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Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives

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Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives

by

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ABSTRACT:

This paper tries to show the principles used, explicitly or not, by the ECJ when recognising certain effects to unimplemented directives between individuals, that is, to show the *underlying rationale* of the current status of the Law. The present state of the matter can only be understood by reference to the changes throughout 30 years of Case-Law. To explain these developments of the law, a reformulation of the theory of the effects of Community Law will be proposed, a reformulation that states that there is a *gradation of the possibilities of invoking a Community norm*, so that the effects of Community Law can no longer be explained by the twin concepts of Primacy and Direct Effect.

"The Boundaries of direct effect therefore continue to appear blurred, the Court of Justice rendering judgements which cannot be explained by any of the propositions mentioned above. (…) what one is left is a line of cases which seem to be allowing for a kind of horizontal direct effect, thus blurring the distinct boundaries of direct effect laid down by the Court itself".

M. LENZ, D. SIF TYNES and L. YOUNG.[2]

"People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts".

O.W. HOLMES[3]

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[2] M. LENZ, D. SIF TYNES and L. YOUNG "Horizontal What? Back to Basis [2000] *ELRev 25*
[3] O.W. HOLMES, "The Path of the Law", 10 *HLRev* (1897), at p. 457.

Abbreviations

AERev	American Economic Review
AG	Advocate General
CED	Cuadernos Europeos de Deusto
CGPJ	Consejo General del Poder Judicial
CMLR	Common Market Law Reports.
CMLRev	Common Market Law Review
DJGV	Departamento de Justicia del Gobierno Vasco
ECJ	European Court of Justice
ECR	European Court Reports
ELRev	European Law Review
EPL	European Public Law Review
GJ	Gaceta Jurídica de la Unión Europea y de la Competencia
HLRev	Harvard Law Review
OJ	Official Journal of the European Communities (its name will change into “Official Journal of the European Union" after the entry into force of the Treaty of Nice)
RIE	Revista de Instituciones Europeas
RTDeur	Revue trimestrielle de droit européen
SEA	Single European Act
YEL	Yearbook of European Law

1.- Introduction

The purpose of this paper is to show the principles used, whether explicitly or otherwise, by the ECJ when recognizing that unimplemented directives may have certain effects between individuals. This topic as it presently stands can only be understood with reference to the changes throughout 30 years of case-law. Accordingly, brief though precise reference will be made to the dynamics of *change*, and while some cases are very well known some others may not be. The parallel discussion between academics will be referred to only insofar as it is relevant to explain the Law. This parallel discussion, though not the main focus of this paper, is nevertheless important as it influences some of the views expressed herein.

As the learned reader will be able to observe, the foregoing analysis of the case-law will show a clear influence from the Legal Realism school of thought[4]. Interest will then be more focused on trying to ascertain what the future decisions of the Court *would* be as opposed to justifying, from any point of view, which decisions *should* be taken by the Court. As a consequence, the difference between "real rules" and "paper rules" will be fully acknowledged throughout the paper[5] and two levels of decision will be clearly identified when analysing the evolution in this area of the law. As a recent study by MADURO POIARES in another field of Community Law has skilfully shown[6], an approach based on this distinction between motive analysis and legal reasoning allows for a deeper comprehension of the behaviour of the Court.

However, motive analysis in a collegial tribunal is not usually easy and hardly ever one-directional, a statement which, in this field, is reinforced by the different and firm positions taken by the AGs. The Court recognised direct effect in general and direct effect to directives in particular in its constitutional search for the "effectiveness" of EC-Law. The erosion of the constitutional guarantees of the division of competences in the 1970s and the end of the Luxembourg-veto power with the SEA[7] brought the "Competence" issue to centre stage. The Court in the 1990s accepted its fate of adjudicating on disputes concerning the division of competences between the Community and the Member States. This, together with the will of the ECJ to ensure cooperation by national Courts, which had shown, in some instances, reluctance

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[4] For an introduction to this branch of philosophy of law, see M.J. HORWITZ, "The Transformation of American Law, 1870-1960", Oxford University Press, New York, 1992, at pp. 169-246 and F. MICHAUT, "L'école de la sociological jurisprudence et le mouvement réaliste américain, le rôle du juge et la théorie du droit", Lille, Atelier national de reproduction des thèses, 1985.

[5] LLEWELLYN uses these terms to emphasize the difference between rules and decisions. See K.N. LLEWELLYN, *Jurisprudence: Realism in Theory and Practice*, University of Chicago Press, Chicago, 1962, at p. 84 ss.

[6] M. POIARES MADURO, *We The Court. The European Court of Justice and the European Economic Constitution*, Hart Publishing, Oxford, 1998. POIARES continues the work made in this area and from a similar perspective by J.H.H. WEILER in an article published in *The Evolution of EC Law*, P. CRAIG & G. DE BURCA (eds), Oxford University Press, 1999, of which the most recent version can be found in "Epilogue: Towards a Common Law of International Trade", in J.H.H. WEILER (ed), *The EU, the WTO and the NAFTA*, Collected Courses of the Academy of European Law, Oxford University Press, 2000.

[7] See J.H.H.WEILER, *The Constitution of Europe. Do new Clothes have an Emperor? And other Essays on European Integration*, Cambridge University Press, Cambridge, 1999, hereinafter WEILER. The understanding (or misunderstanding) of the basics of direct effect in this paper is heavily indebted to the above mentioned book by WEILER and to the following : S. WEATHERHILL, P. BEAUMONT, *EU Law*, Penguin Books, London 1999 p 400-413., hereinafter WEATHERHILL; D. SIMON, *Le système juridique communautaire*, Puf, Paris, 1998, hereinafter SIMON; P.CRAIG, G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford University Press, Oxford 1998., hereinafter CRAIG and DE BÚRCA; G. ISAAC, *Droit Communautaire Général*, Dalloz, Paris, 1999, hereinafter G. ISAAC. Reference for the following cases will be given just the first time they appear in the paper: *Dori, Marleasing, CIA, Bernáldez, Bellone v Yokohama, Centrosteel v Adipol, Océano Grupo, Unilever, Arcaro, WWF, Linster*.

to accept "horizontal" direct effect, explains the denial of horizontal direct effect in *Dori*[8] and *El Corte Inglés*[9]. The most recent cases (and others less recent, e.g. *Marleasing*[10]), though formally accepting the prohibition of horizontal direct effect, evidence a tendency to give certain effects to unimplemented directives in horizontal relations. To explain these developments of the law, a reformulation of the theory of the effects of Community Law will be proposed. This reformulation states that there is a *gradation of the possibilities of invoking a Community norm*, so that the effects of Community Law can no longer be explained by the twin concepts of Primacy and Direct Effect.

"Supremacy" will thus be shown to be a much wider principle than simply one of prevalence of Community Law. The new and far reaching consequences of Supremacy will radically change the traditional views on the effect of Community Law in Member States, as the classical division of norms with and without direct effect will no longer be sufficient to explain the law.

2.- The Case-Law Until *Dori.*

> *"The life of the law has not been logic: it has been experience (...) The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become".*
>
> O.W. HOLMES[11]

The classical story of direct effect is very well known, so it will not be treated here in depth. We will instead only address some parts that are relevant for the understanding of the cases the study of which is the object of this paper.

No provision of the Treaties stated whether the relation between Community norms and national law should be monist or dualist. Following a teleological interpretation and acting more as a constitutional court than as an international tribunal, the Court recognised in its seminal judgement *Van Gend en Loos*[12] that certain Community legal norms should be regarded as the "law of the land" in the sphere of Community Law, that is, that they give rise to rights and obligations directly, i. e. without the need to be implemented by national law. The step was a bold one, particularly if we consider that the legal order of the communities is based on cooperation between the ECJ and national courts[13].

Acceptance by the national judiciary of the new doctrines is a story of mutual empowerment, but also of formalism[14]. *Van Gend en Loos* appeared to be a plausible interpretation of the Treaty, especially as the transfer of sovereignty that served as the basis of direct effect was said to be "within limited fields". Formalism is also valid to a certain extent as an explanation for the acceptance by the national executives and legislatives[15] of the

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[8] Case C-91/92*Dori*[1994] ECR 3325.

[9] Case C-192/94 *Corte Inglés* [1996] ECR I-1281.

[10] Case C-106/89, *Marleasing SA* [1990] ECR I-4135.

[11] O.W. HOLMES, "The Common Law", Dover Publications, New York, 1991 (1881), at p. 1.

[12] Case C-26/62 *Van Gend en Loos* [1963] ECR 1.

[13] For an analysis of the "European courts" (the ECJ and the national courts), their internal dialectics and their influence in the Integration of Europe see J.H.H.WEILER "The least-dangerous branch: a retrospective and prospective of the European Court of Justice in the arena of political integration", in WEILER supra note 7.; and A.M.SLAUGHTER, A. S. SWEET , J.H.H.WEILER (eds), *The European Court and National Courts-Doctrine and Jurisprudence. Legal change in Its Social Context*, Hart Publishing, Oxford, 1998.

[14] A detailed analysis is done in J.H.H.WEILER "The least-dangerous branch: a retrospective and prospective of the European Court of Justice in the arena of political integration", in WEILER supra note 7. , p. 192-197.

