausted by an individual before she can rely on *Francovich* remedies.<sup>87</sup> Also, considering that the facts of *Francovich* are extreme, it is unclear whether the applicability of the case is limited to those situations where the Member State's misconduct is as blatant as it was in *Francovich*.<sup>88</sup> Thus, although some scholars believe that *Francovich* fills the entire gap left by *Marshall*,<sup>89</sup> there are legitimate reasons to doubt this conclusion and to support the application of horizontal direct effect to directives.

### III. THE POSITIVE AND NEGATIVE ASPECTS OF MAKING DIRECTIVES HORIZONTALLY DIRECTLY EFFECTIVE

Before considering the arguments for and against the establishment of horizontal direct effect for directives, it is important to ask why the Court has been reluctant to establish horizontal direct effect for directives. Perhaps the ECJ feels constrained by prior case law regarding direct effect. It may, however, involve some other, extraneous factor. As stated earlier, the Court could have established horizontal direct effect for directives following its ruling in *Defrenne v. Sabena*.<sup>90</sup> Also, in light of the expansive nature of case law before and after *Marshall*—like *Van Gend & Loos* in which the Court established vertical direct effect for Treaty Articles, or *Foster v. British Gas* in which the Court expanded the

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85. See James E. Hanft, *Comment: Francovich and Bonifaci v. Italy: EEC Member State Liability for Failure to Implement Community Directives*, 15 FORDHAM INT'L L. J. 1237, 1272 (1991/1992).

86. *Id.*

87. See Valladares, *supra* note 469, at 48–51.

88. See *id.* at 50–51. Considering case law following *Francovich*, like *Dillenkofer*, and *Brasserie du Pêcheur*, it appears that this issue is now much clearer than it was at the time of Valladares's article. However, the fact that the Court has adhered to the "sufficiently serious" requirement suggests that the breach does have to be relatively serious. Cf. Coppel, *supra* note 8, at 873–74 (stating that it is unlikely that the Court would settle on a strict liability standard for *Francovich* claims). The facts of *Francovich* are extreme because the Italian government had already been criticized once for failure to implement the directive in question under an Article 226 (ex art. 169) proceeding, but continued to leave the directive unimplemented. See *Francovich*, 1991 E.C.R. at I-5371. The Article 226 procedure is described later in this Note.

89. See, e.g., Valladares, *supra* note 63, at 47.

90. *Id.*

definition of a Member State—it appears doubtful that the Court really felt constrained by precedent.<sup>91</sup> Therefore, there must be some other reason for its failure to establish horizontal direct effect for directives.

Various authors have proposed that the reason for the Court's reluctance is political.<sup>92</sup> When vertical direct effect for directives was established by the Court, it faced much criticism from various Member States.<sup>93</sup> Also, almost all Member States that made submissions in a case involving the application of horizontal direct effect to directives, *Faccini Dori*, opposed establishing horizontal direct effect for directives.<sup>94</sup> According to Craig & de Burca, the Member States' opposition to horizontal direct effect is based on the assumption that they will have more discretion in the implementation of directives given to them by EC Treaty Article 249 if national courts and administrators are not directly enforcing them.<sup>95</sup>

To reinforce this possible explanation for the Court's denial of horizontal direct effect for directives, it is "significant to note that, once the resistance of Member States' courts to the direct effect of directives subsided, the ECJ to some extent proceeded toward recognizing their horizontal direct effect."<sup>96</sup> Assuming that political motivations have influenced the Court's reluctance to establish horizontal direct effect for directives, one must consider whether the situation would ever be such as to allow for horizontal implementation of the direct effect doctrine on

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91. See JOXERRAMON BENGOTXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* 237–38 (1993) ("In order to affirm vertical direct effect of directives the Court has gone beyond the wording of article 189 [now Article 249] whilst in order to deny horizontal direct effect of directives it has chosen to interpret the article in a narrow way."); Coppel, *supra* note 8, at 863 (stating that it is disingenuous for Court to claim lack of basis in Treaty for horizontal direct effect of directives considering supremacy, vertical and horizontal direct effect of Treaty Articles and vertical direct effect of directives).

92. See Coppel, *supra* note 8, at 878 (contending that the real reason for the continuing denial of horizontal direct effect is a political one); Giorgio Gaja, *1994 Survey of Books Relating to the Law XI. International and Comparative Law*, 92 MICH. L. REV. 1966, 1971–72 (1994) (reviewing BENGOTXEA, *supra* note 91). Notably, Coppel states that another reason for the Court's denial of horizontal direct effect for directives is that the Commission favors the retention of current case law. See Coppel, *supra* note 8, at 878.

93. See CRAIG & DE BURCA, *supra* note 14, at 188 (stating that *Van Duyn* was not a popular decision and that "some of the Member States felt that the Court had gone too far in advancing its conception of Community law at the expense of the clear language of the Treaty, and the obvious limitations on directives as a form of legislation"); Theis, *supra* note 35, at 162 (contending that the doctrine of direct effect of directives has "been only reluctantly accepted by supreme and constitutional courts, notably in France and Germany, and has met with mixed reactions from academic commentators").

94. See CRAIG & DE BURCA, *supra* note 14, at 211 (citing Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, 1 C.M.L.R. 665 (1995)).

95. *Id.*

96. See Gaja, *supra* note 92, at 1971.

directives. However, given the principles the Court has created to get around its failure to apply horizontal direct effect to directives subsequent to this resistance movement by Member States, like indirect effect and *Francovich* liability, the situation most likely *will* arise so as to allow for application of horizontal direct effect to directives.

Subsection II-A analyzes the arguments against horizontal direct effect for directives and Subsection II-B considers the arguments in favor of horizontal direct effect for directives.

### *A. Arguments Against Horizontal Direct Effect for Directives*

The ECJ's reluctance to establish horizontal direct effect for directives does not dismiss the issue of whether horizontal direct effect should be applied to directives. There are many arguments for and against giving directives horizontal direct effect.

The first and potentially most convincing argument against the Court's establishing horizontal direct effect for directives is the need for judicial restraint.<sup>97</sup> The argument is that if the Court continues to pursue judicial activism, it will lose all credibility and Member States will not respect its decisions at all.<sup>98</sup> On the one hand, this is a definite concern considering that the Court's only true enforcement power rests in the respect it gets from the various Member States.<sup>99</sup> However, when one considers the "active" approach the Court has taken in its development of indirect effect, its expansion of the definition of a Member State, and its creation of *Francovich* liability, one can only conclude that judicial restraint is not a reason for its refusal to apply horizontal direct effect to directives, but rather a pretext for some other underlying issue.<sup>100</sup> For example, as discussed earlier, the Court may be worried about the resultant political pressure from Member States if it were to make directives

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97. See Hinton, *supra* note 59, at 346-47.

98. See *id.* ("If national courts and authorities choose not to abide by ECJ judgments, a greater enforcement problem exists than if the ECJ had not acted at all. A corresponding reduction in the effectiveness of Community law results."); see also Rasmussen, *supra* note 73, at 162 ("If the ECJ's legitimacy crumbled under the weight of societally unacceptable activism, the EC would lose the only institution that throughout the years of declining Member State faith in the benefits of 'building Europe,' has steadfastly insisted on strengthening its still frail construction.").

99. See Hinton, *supra* note 59, at 346-47 (contending that "the ECJ is only effective if national courts and authorities are willing to abide by and enforce its decision").

100. See generally, Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 1 C.M.L.R. 305 (1992); Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, 2 C.M.L.R. 66 (1991); Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, 2 C.M.L.R. 833 (1990); Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 2 C.M.L.R. 430 (1984).

directly effective horizontally.<sup>101</sup> Also, the Court may be resisting the inevitable infringement on the Member States' historical sovereignty that is tied up with making directives directly effective horizontally. Whatever the underlying issue might be, if the Court were truly worried about taking an overly-activist approach, it would have stopped short of some of the other measures it has taken. Thus, since the Court has not stopped short of such measures, judicial restraint must not be the concern behind its reluctance to apply horizontal direct effect to directives.

In fact, one could even argue that by failing to take this final step, the Court is undermining its own credibility by showing too much deference to Member States; the Court is indicating that it is not willing to address Member State opposition when it is required. If anything, the Court's expansive approach suggests that it is absolutely within its power to establish horizontal direct effect; therefore, applying horizontal direct effect to directives would not show lack of judicial restraint.<sup>102</sup>

Next, a number of scholars contend that the estoppel argument relied upon by the Court to justify vertical direct effect for directives does not apply to horizontal direct effect because individuals do not have power over the implementation of directives.<sup>103</sup> If it were not for case law decided subsequent to *Marshall*, this argument might have some merit. However, considering that the Court has expanded the definition of a Member State to include public utilities,<sup>104</sup> for example, this argu-

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101. Note that horizontal direct effect does seem to be a sensitive area that is faced with much resistance by Member States. See, e.g., BENOÛT, *supra* note 91. That said, some states have gone ahead and taken the initiative to recognize horizontal direct effect for directives without the establishment thereof by the Court. See Werner F. Ebke, *European Community Law in a Nutshell*, 15 Hous. J. INT'L L. 237, 241 (1992) (book review) (referring to an example of such recognition in Germany).