[15] Ibid., p. 197.

constitutional construct of a body of norms with direct effect. This acceptance was not however so surprising as the interest of states lay in the development of such a construct. In the words of J.H.H. WEILER:

> "On the whole, in the pre-SEA/Maastricht Period, the Court interfered little in the decisional process of the community, except for a great insistence on respect for institutional arrangements, leaving a relatively free hand to the political organs to strike their bargains. By contrast it intervened through its structural and material jurisprudence rather boldly in the post-decisional phase –creating a legal apparatus which would make these bargains stick. *The judicial message was: you are free to bargain but agreements reached (through legislation) must be respected*. This analysis would suggest a strong interest on the part of the Member States to uphold the judicial construct, given their obvious interest in making bargains stick."[16]

The Court stated: "There will be no free rider Member State" when it built the doctrines of Supremacy and Direct Effect, so the States on the whole, agree with the construct. They had a lot to win and little to lose, since by the Luxembourg Agreements they have a veto power on Community decision making[17]. Control of the Community by the States also explains their peaceful reception of the erosion of the enumerated competences principle that characterised the Community from the mid 1970s to the mid 1980s.[18]

Meanwhile, the Court also developed its case-law on direct effect[19] recognising horizontal direct effect of Treaty provisions in *Defrenne*[20], and recognising direct effect first of certain provisions of directives together with other provisions[21]. Subsequently, it recognized provisions of certain isolated directives in *Van Duyn*[22], invoking the "*effet utile*" of Community Law and the binding effect of directives according to Article 189.

Not all national courts accepted that Directives could be directly effective[23]. The Conseil d´Etat in *Cohn-Bendit*[24] refused to follow *Van Duyn* and to allow the plaintiff to invoke a directive. Looking merely at the words of Article 249 (ex 189) of the Treaty, the French Administrative Court considered that only national authorities were competent to decide the means by which directives could produce effects in domestic law. The German

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16 Ibid, p.201. It is to be remembered here that the foundation of the EEC finds its economic reason in David Ricardo's classical trade theory, according to which trade ends up to be a positive-sum game for all the traders involved thanks to their comparative advantages. Dealing with the so-called "pop internationalism", KRUGMAN stresses the importance of such theory in modern terms: "Ricardo already knew better in 1817. An introductory economics course should drive home to students the point that international trade is not about competition, it is about mutually beneficial exchange"; P.R. KRUGMAN "What do undergrads need to know about trade?", *AERev*, Vol. 83, Issue 2 (May 1993), at p 23.

17 The interaction between law and politics in a Community with and without veto is explained in detail in J.H.H. WEILER, "The Transformation of Europe" [1991] *Yale Law Journal*, 100 2403, and reproduced in WEILER supra note 7, at p. 34.

18 Ibid. at p. 39.

19 See HARTLEY, supra note 7, p. 199-215; CRAIG and DE BÚRCA, supra note 7 p.185-211; SIMON, supra note 2, p. 274-279; WEATHERHILL, p 400-413.

20 Case C-43/75 *Defrenne* [1976] ECR 455, [1976] 2CMLR98.

21 Case C-9/70 *Grad* [1970] ECR 825; Case C-33/70 *SACE* [1970] ECR 1213

22 Case C-41/74 *Van Duyn* [1974] ECR 1337. A sound criticism of the arguments used by the Court in the judgement can be found in S. WEATHERHILL, P. BEAUMONT, *EU Law*, Penguin Books, London 1999 at p. 400.

23 See J. STEINER and L. WOODS, *Textbook on EC Law*, Blackstone Press, London, 1998, p. 52. Less up-dated but a classic on the matter: P.PESCATORE "The Doctrine of "Direct Effect": An infant Disease of Community Law" [1983] 8 *ELRev*, at p. 169-170. For an individualised analysis of the reception of Van Duyn in some Member States see A.M.SLAUGHTER, A. S. SWEET , J.H.H.WEILER (eds), *The European Court and National Courts-Doctrine and Jurisprudence. Legal change in Its Social Context*, Hart Publishing, Oxford, 1998. at p. 9, 41, 140, 180, 204.

24 *Cohn-Bendit* , Conseil d´État , judgement of the 22 dec 1978 [1980] 1 CMLR 543

Bundesfinanzhof[25] took the same views on the direct effect of directives, and the German Constitutional Court had to intervene to put its resistance to an end[26]. The reasoning of those courts in all these examples ran along similar lines. They considered that Article 189 expressly distinguished Regulations from Directives and, as only the former were described as "directly applicable", the latter seemed to be intended to take effect within the national order only via national implementing measures. The development of the doctrine of direct effect of directives was considered by the national Courts to push the treaty too far. The ECJ realised that the fact that its arguments were perceived by national courts to be an implausible interpretation of the Treaty could undermine the cooperation of national courts, so a new argument was introduced[27] in support of direct effect of directives in *Ratti*[28] and *Becker*[29], the so-called "estoppel" argument[30].

The "estoppel" reasoning leads coherently to a distinction between horizontal and vertical cases, so it should not have been surprising that the Court denied direct effect in horizontal situations in *Marshall I*[31]. However the case did not look extremely convincing, as the Court did not refer to the "estoppel" argument, and instead, stated that "the binding nature of a directive existed only in relation to each member to which it is addressed".[32] The Court increased the confusion by starting a process of broadening of the concept of State for the purposes of Direct Effect[33] that continued in later cases, so that the "estoppel" argument can no longer be considered valid[34] today.

But the departure from the doctrine of "estoppel" and the introduction at Maastricht in article 254 (ex191) of the Treaty of a publication requirement for most directives was not followed, despite huge pressure from the literature and the own AGs of the court [35], by a reverse

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[25] *Re VAT Directives* [1982] 1 CMLR 527

[26] See G. ISAAC, supra note 2, at p. 181; F. MANCINI, "The Making of a Constitution for Europe", [1989] 26 *CMLRev* 595 "(…) the German Constitutional Court (…) sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn*. The wound, one might say, is healed and the scars it has left are scarcely visible."

[27] See WEILER, supra note 7, at p. 195

[28] Case C-148/78 *Ratti* [1979] ECR 1629. The case is also important for the influence of the period of transposition of a directive in its direct effect. See also on this matter Case C-129/96 *Inter Environment Wallonie* [1997] ECR I-7411, commented in A. KACZOROWSKA, "A New Right Available to Individuals under Community Law" [1999], *EPL*, V5 I1 p. 79-90.

[29] Case C-8/81 *Becker* [1982] ECR 53.

[30] For the sake of intellectual curiosity I will point that the concept of "*estoppel"* was taken from Public International Law, in particular from the Law governing territory (where is usually studied alongside *acquiescence*). See P. MALANCZUK, *Akehurst´s Modern Introduction to International Law*, Routledge, London, 1997 at p. 154; M.N.SHAW, *International Law*, Cambridge University Press, Cambridge 1997 at p. 350-352.J.A. PASTOR RIDRUEJO, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, Madrid, 1996 at p. 168.

[31] Case 152/84 *Marshall v Southampton and South-WestHampshire Area Health Authority* [1986] ECR 723.

[32] Ibid, at paragraph 48.

[33] For the difference between this concept of State and that as regards article 30 of the EC Treaty, see G.R. MILNER-MOORE, "The accountability of private parties under the free movement of goods principle", *Harvard Jean Monnet working Paper*, 1995, available at : http://www.jeanmonnetprogram.org/.

[34] See for example cases Case C-103/88 *Fratelli Constanzo* [1989] ECR 1839 and Case C-222/84 *Johnston v Chief Constable of the RUC [*1986] ECR 1651.

[35] VAN GERVEN on C-271/91 *Marshall II* [1993] ECR I-4388, JACOBS in C-316/93 *Vaneetveld* [1994] ECR I-770, LENZ on C-91/92 *Dori* [1994] ECR I-3325 argued that the Court should recognise horizontal direct effect to Directives whereas VERLOREN VAN THEMAAT C-89/81 *Hong Kong Trade Development Council* [1982] ECR 1296, SIR GORDON SLYNN C-152/84 *Marshal I* [1986] ECR 734 and MISCHO in C-80/86 *Kolpinghuis* [1987] ECR 3977 were contrary to the recognition of direct effect. See C. TIMMERMANS, "Community Directives Revisited", [1997] *YEL* 17 1-28

of the law on horizontal effect of directives. Thus, in a now classic paragraph of *Faccini Dori*[36], the Court held that:

> "The effect of extending that case-law [that of direct effect of directives] to the sphere of relations between individuals *would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations."*

The SEA meant the end of the *ethos* of veto[37] and turned the aforementioned erosion of the principle of enumerated competences into a menace for Member states. The implications of this phenomenon were far reaching, but for the purposes of this work, we will limit ourselves to remark that the issue of Competences became suddenly very important as there was no more veto for Member States, so the ECJ had to change its loose approach to this issue, as otherwise it would risk breaking the wide consensus on which its position as supreme arbitrator within the Community was based. By acting as the protector of Member State competence against the intrusion of the Community, the Court of Justice preempts any attempt by a national court to do so. It is in this context that we can understand cases like *Keck*[38], the very recent *Tobacco*[39] case and, what is more important for us, *Dori*.

In *Dori* the court did not simply reject horizontal direct effect. More importantly, it was adjudicating on the division of competences between the Community and Member States[40].

Despite clear rulings by the Court in *Marshall I*, *Dori*, and *El Corte Inglés*, authors[41] have continued to argue in favour of horizontal effect of directives. The basis of the discussion is whether the recognition of horizontal direct effect blurs the distinction between directives and

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[36] Case C-91/92 *Dori* [1994] ECR 3325. See also Case C-192/94 *El Corte Inglés* [1996] ECR I-1281.

[37] Via the new article 100A of the Treaty, and, what maybe is more important, the amendment of the Council´s Rules of Procedure adopted by the Council on July 20, 1987, OJ (1991) L291/27. See WEILER, supra note 7, at p. 66-74.

[38] Joined Cases C-267 and C-268/ 91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6907. See J.H.H. WEILER, "The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods", in P. CRAIG, G DE BÚRCA (eds), *The Evolution of EU Law*, Oxford University Press, Oxford, 1998.at p. 371-372.