102. See Betlem, *supra* note 56, at 491 (arguing that the Court could change its mind about horizontal direct effect because it is not that different from indirect effect which permits the enforcement of directives against private parties and also because of the unclear language the Court used in *Faccini Dori*). On a related note, the Court could easily justify establishment of horizontal direct effect under Article 5. EC TREATY art. 5. Under Article 5, Member States are required to take all general or particular measures that are appropriate to fulfill their Community law obligations. EC TREATY art. 5. Importantly, the Court used Article 5 to fill the gaps of direct effect in *Francovich*, concluding that the liability for damages resulting from a violation of obligations under Community law arises out of both the general system of the Treaty and Article 5 of the Treaty. *Francovich*, 1991 E.C.R. at I-5411-14.

103. See Betlem, *supra* note 56, at 481 (1995); Maltby, *supra* note 61, 310 (stating that if estoppel is the basis for the adoption of vertical direct effect, it is clear why directives cannot give rise to horizontal direct effect); Valladares, *supra* note 63, at 25 (1995) (discussing the reasons given against horizontal direct effect by Advocate General Slynn in Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 734, 1 C.M.L.R. 688 (1986)).

104. See, e.g., *Foster*, 1990 E.C.R. at I-3348.

ment loses all strength.<sup>105</sup> Public utilities do not have any more control over the implementation of directives than individuals. Concededly, there is an argument that public utilities, as agents of the state, are constructive state actors and should therefore be treated exactly as the Member State itself is treated.

For example, as a state actor, a public utilities company should not get away with violating a directive any more than a more traditional state government entity should. However, when one considers what is actually entailed in the implementation process of directives and who is responsible for such process, it is inconsistent to hold a public utility in the same light as an internal government agency. The public utility simply does not have the same degree of control over state actions. Because of this distinction, and since the Court allows directives to be asserted directly against public utilities, it seems equally inconsistent to draw the line at public utilities and not allow actions against individuals who violate directives. Therefore, in order to remain consistent, the Court should either expand the estoppel argument (as discussed in Subsection II-A, *supra*) to include horizontal direct effect, or abandon this theory altogether.<sup>106</sup>

A third argument is that there is no basis for horizontal direct effect for directives in the EC Treaty.<sup>107</sup> However, the Court has at other times gone beyond the explicit language of the EC Treaty, so this also cannot be a reason for refusing to establish horizontal direct effect for directives.<sup>108</sup>

Another argument is one referred to earlier, namely that since directives require implementation by national courts, they alone do not provide enough instruction or certainty to allow for direct enforcement

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105. See Walter van Gerven, *Articles 30, 48, 52 and 59 After Keck & Mithouard, and Protection of Rights Arising from Directives after Faccini Dori*, 2 COLUM. J. EUR. L. 217, 235 (1996) [hereinafter, "Articles"]; Walter van Gerven, *The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords*, in INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 335, 344-45 (Deirdre Curtin & Ton Heukels eds., 1994) [hereinafter, "van Gerven"] (concluding that the Court's estoppel argument as applied to public utilities that have no control over implementation of directives suggests that individuals, too, are in a position to have directives enforced against them).

106. See Betlem, *supra* note 56, at 484 (arguing that the estoppel theory does not work as a legal basis for horizontal direct effect, so it should either be expanded to include individuals or abandoned as a basis for any form of direct effect); cf. Coppel, *supra* note 8, at 875 (declaring that the estoppel justification for no horizontal direct effect is no longer viable).

107. Cf. Manfred Zuleeg, *EC Law*, 47 AM. J. COMP. L. 222, 224 (reviewing SACHA PRECHAL, *DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY OF DIRECTIVES AND THEIR ENFORCEMENT IN NATIONAL COURTS* (1995)).

108. For example, the Court did not adhere to a strict reading of the language of the Treaty when it decided *Van Gend & Loos*. See CRAIG & DE BURCA, *supra* note 14, at 166.

against individuals.<sup>109</sup> In other words, directives are not explicit enough to make individuals certain of their legal responsibilities or obligations. This lack of instruction is compounded by the fact that in order for its direct effect even to be in question, a directive must necessarily be either seriously mis-implemented or left unimplemented by the Member State.<sup>110</sup> However, Treaty Articles, which tend to lack instruction as well, have been accorded both vertical and horizontal direct effect by the Court.<sup>111</sup> Thus, lack of certainty is at best a questionable argument against implementation of horizontal direct effect on directives.