[39] Case C-376/98 *Federal Republic of Germany v. European Parliament and the Council of the European Union*, judgement of 5 October 2000 (unreported).

[40] See, D. J. MOORE, *Faccini Dori and Horizontal Direct Effect of Directives*: *Where angels fear to tread*, (unpublished paper for the) College of Europe, Brugge, 1995.

[41] *Marshall*., supra. at note 26. *Dori* and *El Corte Inglés* supra at note 34. Some of the voices arguing in favour of the recognition of horizontal direct effect are: T. TRIDIMAS, "Horizontal effect of directives: a missed opportunity?", [1994] *ELRev* 19 621; P. CRAIG, "Directives, Direct Effect, Indirect Effect and the Construction of national legislation" [1997 *ELRev* 22 519; F. EMMERT, M. PEREIRA DE AZEVEDO, "L´effet horizontal des directives La jurisprudence de la CJCE: un bateau ivre?" [1993] RTD eur 29 (3); J. PALACIO GONZÁLEZ, *Derecho Procesal y del Contencioso Comunitario*, Aranzadi Editorial, Elcano (Navarra), 2000, p. 46, who speaks about a "denial of remedy by reason of the private character of the party to the proceedings". B. PÉREZ DE LAS HERAS, *Ordenamiento Jurídico Comunitario y Tutela Judicial Efectiva* CGPJ-DJGV, Vitoria-Gasteiz, 1995. at p. 95-109; R. MASTROIANNI, "On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?", [1999] *EPL*, V5 I3, at p.417-435; W.VAN GERVEN, "The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords", in D. CURTIN and T. HEUKELS, *Institutional Dynamics of European Integration.. Essays in Honour of Henry G. Schermers*, Martinus Nijhoff Publishers, Dordrecht, 1994; D. KINLEY, "Direct Effect of Directives: Stuck on Vertical Hold", [1995] EPL, V1 I 1 p. 79- 83; M. GALLEGO PÉREZ, "Crónica de la Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas. Comentario a la sentencia del Tribunal de Justicia de 3 de marzo de 1994, Nicole Vaneetveld, dictada en el asunto C-316/93", [1994] *CED* N 11 p. 135-141; J.M. FERNÁNDEZ MARTÍN, "El principio de tutela Judicial Efectiva de los derechos subjetivos derivados del derecho comunitario. Evolución y alcance". [1994] *RIE*, V21 N 3 p. 893-894.

regulations, and whether this would disrupt the competence distribution provided for in the Treaty, insofar as in certain cases the Community was not given the power to enact norms that have effects between individuals.

The purpose here is not to add another string of printed pages to the discussion. This paper is based on the assumption that the prohibition of horizontal direct effect in *Dori* is *correct*, since it is the approach that a Court which takes constitutional limits seriously should take. This accords with the *Geist* of the times[42], which require clear acts on the part of the ECJ to restore some vigour to the long forgotten principle of enumerated competences. The time has come when Brussels (as a bureaucratic structure or as a political idea) is no longer popular among populations and governments of Member states, and the ECJ is no longer peacefully accepted as the sole arbitrator of disputes of competence between the community and the member states.[43] If someone wants to argue otherwise, *Dori* should be refuted. The present writer will not pretend it cannot be done, but only that in his views, attempts to do so have not been very convincing so far.

Member states' concern with respect to the competence issue was clearly stated in the Intergovernmental Conference (IGC) in Nice[44]. This IGC concluded its work on 11 December 2000 (the Treaty being signed on 26 February 2001) with an agreement on the institutional issues that had not been settled at Amsterdam and which had to be resolved before enlargement, as well as on a series of other points not directly connected with enlargement. A *Declaration concerning the future of the Union* was adopted, whereby member states called for a deeper and wider debate about the future of the European Union. Accordingly, during 2001 the Swedish and Belgian Presidencies, in co-operation with the Commission, encouraged wide-ranging discussions with all interested parties, including the candidate countries associated in the process. Though the September 11 attacks against the US made member states focus much of their attention in the development of a strong police and judicial co-operation in criminal matters to combat terrorism[45], the subsequent Laeken Declaration of 15 December 2001

[42] See D. KINLEY, supra., at p. 83:"It is, of course, notoriously difficult to divine from a judgement of the Court of Justice the precise line of reasoning adopted by the Court or any of its individual members arguing alone or in collusion. And so it is with the Court's judgement in Faccini Dori. However, it might not be unreasonable to argue that [the ruling] has much to do with the rather delicate nature of the European Union in this immediately post-Maastricht period. One might, for instance, be able to discern from the Court's judgement some feeling (albeit latent) that it was this time impolitic to take such a radical step. After all, of the submissions from national Governments sought by the Court throughout the course of the case (seven were received) six (Germany, France, Denmark, Italy, the Netherlands and the United Kingdom) argued against any change to the existing distinction and only one (Greece) argued in favour of its disposal".

[43] See J.H.H. WEILER. "The European Courts of Justice: Beyond ´Beyond Doctrine´ or the Legitimacy Crisis of European constitutionalism", in A.M. SLAUGHTER, A.S. SWEET, J.H.H.WEILER, *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart Publishing, Oxford, 1998 at p. 365-388. See also J.H.H. WEILER "Europe: The Case Against the Case for Statehood", [1999] *ELJ* V4 N1 p. 48. Furthermore, some voices have arisen for example in the Spanish Newspaper *El País* that, considering that each time the ECJ extends the competence of the Community it is extending its own competence, it might not be an objective adjudicator. The fact that the question of "*Komptetenz*-Kompetenz" has not been as widely discussed as the division of competences between the Community and the Member States does not make it less important

[44] On the new Treaty see X. A. YATAGANAS, *The Treaty of Nice. The Sharing of the Power and the Institutional Balance in the European Union- A Continental Perspective*, Jean Monnet working Paper, New York 2001. [http://www.jeanmonnetprogram.org/]. Official documents may be found in the interinstitutional website: http://www.europa.eu.int/igc2000.

[45] Amongst other achievements, the European arrest warrant is specially relevant. At this respect, see the Report on the Evaluation of the conclusions of the Tampere European Council, submitted by the Belgian Presidency to the European Council on 6 December 2001, at p. 2. The developments in the Third Pillar of the Union have also led to a debate on the distribution of competences between the Union and the Member States in this field; see íbid., at pp. 7 and 13.

reaffirmed the political will to reach agreements on *a better division and definition of competence in the European Union*[46]. For that purpose, the Laeken IGC convened a Convention on the future of the European Union, active from 1 March 2001, with the task of considering the key issues arising for the Union's future development and identifying the various possible responses[47].

3.- The Case-Law from *Dori* until today: Giving effect to directives in other ways

A) The End of the "Estoppel" Reasoning - Broadening the Concept of State

The broadening of the concept of State is frequently included by authors among those post-Dori developments of the law where the ECJ circumvented its own prohibition of horizontal direct effect for directives, and indeed in some way this broadening diminishes the importance of this prohibition. These developments are well-known, have been covered and therefore will not be covered any further. [48]

B) State Liability in Damages for non-Implementation of a Directive

In its *Francovich*[49] ruling, the Court of Justice introduced a further and increasingly important means by which an individual can enforce a directive[50] when, as in *Dori*, a barrier to horizontal direct effect is encountered. It declared that a State could be liable to an individual in damages for loss caused by its failure to implement a directive. The consequence is not horizontal direct effect per se but nevertheless amounts to some "effect" recognised in being a unimplemented directive.

It is outside the scope of this paper to go into details into the law of State Liability for breaches of Community Law[51], but it should be remembered that, according to the Court it is possible to bring a damages claim where an individual cannot rely on the provisions of an unimplemented directive on the ground:

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[46] Point II of the Laeken Declaration.

[47] Íbidem, Point III. Apart from the said demarcation of responsibilities between the Union and the Member States, the main subjects to be considered include the status of the Charter of Fundamental Rights of the European Union, the simplification of the treaties and the role of the national parliaments in the institutional architecture of the European Union. Once this preparatory work has been completed another Intergovernmental Conference will be convened in 2004 to deal with these matters.

[48] For further reading see P. CRAIG "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation". *ELRev* 22 at p. 528; V. KVJATKOVSKI, "What is an ´Emanation of the State?´ An Educated Guess". *EPL*, V3 I3, p. 329 338; CRAIG and DE BÚRCA, supra note 2, at p. 193; HARTLEY supra note 2 at p. 208; WEATHERHILL, supra note 2 at p. 406. Authors usually refer to the so-called *Foster* test, that provides a non exhaustive definition of what is to be considered a public body for the purposes of direct effect (see Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313 at paras 19-20) and its application in English Law (see inter alia *Foster* (1991) House of Lords 2 AC 306; *Doughty v Rolls-Royce plc*, [1992] I CMLR 1045; *NUT and Others v St Mary´s Church of England Junior School* [1997] 3 CMLR 630).

[49] Joined Cases C-6 and C-9/90 *Francovich and others* [1991] ECR I-5357.

[50] CRAIG and DE BÚRCA, supra. note 7. At p. 210.

[51] For a detailed analysis of this area of the law see T.TRIDIMAS, *The General Principles of EC Law*, Oxford University Press, Oxford, 2000., at p. 325. See also K. LENAERTS, P.V. NUFFEL, *Constitutional Law of the European Union*, Sweet & Maxwell, London, 1999 at p. 511, 583 ; T.C.HARTLEY, *The Foundations of European Community Law*, Oxford University Press, Oxford, 1998, p. 226-232; SIMON, supra note 7 at p. 300.

a) That they required additional implementing measures and hence could not have direct effect[52]. Or, what is more important for our purposes:
b) That the provisions –although satisfying the substantive requirements for direct effect –were invoked as against another individual[53]. Or
c) That the national law could not be interpreted in conformity with the directive[54].

C) The *CIA* and *Bernáldez* Case-Law. *Unilever*

Cases like *CIA*[55] and *Bernáldez*[56] have been referred to on a repeated number of occasions by the literature. They are usually but not always grouped together[57] in terms of direct effect, where the presence of an element of public law allegedly turns what at first sight seemed to be a horizontal relationship into a vertical relationship. *CIA* is basic for the purposes of understanding the new cases, but very well known, so its facts will not be repeated here. In any case it is more remarkable that the Court did clarify whether the situation was a horizontal or vertical one, which is even more surprising considering that AG ELMER had explicitly raised the issue.[58]

While *CIA* could be reconciled with *Dori* because of public law elements (i.e. the proceedings related to unfair trading) that rendered the relationship vertical for the purposes of direct effect, in the recent *Unilever*[59] the importance of the public element is, at best, ancillary, so that the classic doctrine of direct effect is clearly insufficient to explain it.

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[52] *Francovich* paras 26-27 [1991] ECR at I-5412-5413

[53] C-91/92 *Dori* para 25, *supra*, ECR [1994] at I-3356; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, para. 22 at I-1304. Compare Case 97/96 *Daihatsu Deutschland* [1997] ECR I-6843 (where, with regard to a dispute between private legal persons, the Court of Justice did not consider it necessary to inquire into the direct effect of the directive and merely referred to the possibility of a damages claim) with Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, para 46 (where, with regard to disputes between individuals and public undertakings, the Court inquired into direct effect and did not discuss the damages claim). Some other cases on directives are Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94 *Dillenkofer*[1996] ECR I-4845; and Case C-319/96 *Brinkman* [1998] ECR I-5255.

[54] Case C-334/92 *Wagner Miret* [1993] ECR I-6911, para. 22 at I-6932; Case C-111/97 *Evobus Austria* [1998] ECR I-5411, paras 14-21 at I-5436-5438.

[55] Case C-194/94 *CIA Security International SA v Signalson* [1996] ECR I-2230

[56] Case C-129/94 *Criminal Proceedings against Rafael Ruiz Bernáldez.* [1996]ECR I-1847

[57] See CRAIG and DE BÚRCA, supra note 2. At p. 206, who groups this cases under the heading "incidental" direct effect.

[58] See Opinion by ELMER issued on 24 October 1995, paras. 68 –74. AG ELMER found himself in one of the traps that we will see in the more recent cases, where an attempt to explain things in terms of the classical doctrines leads to quite unplausible consequences. AG ELMER explained the effects of the regulation in the proceedings against CIA relying in their public law character. This is open to argument, but not particularly bold. What strikes most the reader is that the effects against Signalson were explained in terms of *Marleasing*, which is clearly a conceptual mistake. *Marleasing* is about the interpretation of national law, whereas the result of *CIA* proposed by AG ELMER (and, eventually , the result reached by the Court)is a result of *innaplication* of national law. Maybe we are too cartesian, but we cannot see how one can explain the second in terms of the first. Some recent developments of the CIA case law that are not directly relevant to the study of horizontal direct effect but that limit the application of CIA are Case C-226/97 *Lemmens* [1998] ECR I-3711, which is also very well known, and Case C-37/99 *Donkersteeg* [2000] (not yet reported), where the Court substantially followed the Opinion delivered by AG FENNELLY on 6 April 2000 and refused to extend the limits of CIA. Comments on *Lemmens* may be found in F. BERROD "Directive concernant la procédure d´information dans le domaine des normes et réglementations techniques", [1998] *Europe*, commentaire 274; L.GONZÁLEZ VAQUÉ, "Inaplicabilidad por los jueces nacionales de las reglamentaciones técnicas no notificadas a la Comisión Europea: la sentencia *Lemmens* del TJCE" [1999] *GJ* 201, p. 45-50.

[59] Case C-443/98 *Unilever* (unreported) judgement of the 26 September 2000.

Unilever had supplied Central Food with olive oil. The latter had informed the former that the oil supplied had not been labelled in accordance with Italian law and, consequently, refused to pay the amount due and called on Unilever to remove the goods from its warehouse. Unilever contested Central Food's position. Under the procedure for notification and examination of draft technical regulations established by Directive 83/189/ EEC [60], the Commission had ordered the Italian Republic not to legislate in relation to the labelling of oil until 5 may 1999. Referring to the *CIA* judgement, Unilever therefore contended that the contested Law should not be applied, as the Italian Law had been enacted on the 3 August 1998 and commenced proceedings before the Pretore di Milano for an order requiring Central Food to pay a sum corresponding to the price of the consignment. The Pretore di Milano decided to refer the case to the ECJ for a preliminary ruling requesting the Court's view on whether, in the circumstances of the case, it should disapply the Italian law in question.

The Italian and the Danish Governments, which had submitted written observations, contended that the Community only had the power to impose obligations with immediate effect between individuals where it was empowered to enact regulations. In their view, *CIA* should not be regarded as a reverse to the principle according to which a directive cannot have direct effect in horizontal relations between individuals[61].

Nevertheless the Court repeated its arguments set out in *CIA* and held[62]:

> "[…], it follows from the Case-Law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with article 8 of the Directive 83/189 can be invoked in proceedings between individuals (…) and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the CIA Security case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings. (…) *In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those governments is concerned [Faccini Dori], Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals."*

The last sentences show the development of a new doctrine of the effect of unimplemented directives in national legal systems. This statement (and the whole case in general) cannot be explained according to the old theories of direct effect or of consistent interpretation. The Court has something different in mind: the *Invocability of exclusion* that it had used in other contexts which we will deal with later.[63]

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[60] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ 109/8.

[61] Case C-443/98 *Unilever*, at para. 35.

[62] Ibid., at paras. 49 and 51

[63] It must in any way be noticed that the Court reached that result against the opinion of AG JACOBS [Opinion delivered on 27 January 2000 at paras. 111, 112 and 114.]: "In my view [… infringement of the standstill requirements] cannot be treated as having far-reaching effects on contractual relations between individuals. *In substance the effect would be that, solely on the basis of such failures by Member States, courts would be obliged to find a breach of contract.* Such consequences would be contrary to principles fundamental to our legal systems, and contrary in particular to fundamental requirements of legal certainty. (…) Nor does it seem necessary that it [… infringement of the standstill requirements] should be given such effects. The Community's overriding interest in ensuring the free movement of goods does not arise until it has been established that the technical regulation does obstruct such freedom of movement. In cases such as the present the Community's interest can be fully secured by reliance on Article 30 of the Treaty." More recently, AG JACOBS has tried to minimise the possible consequences of the *CIA* case-law among traders by making more stringent the concept of "technical regulation": "A finding that a measure of national law, which has not been notified under Article 8 of the Directive, constitutes a technical regulation may thus have direct and serious consequences for traders throughout the Community. For reasons of legal certainty it is, therefore, important that the definitions

Two cases are frequently mentioned[64] alongside *CIA* as they all seem to undermine the prohibition of horizontal direct effect in *Dori* and *El Corte Inglés: Panagis Pafitis*[65] and *Bernáldez*[66]. They are, as mentioned above, usually reconciled with *Dori* by considering them vertical due to the presence of a Public Law element.

This is plausible (but, still arguable) in *Pafitis*[67], but the Titanic of the old doctrines sunk with *Bernáldez*. In this case, it is to be remembered, a Sevilla court referred five questions to the ECJ asking for the interpretation of three directives on the approximation of the laws of the Member States relating to motor insurance. The questions were raised in criminal proceedings against Rafael Ruiz Bernáldez, who had caused an accident while driving while intoxicated. Under Spanish Law, the insurance company was excluded from the cover of damage if the driver was intoxicated. The Court held:

> "Article 3(1) of Council Directive 72/166/EEC (…) is to be interpreted as meaning that (…) a compulsory insurance contract *may not provide* that is certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle (…)."[68]

The ruling defies any attempt of interpretation according to the classic parameters of direct effect and consistent interpretation. No reference is made to *CIA*, *Dori*, or *Marleasing*. The Public law element (maybe that the insurance was compulsory) was too weak to enable the Court to refer to *CIA*, or at least to the classic reading of *CIA* that held it to be a vertical direct effect case. National law was clearly incompatible with Community Law, so *Marleasing* could not be used without a *contra legem* interpretation (see below).

Another reading is that the Court may simply have given the correct interpretation of the Community norm, without ruling on its effects in national law. This last understanding of *Bernáldez* is consistent with earlier case-law and it is a plausible literal reading of the judgment. However it would make no practical sense. It would be like the ruling of a court saying "according to this penal code, X has committed murder, but this Tribunal does not find it necessary to rule on whether this penal code is to be applied". The Court was never asked to explain what the exact effect of its ruling was. However we will see that in a later but similar case[69], a national court highlighted all the inconsistencies of this kind of judgements. It stressed that the attempt by the Court to solve these inconsistencies, still based on the classical doctrines[70], only led to more confusion.

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laid down in Article 1 of the Directive be interpreted in a way which is predictable to traders and national authorities. That consideration calls for an interpretation which does not go beyond, or distort, the ordinary meaning of the wording of Article 1(1)" [Opinion delivered on 17 January 2002 on *Case C-159/00 Sapod Audic*; judgement not delivered at the time of writing this lines].

[64] See K. LACKHOFF, H. NYSSENS, "Direct Effect of Directives in Triangular Situations", [1998] *ELRev* 23 p. 397-413; J.STUYCK, (note to cases C-192/94 *El Corte Inglés*, C-129/94 *Bernáldez*, C-441/93[1996] *CMLRev* 33 1261-1272.; CRAIG and DE BÚRCA, supra note 7. At p. 208.