In fact, horizontal direct effect for directives may even increase certainty for individuals against whom EC law is being asserted. For example, one Advocate General argued that the recognition of horizontal direct effect would not prejudice legal certainty, but rather could only result in enhanced legal clarification for individuals.<sup>112</sup> "In particular he pointed out that the very broad conceptualization of 'State' for the purpose of direct effect, and the unclear limits of the duty imposed on national courts to construe their domestic law in conformity with EC law, have created so much uncertainty that the recognition of horizontal direct effect could only result in legal clarification for the citizens of the Union."<sup>113</sup> In other words, if the law were that directives could be asserted against all individuals in breach of an EC directive, enhanced clarity would be obtained for individuals against whom the directive is asserted, because the question of what constitutes a Member State would no longer be relevant.

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109. See CRAIG & DE BURCA, *supra* note 14, at 192; Maltby, *supra* note 61, at 310; cf. Coppel, *supra* note 8, at 876 (stating that when analyzing their legal position individuals "would have to refer not only to national laws but also to Community legislation and, moreover, to come to an independent conclusion as to whether national law faithfully reflected Community law").

110. See Betlem, *supra* note 56, at 487.

111. See CRAIG & DE BURCA, *supra* note 14, at 192 ("While it is true that there are problems of legal certainty which could be created by the so-called 'horizontal' application of directives, these are problems which the Court has surmounted in the case of the direct effect of other kinds of Community law."); Rasmussen, *supra* note 73, at 157 (arguing against horizontal direct effect, the author states that there are many similarities between Treaty provisions and directives); Valladares, *supra* note 63, at 24 (arguing that giving horizontal direct effect to Treaty provisions, but not to directives, results in absurdities).

112. See Betlem, *supra* note 56, at 486 (citing Opinion of Advocate General Jacobs in Case C-316/93, *Vaneetveld v. Le Foyer SA*, 1994 E.C.R. I-763, 2 C.M.L.R. 852 (1994)); cf. Valladares, *supra* note 63, at 27 (quoting Professor Anthony Arnall arguing in regard to *Marshall* that "the rights of the individual and the requirements of legal certainty would have been better served had the Court accepted that directives were capable of producing horizontal direct effect"). As used in this Note, "legal certainty" means certainty with regard to legal rights and obligations.

113. See Betlem, *supra* note 56, at 486 (citing Opinion of Advocate General Jacobs in *Vaneetveld*).



A fifth argument related to the lack of legal certainty contention is that individuals are not put on notice regarding EC directives.<sup>114</sup> Since the reformation of Article 191 (now Article 254), however, most directives are now required to be published and therefore individuals have at least formal notice of EC directives.<sup>115</sup> Thus, lack of notice is no longer a valid argument against horizontal direct effect of directives. This point is bolstered by the fact that individuals who should be on notice presumably employ lawyers who are familiar with EC law to keep them informed of the changing status and implementation of directives.<sup>116</sup>

Importantly, there appears to be a general notion of unfairness that underlies the legal certainty and notice arguments advanced against horizontal direct effect. For example, it simply seems unfair to saddle individuals with liability for a Member State's failure to implement a directive. Although this is a point worth considering, it is not strong enough to deny wronged individuals the recourse they deserve. After all, the individuals that would be held liable under a regime in which horizontal direct effect for directives is instituted would not be asked to do anything more than comply with EC law. It is just that with horizontal direct effect there would be a missing link, namely the Member State's proper implementation of the EC directive in question into national law. If the Member State were to properly implement the EC directive, the individual would be held liable for breaching the Member State law that reflects the EC directive.<sup>117</sup> However, the fact that the Member State failed to implement the directive in question would not change the fact that the directive is binding EC law with which its addressees should comply. Therefore, considering that individuals have notice of EC law and there is legal certainty with horizontal direct effect for directives, this missing link of Member State implementation should not make a difference, especially in the context of the European Community.

For example, if there were an EC law directive that made drinking alcohol under the age of 18 illegal, a Member State's failure to imple-

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114. See CRAIG & DE BURCA, *supra* note 14, at 211; Maltby, *supra* note 61, at 310.

115. See EC TREATY art. 254 (ex art. 191); Coppel, *supra* note 8, at 876 (noting that the legal certainty argument is weakened by reforms to Article 191 (now Article 254) which now make it obligatory for directives to be published in the Official Journal).

116. See Coppel, *supra* note 8, at 876. It should be noted, however, that this argument may apply to corporations who have inside legal counsel constantly informing them of the legality of their actions, but it does not apply as neatly to individuals who act and do not have such counsel.

117. See van Gerven, *supra* note 105, at 351 (stating that "someone, who would have been bound by an obligation imposed by a directive if that directive had been properly implemented by the Member State concerned, can not take advantage of that Member State's failure to do so, in order to deny a course of action brought against him by a person who would have obtained legal rights against him, if the Member State's default had not occurred, and who was entitled to act in reliance thereupon").

ment the directive and to pass a national law making it illegal in that Member State to drink alcohol under the age of 18 would not affect the existence of the EC law. The fact would remain that it is illegal to drink alcohol under the age of 18 in the European Community despite what the national law might say. Thus, individuals in the European Community should be bound by this law regardless of what the national laws are. As citizens of countries that are members of the European Community, individuals must be cognizant not only of national laws, but also of European Community laws. Also, just as there are national laws by which individuals are bound, but about which they know nothing, so too, there are European Community laws about which individuals know nothing but by which they are bound. In this way, holding individuals liable for a Member State's failure to implement EC law would not be unfair, or at least would not be unjust enough to deny other individuals the recourse they deserve.

A sixth argument that has been advanced is that horizontal direct effect would blur the distinction between regulations and directives set out in Article 249 of the EC Treaty.<sup>118</sup> Although it is true that the drafters of the Treaty Establishing the European Economic Community (the "EEC Treaty") intended that there be a distinct difference between regulations and directives, this distinction has already been blurred by subsequent Community legislation.<sup>119</sup> As Betlem illustrates:

Not only do regulations frequently require action to be taken by the domestic authorities (including the legislatures), but the choice left for Member States in implementing certain provisions of directives may not differ from a directly applicable provision of a regulation; often they are not distinguishable in content but only in 'form and nomenclature.' It follows that arguments based on the nature of a directive cannot be decisive.<sup>120</sup>

In the alternative, as Betlem explains, differences between directives and regulations would remain even after directives are made horizontally directly effective.<sup>121</sup> "Horizontal, like vertical, direct effect would only apply under certain circumstances; that is in the event of incorrect or

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118. See Betlem, *supra* note 56, at 487; Maltby, *supra* note 61, at 310; Valladares, *supra* note 63, at 25 (discussing Advocate General Slynn's opinion in Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 734, 1 C.M.L.R. 688 (1986)).

119. See Betlem, *supra* note 56, at 487 ("Admittedly the drafters of the EEC Treaty originally had intended a clear distinction, but in the subsequent pattern of Community legislation a firm ontological difference cannot be detected."); Coppel, *supra* note 8, at 877.

120. Betlem, *supra* note 56, at 487.

121. See *id.*

non-implementation, and after the expiry of the designated period.”<sup>122</sup> In other words, unlike regulations, horizontal direct effect of directives would be contingent upon the directive either being seriously mis-implemented or unimplemented.

Yet another argument is that if a Member State is in default, it is the Commission's obligation to consider such default under its Article 169 (now Article 226) functions.<sup>123</sup> Under Article 226, the individual may petition the Commission to take action against a Member State for its failure to properly implement a directive.<sup>124</sup> Considering the Court allows deviation from the Article 226 procedures in the case of vertical direct effect by allowing individuals to directly assert Community law against a Member State where the Member State has failed to properly implement a directive, disallowing deviation from the Article 226 procedures in the case of horizontal direct effect is inconsistent. For that reason, this argument is severely undermined.

A eighth argument against horizontal direct effect for directives is that the binding effect of a directive exists only against the Member States to which it is addressed.<sup>125</sup> To rebut this argument, however, one need only cite to *Defrenne v. Sabena*, which held that the fact that certain Treaty Articles are addressed to Member States only does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.<sup>126</sup>

Two final arguments against horizontal direct effect are the “democratic deficit” argument and the “subsidiary principle” argument. The “democratic deficit” argument is that the circumvention of the implementation process characteristic of horizontal direct effect makes horizontal direct effect less than democratic.<sup>127</sup> The “subsidiary principle” argument is that directives are the embodiment of subsidiarity

122. *Id.*

123. Under Article 226, an individual can petition the Commission to inform it of a violation of Community law by a Member State. EEC TREATY art. 226 (ex art. 169) (“If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.”). See *Marshall*, 1986 E.C.R. at 735 (Opinion of Advocate General Slynn).