[65] Case C-441/93 *Pafitis*[1996] ECR I-1347.

[66] *Bernáldez.* See also Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, of which a comment may be found in A. WARD. "New Frontiers in Private Enforcement of EC Directives", *ELRev*, 23 p. 65-78.

[67] The case should be well known as well, so the present writer will no go deeply into it.

[68] *Bernáldez*, para. 24.

[69] Case C-215/97 *Bellone* [1998] ECR I-2191.

[70] Case C-456/98 *Centrosteel*(unreported), judgement of 13 July 2000.

D) The doctrine of "indirect" effect[71]

D.1) The Case-Law until Arcaro

Another way in which the Court of Justice appeared to encourage the application and effectiveness of directives, despite refusing to allow their direct horizontal effect enforcement, was by developing a principle requiring national law to be interpreted in "the light of the wording and purpose" of Community Law, including unimplemented directives[72]. *Marleasing* stated firstly that an unimplemented directive could be relied on to influence the interpretation of national law in a case between individuals (as the obligation to interpret national law in conformity with the directive holds irrespective of whether their provisions have direct effect), and secondly that this was so even where the national law had been adopted before the directive.

In *Wagner Miret*[73], the Court accepted that the Spanish legislation in question could not be interpreted in such a way as to give effect to the result sought by the applicants, which is frequently quoted as the most important limit to the *Marleasing* case-law. The national court is thus not obliged to make a *contra legem* interpretation. In a recent decision *Evobus Austria*[74], the Court of Justice confirmed that provisions of domestic law may be incapable of being interpreted in conformity with a directive. The Court of Justice emphasised that if national law cannot be interpreted consistently with the directive, then the plaintiff has the alternative remedy of an action for damages against the State.

However the boundaries of the Principle of Consistent Interpretation became rather obscure after *Arcaro*[75]. As the case is also famous, only its most striking paragraph will be reproduced here, a paragraph that has been quoted in much literature in the field for the most amazing variety of purposes:

> "that 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 to the imposition on an individual of an obligation laid down by a directive which has not been transposed* [which is exactly what Marleasing does] or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (…)".

If literally interpreted, this is *contra-Marleasing*. Different and subtle theories have been sought[76] to explain the relation between the two judgements. However *Arcaro* should not be read as a reverse of the *Marleasing* case-law, particularly because it is a judgement by a three-judge chamber. In the present writer's opinion, *Arcaro* should not be limited to its criminal law context.

D.2) Current developments in the Marleasing Case-Law

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[71] For the classic part of the case-law see further, CRAIG and DE BURCA, supra note 7 p.198; LENAERTS, supra note 7 p. 580; WHEATHERHILL, supra note 7 p. 409; J. PALACIO GONZÁLEZ, *Derecho Procesal y del Contencioso Comunitario*, Aranzadi Editorial, Elcano (Navarra), 2000, p. 50

[72] CRAIG and DE BURCA, supra note 7 p.198. The principle was stated in Case C-14/83, *Von Colson* [1984] ECR 1891 and soon limited in Case C-80/86, *Kolpinghuis Nijmegen* [1987] ECR 3969.

[73] Case C-334/92, *Wagner-Miret* [1993] ECR I-6911. See E. DEARDS, "Indirect Effect after *Webb v Emo Air Cargo (UK) Ltd*: How Must National Law be Interpreted to Comply with a directive?",[1996] *EPL*, V2 I1 p. 71-79; M.I.ROFES I PUJOL, "Crónica de la Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas. Sentencia Wagner Miret: la protección de los trabajadores asalariados en caso de insolvencia del empresario", [1995] *CED* n 1 p. 109-113.

[74] C-111/97, *Evobus Austria*[1998] ECR I-5411.

[75] Case C-168/95 *Arcaro* [1996] ECR I-4705

[76] See P.CRAIG, "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation" (1997) 22 ELRev. 519 at p. 526.

Bellone[77] concerned the interpretation of a directive relating to self-employed commercial agents[78]. Mrs. Bellone acted as a commercial agent on behalf of Yokohama pursuant to an agency contract entered into between the parties. After Yokohama terminated that contract, Mrs Bellone claimed payment of various indemnities. The Pretore of Bologna rejected Mrs Bellone´s claims on the ground that the agency contract was void because it had not been entered on the register of commercial agents and representatives at the time when the contract was concluded. Registration is compulsory pursuant to Italian law. On appeal, the Tribunale, Bologna, considered that a question of Community Law arose insofar as the national rules in issue in the main proceedings, which make the right of agents conditional upon entry in the appropriate register, could be incompatible with the directive, which makes no provision for such a register.

The ruling in *Bellone* is similar and as ambiguous as regards its exact effect in national law as was *Bernáldez*. In any event, it must be noted that the Court did not mention *CIA*, *Marleasing*, *Van Duyn*, *Dori*, nor any of the Principles usually associated to these cases. The Court held instead:

> "Council Directive 86/653 of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents precludes a national rule which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register"[79].

If ever the traditional view of direct effect (or, rather the traditional vision of this area of law based on the division of provisions with and without direct effect) was problematic, it is never more than here (with the exception, perhaps, of *Unilever*). How is *Bellone* to be interpreted? How is *Bernáldez* to be interpreted? Direct Effect? The word "precludes" used in *Bellone* may remind us of *CIA*, and *Bernáldez* is usually studied alongside *CIA*. Therefore these two cases may be *CIA*-like cases. Of course, the problem would be how to explain *CIA*. It has to be remembered that the reference in *CIA* was framed very much as a traditional direct effect question, the national Court trying to ascertain whether the Community provision in question was sufficiently precise and unconditional to be relied upon by an individual before the national court. However if we are going to read *CIA* as a direct effect case, it should be reconciled somehow with *Dori*.

The outcomes are frequently explained by reference to the existence of a public law element[80], so that finally they are considered to be vertical and not horizontal, thus avoiding the

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[77] Case C-215/97 *Bellone v Yokohama SpA* [1998] ECR I-2191.

[78] Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L382/17.

[79] No reference is made to the reasonings of the Court which refers to the law of agency and are devoid of all interest for our purposes.

[80] CRAIG and DE BÚRCA [P. CRAIG, G. DE BÚRCA, supra note 7 p. 206] argue that a "subtle distinction" has to be made "between the impermissible imposition on an individual of an obligation contained in a non-transposed directive, and the permissible "incidental" adverse effects of a non transposed directive on an individual". The directive would thus just be directly effective vertically (against the State) and the effects towards the individual would be "incidental". Exactly the same reasoning is made by C. TIMMERMANS [C. TIMMERMANS, "Community Directives Revisited" (1997)*YEL*, 17 at p. 17]. In this same line of reasoning, J. STUYCK [J. STUYCK, Note to cases *El Corte Inglés*, *Bernáldez* and *Pafitis*, *CMLRev* [1996] 33: 1261-1272] considers that all these cases are vertical and not horizontal and that the individual is thus enforcing the directive vis-à-vis the State and not vis-à-vis other individuals. Related with the use of the "Public Law " element to explain this case law is the mention that is sometimes done of another way of going around the prohibition of the *Dori* case. I am

prohibition of *Dori. CIA* brought an action under Belgian Public Law seeking to uphold a public law obligation, namely the obligation not to engage in unfair trading practices, breach of which would potentially lead to criminal liability. The Public Element is said to be similar in *Bernáldez*, either from the fact that the proceedings were brought by the public prosecutor, or by virtue of the compulsory nature of the insurance contract in question. Appealing as it might result at first sight, the inconsistencies of this solution have been pointed out by M. LENZ, D. SIF TYNES and L. YOUNG[81]:

> "Firstly, the delimitation of public law may vary from one Member State to the other. Secondly, it should be noted that in any event the public/private law is not easily drawn (…) Indeed [if all this cases are considered to be public law cases] then it is hard to imagine what would fall outwith this domain. [argument that I find specially true for *Bellone*]. Moreover, if one were to accept the "public law element" theory as an exception to the firmly established denial of horizontal direct effect, such a wide approach thereto would call into question the principle of restrictive interpretation of exceptions".

Strictly speaking, it seems that the Court simply gives the correct interpretation of the directive without referring to its effects in national law. Should it be so, then the national Court would not be given any strict guidance on how to apply (or, rather whether to apply) Community Law for which it had just received the correct interpretation from the ECJ. If our point of departure is a conceptual set of propositions where a provision is to be classified as having or not having direct effect and the concrete relationship at stake is clearly horizontal (as indeed I think it is in the case in *Bellone*, but it is not the purpose of this paper to argue about what is or what is not a Public Law relationship), then maybe the answer would be that the provision is not directly effective. It might be the case that whereas National law would be contrary to the directive thus interpreted by the ECJ, it would still be the law applicable to the relationship, as Community Law might not be directly effective. This is precisely what another Italian national Court took for granted when it asked for a reference in *Centrosteel Vs. Adipol GmbH*[82]:

> "*The national court, taking Bellone into account, takes the view that, since under the settled case-law of the Court of Justice directives do not have direct effect in relations between individuals, Bellone cannot result in [Italian Law] being dissaplied in the proceedings before it.* According to the national court, it may therefore be necessary to refer directly to the provisions of the Treaty, in particular those provisions relating to freedom of Stablishment and freedom to provide services, which, unlike directives, are directly".

The ECJ had thus to abandon its comfortable position of *Bellone* and *Bernáldez* and to state clearly the effects that Community Law would have in national law. It did so following the traditional view of an all embracing division between directly effective and non directly effective provisions. It thus found itself caught by its formal prohibition of direct effect, so it had to use *Marleasing*. What initially was a *Bernáldez* solution in *Bellone* had to be explained in terms of *Marleasing* by its sequel *Centrosteel*:

> "14. It should also be noted that in *Bellone* the Court ruled on a situation identical (...) that the directive precluded the validity of the agency contract from being conditional on the commercial agent's entry in such a register.