124. EC TREATY art. 226 (ex art. 169).

125. See CRAIG & DE BURCA, *supra* note 14, at 192; Betlem, *supra* note 56, at 8; Valadares, *supra* note 63, at 25 (discussing the Advocate General Slynn's opinion in *Marshall*, 1986 E.C.R. at 734). Craig & de Burca contend that this is not a strong argument because the Court usually looks to the precise text of the EC Treaty simply as *one* factor in deciding on the interpretation of the relevant provision. CRAIG & DE BURCA, *supra* note 14, at 192.

126. See CRAIG & DE BURCA, *supra* note 14, at 192. See also Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne*, 1976 E.C.R. 455, 2 C.M.L.R. 98 (1976), *modified*, Case 50/96, *Deutsche Telekom v. Schroder*, 2000 E.C.R. I-743.

127. See Betlem, *supra* note 56, at 487.

because the EC Treaty leaves it up to the Member States to implement directives. By allowing individuals to enforce directives directly against other individuals, we would remove the subsidiarity of directives and therefore encroach on the sovereignty of the Member States.

The democratic deficit argument, as in many other arguments against horizontal direct effect, can also be leveraged against vertical direct effect because non-implementation is present in that situation as well. As for the subsidiarity argument, it also applies equally to vertical direct effect of directives. In addition, as Coppel argues, the subsidiarity question has more to do with the acceptance of a directive, rather than making it effective:

Once the decision has been taken to produce a directive, subsidiarity may then dictate that the directive is worded broadly rather than narrowly, leaving more rather than less discretion to the Member States. However, once a directive has been adopted, it is hard to see how subsidiarity could justify any move to make its terms less effective at a national level.<sup>128</sup>

Thus, once a Member State has accepted a directive, it has necessarily agreed to make it effective.

Although many arguments can be advanced against establishing horizontal direct effect for directives, those arguments are rebuttable. One of the strongest rebuttals is that many of the arguments against horizontal direct effect, if really considered seriously, can also be used against measures the ECJ has already implemented such as vertical direct effect for directives, horizontal and vertical direct effect for Treaty Articles, and the indirect effect doctrine.<sup>129</sup>

#### *B. Arguments in Favor of Horizontal Direct Effect for Directives*

Along with the convincing rebuttals to arguments against horizontal direct effect for directives, there are some additional arguments that support horizontal direct effect for directives. For example, it simply seems arbitrary that individuals can assert rights granted by EC law if their employer is a Member State, but cannot do so if they work for a private employer, especially considering that the distinction between a private entity and a State entity has become vague.<sup>130</sup> Not only is it

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128. See Coppel, *supra* note 8, at 877.

129. See *id.* at 878 (stating that indirect effect can result in the terms of directives being enforced against individuals who do not have any more notice than they would under horizontal direct effect).

130. See de Burca, *supra* note 65, at 231 (1992) (stating that the distinction between an employee of private versus public entities is arbitrary especially since it is uncertain what is

arbitrary, but it goes against the EC law principle of non-discrimination, because employees of private employers are necessarily being discriminated against relative to employees of public employers in a world where there is vertical direct effect but no horizontal direct effect.<sup>131</sup>

Second, an argument advanced by Advocate General Lenz in *Faccini Dori* is that economic competition may be distorted where a directive has been implemented correctly in some Member States but not in others, normally to the disadvantage of more conscientious Member States.<sup>132</sup> For example, if there were an EC directive regulating the amount of trade that could be contracted for with foreign country X, and Member State Y interprets/implements the directive more conservatively than Member State Z, Member State Y could be at a relative economic disadvantage. Its diplomatic relations with foreign country X could suffer vis-à-vis Member State Z's diplomatic relations with foreign country X as a result of the more restrictive trade policy. Also, the restrictive approach may prevent the more conservative state from maximizing its production capabilities because of the potential limitations on trade with foreign country X, relative to Z. In this way, differing interpretations of a directive between Member States can have negative repercussions for Member States.

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regarded as a public body or an emanation of the state); O'Keeffe, *supra* note 79, at 904 ("Individuals could rely on a directive if suing a Member State or an emanation thereof but not if they were suing an individual, even though the underlying problem might be identical in both cases."); Valladares, *supra* note 63, at 28. In *Foster*, the public gas company was considered an emanation of the state and therefore an individual could directly invoke a Community directive as against the public gas company. Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, I-3348-49, 2 C.M.L.R. 833 (1990). After cases like *Foster*, which are discussed in Section II of this Note, the distinction between a private entity and a State entity has become vague.

131. See Coppel, *supra* note 8, at 862 (citing Advocate General Lenz's Opinion in *Faccini Dori*); cf. van Gerven, *supra* note 105, at 349 (referring to his own Advocate General's Opinion in *Marshall*, arguing that the inequality that results in giving direct effect as against the public sector and not against the private sector is one reason for establishing horizontal direct effect); Ward, *supra* note 78, 314 (1994) ("If the effect of European law is not common to all individuals in all Member States, then the idea of European law, which is based on the rule of law and is thus rights-based, becomes nonsense."). Notably, the EC law principle of non-discrimination is a general principle of law. General principles of law constitute a source of EC law and are generally principles that are common to some or all of the Member States. Anti-discrimination is one such general principle of EC law. See generally, HORSPOLL, *supra* note 10, at 115-27.

132. Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, I-3339, 1 C.M.L.R. 665 (1995) (Opinion of Advocate General Lenz); Coppel, *supra* note 8, at 862; cf. Valladares, *supra* note 63, 13 (arguing that direct effect generally has "facilitated the creation of a common market by helping to remove barriers to trade, which aids in the harmonization of national legal systems and controls anti-competitive behavior").

Third, attaching horizontal direct effect to directives will limit the financial consequences which Member States and public authorities currently incur, pursuant to *Francovich*, when the Member State has not implemented Community law correctly.<sup>133</sup> If directives could be used against individuals directly despite the Member State's failure to properly implement the directive, the individuals bound by the obligations of the directive will carry the burden of non-compliance. Otherwise, "frequent use of the *Francovich* liability will certainly burden the state budget instead of burdening" such individuals.<sup>134</sup>

Fourth, accepting the horizontal direct effect of all directives that are clear and unconditional on their face, not just directives that are seriously mis-implemented or unimplemented, would alleviate part of the current burden on national courts to interpret national law in conformity with a directive.<sup>135</sup> Under the current regime, in the case where an individual must enforce her Community rights through a directive that has been properly implemented into national law—in other words, in the case where direct effect is inapplicable—it is unclear whether such an individual has been accorded the full extent of her Community rights as intended by the drafters of the directive in question. In such a situation, the directive may be a diluted hybrid of its original form. However, if individuals could enforce the directives directly in their original form, clarity would be obtained because the directives would not be subject to the deliberations and interpretations of the Member State.<sup>136</sup> With this type of horizontal direct effect, the directives could be directly applied without the struggle of first adapting national law to the directive. This assertion is a substantial addition to what has been addressed by this Note up until this point because it argues that directives can be applied directly by individuals without first giving the Member State the opportunity to implement the directive. This is a more aggressive argument because it suggests that EC law should encroach to a greater extent on Member State sovereignty. However, the same arguments made earlier in this Note apply here, namely the Member State's opportunity for or lack of implementation of European Community law does not affect the

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133. See van Gerven, *supra* note 105, at 349–50 (referring to his own Advocate General's Opinion in *Marshall*).

134. *Id.* at 350.

135. See *id.* at 349 (referring to his own Advocate General's Opinion in *Marshall*, stating that the burden on national courts to interpret national law in conformity with the directive in question "has increased now that the Court has held . . . that all national law, including rules that were enacted (long) before (and thus not meant to implement the directive concerned), must be construed in accordance with Community law").

136. Arguably, however, the directive will be interpreted by the Member State court once it is asserted by an individual in such court. However, considering the Member State court would look to the ECJ for interpretive assistance, this is not a compelling counter-argument.

existence and binding nature of the EC directive. Arguably, sovereignty is encroached upon more by the existence of the EC law than by the Member State's lack of opportunity to implement it. Also, Member States make the decision to relinquish a level of sovereignty when they decide to enter the European Union. Thus, horizontal direct effect of all directives—irrespective of attempted implementation—would be less burdensome on national courts than the current regime, under which directives have to be implemented into national law.<sup>137</sup>

Finally, directives are simply less effective when they cannot be invoked against individuals.<sup>138</sup> The more people there are against whom EC law can be directly enforced, the more effective it will be. As Coppel concludes:

The only way to enable . . . [a significant category of] citizens of the European [Community] . . . to give effect to their rights under directives which remain unimplemented, or imperfectly implemented, in their home state is to allow them to claim horizontal direct effect.<sup>139</sup>

Also, although the Court does need to consider judicial restraint to some extent, it is disingenuous for the Court to use judicial restraint as an excuse to stop short of applying horizontal direct effect to directives considering the restraint it has failed to use in its jurisprudence up to that point. "The conclusion to be drawn is that if the Court of Justice has been prepared to sacrifice values and principles such as legal certainty and subsidiarity to the overall goal of effectiveness in these areas, then it should be able to do so in respect of horizontal direct effect of directives also."<sup>140</sup>