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speaking about the effect that the "collateral" effect that the use of directives in litigation against the State can have for another individuals, for example in litigation concerning public procurement. See for example Case 158/80 *Butterfahrten* [1981] ECR 1805.

[81] M. LENZ, D. SIF TYNES, L. YOUNG, "Horizontal what? Back to Basis"[2000] *ELRev* 25, 509-522.

[82] Case C-456/98 *Centrosteel* (unreported), judgement of 13 July 2000, para. 9. The facts were very similar to those in *Bellone*.

> 15. It is true that, according to settled case-law of the Court, *in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals* [The Court quoted here *Marshall I* and *Dori*].
>
> 16. However, it is also apparent from the Case-law of the Court [The Court quoted here *Marleasing*, *Wagner Miret*, *Dori* and *Océano Grupo*] that, when applying national law whether adopted before or after the directive, *the national court that has to interpret that Law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view* and thereby comply with the third paragraph of Article 189 [now 249] of the EC Treaty".

It has to be noticed that in paragraph 6 of *Bellone* and also in paragraph 6 of *Centrosteel* the Court had stated that Italian case-law clearly treated an agency contract entered into by a person who is not registered as void on the grounds of infringement of the mandatory provisions laid down in article 9 of Law no 204. So apparently the Court in the above mentioned paragraph 16 of *Centrosteel* suggests a use of *Marleasing* which, arguably, would amount to a *contra legem* interpretation of national law.

Changing slightly the subject of our discourse, it also has to be noticed that in this same case AG JACOBS[83] made clear (correctly it seems) the limits of *Arcaro* in the sense that has been indicated above:

> "34. [it] might appear to impose drastic limitations on the principle of interpretation of national law in accordance with Community directives. I do not consider, however, that the statement should be read in that way. It was made in the context of criminal proceedings, and the *Kolpinghuis* case cited by the Court also concerns criminal liability. In so far as the wording might appear to apply outside the criminal context, it is difficult to reconcile both with the Court´s prior and subsequent case-law."

Summarising, *Bellone* and *Centrosteel* are important for our purposes for two reasons:
a) Clarification and limitation of the significance of *Arcaro*.
b) Problems that arise when the Court tries to apply to the recent cases the classic view of Direct Effect. The Court not only proposed a *contra legem* use of *Marleasing* in *Centrosteel* but also made a somewhat surprising evolution from *Bellone* to *Centrosteel*. Although the Court did not allude to any revolutionary thinking in its judgment, the Court first answered in a *Bernáldez* way (*Bellone*) and then in a *Marleasing* way (*Centrosteel*). Let us not underestimate this evolution. *Bernáldez* and *Bellone* tend towards the inapplicability of national law. On the contrary, *Marleasing* is about the interpretation (and thus the application) of national law. The difference between the two is particularly relevant insofar as *Marleasing* cannot require a *contra legem* interpretation, whereas *Bernáldez* or *Bellone*, at least as we understand them, require the disaplication of national law that is contrary to the directive. *Bernáldez* is indeed linked with *Marleasing*, insofar as they both stem from the overarching principle of Supremacy, but its closest link is with *CIA* which also concerns disapplication of national law.

The blurring of the limits between *Bernáldez* and *Marleasing*, in the present writer's view, is a sign of the logical continuity between the two. As *Bernáldez* is to some extent similar to *CIA*, it flows that *Marleasing and CIA* are not as separate as was once traditionally thought. The sharp conceptual divisions usually made by authors in this field prove to be elusive when we try to apply them to the case-law.

We will see below that, though the Court does not refer to it, the principle of Supremacy is behind all these cases. It is this principle which binds them together, and is the reason why the line between *Marleasing* and *Bernáldez* is not as clear as was once thought. It is not because in the end they are both Supremacy cases. The Court encounters difficulties in clarifying its

[83] Opinion delivered on 16 march 2000.

principles in this area, but as will be seen below the ultimate criterion is that Supremacy should not be hindered. The effects of Community Law provisions in the national legal systems may no longer be explained by the *summa divisio* of provisions with and without direct effect[84]. A more nuanced classification is to be distinguished, recognising a gradation of situations depending on the implications that the Supremacy of Community norms may have in each situation, depending on the "justiciability" of the provision in question. Using Supremacy as the ultimate criterion we can draw a clear and sharp line that explains all the cases without contradictions such as the evolution from *Bellone* to *Centrosteel* and without having to use *Marleasing* to reverse a clear interpretation of national law. But this, as we have just said, will be exposed in more depth in the last part of this paper.

D.2.2) Case *Océano Grupo*[85]

These joined cases concern the possibility for a national court to raise a point of Community Law on its own motion. The topic is of huge importance and it is indeed related with the subject of these pages as it can also be considered another consequence of the Principle of Supremacy[86]. But this paper will deal with Supremacy only in relation to direct effect of directives, so this area of the law will not be examined in depth either[87].

The Case is interesting because it states a constitutionally crucial application of the doctrine of consistent interpretation:

> "The requirement for an interpretation in conformity with the directive with the directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on by virtue of an unfair term".[88]

We repeat, "a constitutionally crucial application" of the *Marleasing* Principle, so crucial, that one indeed doubts whether it is sustainable. We will see a different and enlightening solution of the case, that of AG SAGGIO, which points to the new conception of the effects of Community Law that it is constantly submitted in this paper as the way to explain all these apparently incoherent cases.

But let us recall the judgement first. Between 1995 and 1996 each of the defendants in the main proceedings entered into a contract for the purchase by instalments of an encyclopædia. The contracts contained a term conferring jurisdiction on the courts in Barcelona, city in which none of the purchasers was domiciled, but where the sellers had their principal place of business. The purchasers of the encyclopædia did not pay the sums due in the agreed dates, and the sellers brought actions in the aforementioned Barcelona court to recover their money.

Article 3 of the Directive on unfair terms in consumer contracts[89] defines what constitutes an *unfair contractual term* and gives an indicative and non exhaustive list of the terms which may be regarded as unfair, one of which is "excluding or hindering the consumer right's to take legal action or exercise or any other legal remedy". The directive also establishes

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[84] See SIMON, supra note 7. at p. 306.

[85] Joined Cases C-240/98 to C-244/98 *Océano Grupo*, judgement (unreported) of 27 June 2000.

[86] See SIMON, supra note 7 at p. 296. Supremacy is at stake because in certain circumstances the mere prevalence of Community Law can be useless if Community Law is not invoked by the parties.

[87] For a more detailed analysis see T.TRIDIMAS, *The General Principles of EC Law*, Oxford University Press, Oxford, 2000. at p.299 The leading cases in the field are Case C-312/93 *Peterbroeck* [1995]ECR I-4599 in public law and Joined Cases C-430 and C-431/93 *Van Schijndel* [1995] ECR I-4705 in private law

[88] *Océano Grupo*, supra, at para. 2 of the actual ruling of the Court.

[89] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95/29.

the following two obligations on the member states: a) To lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer (art. 6). b) To ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

The Directive should have been transposed into national law no later than 31 December 1994 but by the date of the proceedings there had not been any Spanish national law enacted for this purpose. Consumers therefore had to rely on the Law 26/1984 of 19 july 1984, General for the Protection of Consumers and Users which, although defining unfair terms and declaring them void, did not specifically declare as unfair any clause restricting Jurisdiction. Because decisions of Spanish national courts were inconsistent, the Court of Barcelona was unsure as to whether under Spanish Law, a court may, in proceedings concerning consumer protection, determine of its own motion whether an unfair term is void.

The ECJ first stated that the term at issue in the main proceedings satisfied the criteria to be considered unfair, as it obliged the consumer to submit to the exclusive jurisdiction of a court which might be a long way from his domicile[90]. It then analysed the system of protection introduced by the directive, and found that it was based in the idea that the consumer is in a weak position vis-à-vis the seller or supplier, and that this unbalance could only be corrected by positive action by the court. So the court's power to determine of its own motion whether a term is unfair should be regarded as constituting a proper means of preventing an individual consumer from being bound by an unfair term, and it could "act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers"[91].

The Court referred to the principle of consistent interpretation[92] and therefore held that:

> "The requirement for an interpretation in conformity with the directive requires the national court, (…) to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term"[93].

AG SAGGIO felt that there was a clear and obvious contrast between the internal procedural provisions and the directive. While the internal law recognised the validity of a jurisdiction clause such as the one at issue, the Community directive stated that the clause would not be binding on the consumer, being as it was "abusive". He considered that "obviously there does not seem[ed] to exist any internal law disposition that c[ould] be ´interpreted´ in a way that the objective pursued by the directive is achieved"[94]. The solution that was finally reached by the Court would (correctly in the present writer's view) have been considered *contra legem* and unacceptable by AG SAGGIO.

SAGGIO noticed that *Marleasing* could thus not be used in this case, as he noticed that the proceedings were between individuals. Of course, he could have simply said that Community Law had nothing to say about the case but to provide reparation of damages against the State and that the internal law should produce its effect, but the solution would have been perceived not only as unfair but also as hindering the principle of Supremacy of Community Law. One could even doubt the legal nature of a directive which although obliging a Member State to adopt its national law by 1994, has no effect in a 1997 dispute. This is the case, even though the 1997 dispute is based on facts from 1995/96 and is only relevant as a basis for a claim in damages against the State. For example, in Spain that would entail long delays while

[90] *Océano Grupo*, supra, paras 21-24.
[91] Ibid., paras. 25-28.
[92] Ibid., paras. 30-31, where *Marleasing*, *Wagner Miret* and *Dori* are specifically mentioned.
[93] Ibid., para. 32.
[94] Opinion delivered on 16 December 1999, at para. 29 in fine.

the judgement is pending in view of the overloaded judicial system that has to deal with a large number of cases brought against the State, as a claim is subject to all the requirements of the law of damages, including evidence of a causal link. Having the State as defendant can also be viewed as far more difficult than a seller of encyclopædia.

So some kind of effect had to be conferred to the directive, and the classical view of direct effect had to be abandoned. And so did SAGGIO. He gathered this case together with *CIA*, *Bernáldez* and *Bellone*, to explain them all by a new doctrine, inspired in a similar analysis made by D. SIMON, that held as follows:

> "l´obligation d´écarter les règles nationales contraires au droit communautaire s´impose au juge national en vertu du principe de primauté, y compris, si la norme en cause est déporvoue d´effet direct. *Si le juge national (…) ne peut se sustituer à l´autorité de transposition, rien ne lui interdit en revanche d´écarter l´application d´une règle nationale incompatible avec une norme qui lui est hiérarchiquement supérieure en vertu du principe de primauté. (…). Certes, l´analyse proposée suppose un découplage entre effet directe et primauté, mais cette dissociation paraît précisément constituer l´un des axes dominants de l´évolution récente de la jurisprudence de la Cour de justice comme des jurisdictions nationales"*.[95]

This attempt to stress the difference between the principle of conform interpretation and the possibility of simply disapplying national provisions found to be contrary to a directive was also transpired from AG JACOBS' opinion in *Axa Royale*[96]. In this case, the reference for a preliminary ruling was made in the course of proceedings between Axa Royale Belge SA and Mr Ochoa, an insurance broker, and Stratégie Finance SPRL concerning the failure to include certain information required by national law in life-assurance proposals or policies. Mr. Ochoa deleted from life assurance proposals the warning required by a Belgian decree, whereby clients were to be advised that cancellation, reduction or surrender of an existing life-assurance contract for the purposes of subscribing to another life-assurance contract is generally detrimental to the policy-holder. Axa alleged that failure on the part of Stratégie to include this warning in its proposals encouraged its clients to replace their existing life-assurance policies with new ones to the benefit of Stratégie.

The said Belgian decree was intended to implement a directive on life assurance[97] and, more specifically, to extend the protection afforded by it to policy-holders. As well intentioned as the implementing measure seemed to be, the national court was however concerned with the compatibility with the directive of the obligation imposed by the decree and referred the case to the ECJ for a preliminary ruling on the applicability of the national provision at issue.

The relationship referred by the national court being a horizontal one, the importance of this case lies in the fact that the legal analysis of the situation was directly and primarily focused by the AG[98] on the compatibility of the implementing measure with the directive. JACOBS did not expressly analyse whether the situation could be solved via a conform interpretation of the conflicting national provision. And, it is submitted, he did not do so because it seemed plain to him that in light of the wording of the directive, that interpretation was not possible:

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[95] Ibid. at note 17.

[96] Case *C-386/00 Axa Royale Belge SA v Georges Ochoa and Stratégie Finance SPRL*, judgement (not yet reported) of 5 March 2002.

[97] Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance (third life assurance Directive), OJ 1992 L 360.

[98] Opinion delivered on 15 November 2001.

> "That provision [of the Directive] *plainly* suggests that *only* specific information directly relevant to the particular commitment may be required. A general warning [like the one foreseen in the conflicting national provision] (...) cannot in my view constitute such information (...) It is *clear* that, by regulating the information to be provided to policy-holders, the Directive not only strikes what the Community legislature regarded as the correct balance between consumer protection on the one hand and opening up the market in life assurance products on the other but also does so in terms which exclude a requirement such as that imposed by Article 4(2)(b) of the Royal Decree".[99]

Bearing this in mind, the legal reasoning of the Court turns out to be somewhat unexpected. Even though the AG had clearly stated that the national provisions at issue could not be reconciled with the directive by means of interpretation (in the sense that to do so would have amounted to a *contra legem* interpretation), the Court maintained a firm stance as it had done in previous cases such as *Centrosteel* and reiterated its case-law on consistent interpretation, mistakenly providing a *contra legem* interpretation[100]:

> "18. It should be recalled, as a preliminary point that even if, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals, the national court that has to *interpret* that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) [The Court quoted here *Centrosteel*].
>
> 19. It is in the light of that observation that the question referred for a preliminary ruling should be answered.
>
> 31. In those circumstances the reply to the question referred must be that Article 31(3) of the directive *precludes* national legislation which provides that a life-assurance proposal, or in the absence of a proposal, a life-assurance policy must inform the policy-holder (...)."

As we will see below, all these inconsistencies could have been avoided had the Court made use of the theories sustained -expressly or implicitly- by the AGs.

E) The control of the respect of the limits to the discretion conferred to a State to transpose a directive

It has to be noted that the doctrine of the inapplicability, also called the doctrine of the "invocability of exclusion" of national norms contrary to a directive is alien to the old case-law, although its interaction with the doctrine of direct effect had been rarely noted.

It is settled law that the national court must consider "whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods of implementing the directive, have kept within the limits as to the discretion set out in the directive"[101]. If national law confers on courts and tribunals discretion to apply mandatory rules of law of their own motion, they must examine *ex proprio motu* whether the national authorities remained within the limits of their discretion under the directive[102].

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[99] Ibid, at paras. 24 and 27.

[100] In Case *C-291/00 Société LTJ Diffusion*, AG JACOBS himself pointed out the risk of verging in a *contra legem* interpretation when applying the *Marleasing* doctrine to national legislation the wording of which differs noticeably from that of the directive which it is apparently intended to transpose (Opinion delivered on 17 January 2002, para. 18; judgement not delivered at the time of writing these lines).

[101] See Case C-51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113 para. 24; Case C-38/77 *Enka* [1977] ECR 2203 paras 10, 17-18; Case C-36/75 *Rutili* [1975] ECR 1219, paras 17-20.

[102] K. LENAERTS, supra note 7, at pp. 579-580. See also Case C-72-95 *Kraaijeveld*[196] E.C.R. I-5403, paras 56-61.

However[103], the review to be conducted of national law in the light of the directive extends further than measures taken to implement it; it covers all rules governing the application of the directive in the national legal system, including rules that applied before the directive was adopted[104]. Why then, if this is settled and clear case-law, has it never been used to explain cases such as *CIA* and *Bernáldez*? Probably because the relationship between them was usually unnoticed, although not always, as this paragraph from LENAERTS shows:

> "The Court of Justice is not prepared, however, to accept a situation in which the disaplication of national provisions would lead to the imposition on an individual of an obligation laid down by a directive which has not been transposed. Accordingly, the Court has held that Community law does not allow a national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court."[105]

Judge LENAERTS quotes *Arcaro* as authority but in the writer's view, and as already mentioned above, *Arcaro* is only good law in its criminal law context. One simply cannot see why the reasoning used by the Court in the most recent cases *WWF*[106] and *Linster*[107] would be any different if the situation had arisen between individuals.

WWF was preliminary reference from the Administrative Court, Autonomous Division for the Province of Bolzano. It concerned the interpretation of a directive on environmental assessment[108]. The main proceedings had started when the applicants, who were persons claiming to live near Bolzano-St Jacob Airport and two environmental associations, challenged before the national court the legality of the contested measures, which approved a project for the restructuring of that airport, on the ground that the procedure followed for approving the project was not in conformity with the requirements of the directive. According to them, since the project was likely to have significant effects on the environment, it fell within the scope of the directive and should have been made subject to the assessment procedure provided for in the aforementioned Community norm and not to a mere 'environmental impact study' under national law, which did not meet the directive requirements.

The national court decided to stay proceedings and to submit several questions for a preliminary ruling, including whether, had the directive been incorrectly transposed, it was vertically directly effective in the sense that the authorities of the Member State were required to subject the projects at issue to an environmental assessment.

The Court, following AG MISCHO[109], held[110] that the directive was to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the directive certain classes of projects, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment.

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[103] Ibid. at p. 580

[104] See Case C-21/78 *Delkvist*[1978] paras 13-16.

[105] K. LENAERTS, supra note 7, at p. 580.

[106] Case C-435/97 *WWF*, (unreported) judgement of 16 September 1999

[107] Case C-287/98 *Linster* (unreported) judgement of 19 September 2000.

[108] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[1985] OJ L 175/40.

[109] Opinion delivered on 29 April 1999.

[110] See *WWF*, supra, at para. 49.

However, having been explicitly[111] asked by the national court about the direct effect of the directive, the Court's answer was phrased in different terms. It referred to the control over the limits of the discretion left to the Member State by the directive, so as to dissapply all national provisions where the national authorities had gone beyond the limits of that discrection[112]:

> "(…) the national court is essentially asking whether Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, *where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions*. (…)
>
> As regards the right of individuals to rely on a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect conferred on directives by Article 189 of the EC Treaty (now Article 249 EC) for the possibility for those concerned to rely on the obligation which directives impose to be excluded in principle. Particularly *where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set out in the directive* [The Court quoted here Cases Verbond van Nederlands Ondernemingen and Kraaijeveld]."

Consequently, the ECJ held that where that discretion had been exceeded and as a result the national provisions should be set aside, it was for the authorities of the Member State, according to their relevant powers, to take all the general or particular measures necessary to ensure that projects were examined in order to determine whether they were likely to have significant effects on the environment and, if so, to ensure that they were subject to an impact assessment.