Therefore, as the Court itself has implicitly acknowledged through the measures it has taken subsequent to its refusal to apply horizontal direct effect to directives, the Court's failure to establish horizontal direct effect for directives stops short of maximizing the potency of EC law. If the application of horizontal direct effect to directives were unnecessary or insignificant, the Court would not have taken the steps it took to make EC law more powerful after its decision in *Marshall*. It is as if the Court made its decision in *Marshall*, regretted it, could not

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137. It is important to note that "outright" horizontal direct effect does make directives and regulations almost identical, and therefore, it is probably not the best solution to the problem of the lack of horizontal direct effect of directives discussed earlier, given the language in the EC Treaty.

138. Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, I-3340, 1 C.M.L.R. 665 (1995) (Opinion of Advocate General Lenz); Coppel, *supra* note 8, at 862.

139. *Id.* at 874.

140. *Id.* at 878.

overturn it and instead took other measures to try to obtain the result of overturning the decision.

### CONCLUSION

From the inception of the doctrine of direct effect in *Van Gend & Loos*, the Court has taken steps to increase the effectiveness of EC law. The Court broadened the principle of vertical direct effect so as to cover decisions, regulations and Treaty Articles in addition to directives. The Court further established horizontal direct effect for regulations, decisions and Treaty Articles. However, the ECJ failed to establish horizontal direct effect for directives. In attempting to fill gaps where needed, the Court expanded the definition of a Member State in order to increase the number of plaintiffs who could rely on EC law. However, the Court's ambiguous expansion of the definition of a Member State has done more to cause confusion, than enhance the effectiveness of EC law.<sup>141</sup> Also, the Court created indirect effect and *Francovich* liability. However, even these two measures do not fully compensate for the deficiency in effectiveness caused by the lack of horizontal direct effect for directives. Due to the language used by the Court in *Marleasing* and the restrictive approach taken by the Court in cases following *Marleasing*, the reach of indirect effect is yet unclear.<sup>142</sup> Also, given the conditions placed on *Francovich* liability and the questions surrounding its applicability, the effectiveness of *Francovich* is also uncertain.

A significant number of people will not find remedies from either direct effect or *Francovich* liability, and without horizontal direct effect the only thing left to prevent them from being without recourse is the cumbersome Article 226 procedure.<sup>143</sup> Unfortunately for individuals, this process suffers major deficiencies, which makes it all the more important that individuals get the support of horizontal direct effect.<sup>144</sup>

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141. See Bellem, *supra* note 56, at 486.

142. Cf. Hinton, *supra* note 59, at 326.

143. See Coppel, *supra* note 8, at 874; see also EEC TREATY art. 226 (ex art. 169); Hanft, *supra* note 85, at 1247 ("When a directive cannot confer a direct effect and national law cannot be construed to give the directive its intended effect, the only recourse for an individual or undertaking is to request that the Commission institute an Article 169 proceeding.").

144. See Kurt Riechenberg, *Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration*, 22 FORDHAM INT'L L. J. 696, 712 (1999) ("There is general recognition that the infringement procedure under Article 169 of the EC Treaty is not a particularly efficient instrument to control the respect of Community law by Member States"); Valladares, *supra* note 63, at 9-12 (stating that not only does the Article 169 (now Article 226) procedure lack enforcement power, but also that the Commission is overloaded with work, and political reasons often prevent it from initiating proceedings against offending Member States).



"Because of the deficiencies of the Article 226 process, the developments regarding the direct effect of Directives in national law are extremely important."<sup>145</sup> The Court has stopped short of truly making EC law powerful by failing to give individuals the requisite tools to bring suit under EC Treaty directives against other individuals.<sup>146</sup>

Many reasons have been advanced by the Court and others to explain or justify its decision to deny horizontal direct effect for directives. Most of these arguments do not stand up to counter-arguments which illustrate that if the same reasoning were applied to the doctrines of indirect effect or *Francovich* liability, for example, those doctrines, too, should not have been implemented. Also, the acceptance of such arguments suggests that there could be no means to apply vertical direct effect to directives, which the court has in fact managed to do. The reasons advanced against the establishment of horizontal direct effect for directives cannot overcome the argument that horizontal direct effect for directives is necessary to achieve the Court's goal of maximum effectiveness of EC law. Therefore, the only plausible conclusion is that horizontal direct effect for directives should be established immediately!

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145. Theis, *supra* note 35, at 168.

146. See Coppel, *supra* note 8, at 874.