The fact that the relationship was vertical in *WWF* does not undermine the possibility, in the present writer's view, of using this reasoning to explain all the aforementioned and ever conflicting cases, from *CIA* to *Bellone*. It is respectfully submitted that such an obscure judgement as *Arcaro* does not provide good reasons for setting aside this possibility which, as we will see, deals with all the theoretical and practical problems of the cases examined in this paper.

Similar conclusions can be drawn from *Linster*[113] where, for the purpose of constructing the motorway link with Saarland, the State of the Grand Duchy of Luxembourg had commenced proceedings for the expropriation of plots of land. The owners concerned challenged the expropriation on the ground that the laws regulating the expropriation in question had been adopted in breach of a directive on environmental assessment[114], in that the project had not been preceded by an environmental impact study or a public inquiry as was required by the directive.

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[111] Ibid., at para 27 in fine.

[112] Ibid., at paras 68-71.

[113] Case C-287/98 *Linster* (unreported) judgement of 19 September 2000.

[114] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[1985] OJ L 175/40.

The Luxembourg court adjudicating the issue was uncertain whether it could verify compliance with the directive. This uncertainty was irrespective of whether the directive, which had not been transposed within the prescribed period, had direct effect or whether such verification involved appraisal of the direct effect of the directive. It referred to *Nakajima* v *Council*[115], in which the Court had reviewed the legality of the basic Community anti-dumping regulation[116] in the light of the GATT Anti-Dumping Code[117] and had distinguished the question of direct effect from that of collateral review of legality.

The national court thus referred to the ECJ for a preliminary ruling asking, whether articles 234 and 249 of the EC Treaty should be interpreted as meaning that a court called on to verify the legality of a procedure for the expropriation of immovable property might find that the environmental impact assessment required by the Community directive had not been carried out. Alternatively, the national court asked whether such a finding involved an appraisal of the direct effect of the directive, entailing that the court was required to refer a question on the matter to the Court of Justice of the European Communities.

The ECJ followed the structure of reasoning that it had followed in *WWF* and did not answer the question that it was being asked. Instead it answered the question whether the provisions of the directive could be taken into account by national courts in order to review whether the national legislature had kept within the limits of the discretion set by it[118]:

> "(…) it would be incompatible with the binding effect conferred on directives by that provision to exclude, as a matter of principle, any possibility for those concerned to rely on the obligation which directives impose. Particularly *where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set by the directive* [The Court then quoted Cases *Verbond van Nederlandse Ondernemingen*, *Kraaijeveld* and *WWF*."[119]

The ruling is almost literally the same as in *WWF*, other than that the question that had been asked by the national court referred explicitly to the relationship between the doctrine on the control of the discretion conferred on Member States by a directive and the doctrine of Direct Effect. The Court just answered to the applicability of the first, and said nothing about the second. What we have said about *WWF* applies here: one does not see the reason to limit the application of this doctrine to vertical relationships.[120]

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[115] Case C-69/89 *Nakajima* [1991] ECR I-2069

[116] Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community [1988] OJ L 209/1.

[117] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations [1980] OJ L 71/1

[118] See *Linster*, at paras 25-39.

[119] Ibid., at para. 32.

[120] A recent example of the invocability of exclusion in vertical relationships can be found in Opinion *C-99/01 Gottfried Linhart* (judgement not yet delivered at the time of writing). It was argued that the implementing national legislation had gone beyond the limits of the margin conferred on the Member States by Directive 76/768/CEE on cosmetic products. Accordingly, AG HEELGOED held in his Opinion delivered on 7 March 2002 that the Directive precluded the said relevant legislation.

In fact, a recent case may be interpreted as an application of this legal reasoning to horizontal relationships. Although the Court did not expressly mention it, it may be concluded that by its decision in *Heininger*[121], it ruled on the inapplication of national implementing legislation as against individuals due to it having been adopted in breach of the margin of discretion afforded to member states by a directive.

The facts of the case recall *Dori*, as the plaintiffs in the main proceedings were also consumers claiming a right to cancel a contract on the basis of a directive[122], but it is substantially different from *Dori* in that here the directive had already been transposed (even if incorrectly). The main concern of the referring Court was to ascertain whether the contract at issue fell within the scope of protection of the relevant Community provision. However, the most important finding of the Court for our purposes is the one dealing with the discretion of States when implementing directives and its effect in the situations governed by such transposing measures. More concretely, the States party to the proceedings had argued that the directive at stake granted them a wide margin of discretion as to the means to fulfil the specific objective of the protection of consumers[123]. However, pursuant to an interpretation of the purpose of the directive, the Court concluded that the member states did not enjoy such a broad margin of discretion and that this had been exceeded by enacting the conflicting provisions:

> "The bank and the German, Italian and Austrian Governments claim that, since Article 4 of the doorstep-selling directive requires the Member States to ensure that their national law lays down appropriate consumer protection measures in cases where the consumer has not been informed of his right of cancellation, the national legislature is at liberty to limit to one year the period within which the right of cancellation provided for in Article 5 of that directive may be exercised (...). Having regard to the wording and purpose of Article 5 of the doorstep-selling directive, it is not possible to construe the third paragraph of Article 4 as enabling the national legislature to provide that the consumer's right of cancellation must in any event be exercised within a period of one year, even if the trader has not notified the consumer of the existence of that right."[124]

As had been the case in *WWF* and more clearly in *Linster*, the final consequence of the ruling amounted to setting aside the national legislation contrary to the limits established in the directive. It must be acknowledged that the Court was fully conscious of the implications of this decision for the individual parties[125]. Indeed, as AG LÉGER pointed out in his opinion[126], the cornerstone of this conclusion was the need to ensure the effectiveness of the rights granted to individuals by the Community provisions:

> "En effet, nous tenons à insister sur le point suivant. Si le consommateur n'est pas informé de l'existence d'un droit de révocation, il se trouve dans l'impossibilité de l'exercer. *L'effectivité* de ce droit repose donc entièrement sur le comportement du commerçant. La directive démarchage à domicile fait peser sur ses épaules une responsabilité particulière, car le droit du consommateur dépend de son attitude. Une défaillance du commerçant peut empêcher la mise en application de ladite directive. "[127]

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[121] Case *C-481/99 Heininger*, judgement (not yet reported) of 13 December 2001.

[122] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372, p. 31.

[123] The Court had already ruled in *Dori* about this discretion on the part of the Member States: "Admittedly, Articles 4 and 5 [of Council Directive 85/577/EEC] allow the Member States some latitude regarding consumer protection when information is not provided by the trader and in determining the time-limit and conditions for cancellation" (para. 17).

[124] Case *Heininger*, paras. 43 and 46.

[125] In paras. 49-54, the Court discussed and finally refused to limit temporarily the effects of its ruling.

[126] Opinion delivered by AG LÉGER on 12 July 2001.

[127] Ibid., at para. 60.

From an all-embracing perspective, it is of the utmost interest that AG LÉGER in *Linster* [128] adopted the same approach in finding the common *rationale* behind all the aforementioned cases. As his opinion will be explained in detail in the next part of this paper, it will not be discussed here in depth. It suffices to say now that the principle of Supremacy plays a crucial role[129].

4.- The Gradation of Invocability. Towards a New Formulation of the Theory of the Effects of Community Law

The classical analysis of the effects of Community Law in the legal orders of the Member States, as it has been conducted in both the case-law and in the scientific literature, has been based in the *summa divisio* opposing the norms with direct effect to those norms without it[130]. The dominant doctrine, reasoned from the classic formulations of the Court of Justice, had a tendency to overstate the role played by Direct Effect as the exclusive foundation of the competences attributed to the national judge in the application of Community Law in general and of directives in particular[131]. This might have been true for the earliest cases, but the most recent developments of the law confirm the words of R. KOVAR:

> "A une division dichotomique opposant l´effet direct à la absence d´effet qui donne une vision abusivement simplifiée d´une réalité autrement plus complexe, il faut certainement préferer une présentation davantage nuancée fondée sur une pluralité graduée de situations en fonction des divers types d´effet que peuvent avoir les normes communautaires."[132]

In other words[133], it is necessary to proceed to a "deconstruction/construction" of the effects of Community Law paying due attention to the diversification of ways of invocability, the autonomy of the *binding* effect of Community Law no matter its *direct* effect in the traditional sense of the term, and the "rereading" of the articulation between Direct Effect and Supremacy. It appears that the evolution of the relationships between Community Law and national law involves a separation between the two key concepts of Direct Effect and Supremacy, and it leads to ordering the effects of Community Law around the notion of "justiciability". It is following this above mentioned criterion that we can establish, not a dichotomous distinction, but a *progressive gradation* between *minimal* and *reinforced justiciability*.

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[128] Opinion delivered by AG LÉGER on 11 January 2000.

[129] "*Ces arrêts semblent être plus redevables à l'égard du principe de primauté qu'à l´egard du principe d'effet direct*"*;* Ibid., at para. IV.

[130] See SIMON, supra note 7 p. 306. What follows is an analysis of the new cases inspired in the concepts proposed by Prof. Simon, in a quite similar way as it has been done by the Opinion delivered by AG SAGGIO on the 16 of December 1999 in Joined Cases C-240 to C-244/98 *Océano Grupo* (unreported) and by AG LÉGER in Case C-287/98 *Linster* (unreported) Opinion delivered on 11 January 2000. See also S. PRECHAL, *Directives in European Community Law*, Clarendon Press, Oxford, 1995 at p. 121-122.; S. PRECHAL, "Does Direct Effect Still Matter?" [2000] *CMLRev* 37, vol. 5, pp. 1047-1069.; E.M PUERTA DOMÍNGUEZ, *La directiva comunitaria como norma de derecho aplicable*, Comares, Granada, 1999.

[131] See D. SIMON, *La Directive Européenne*, Dalloz, Paris, 1997 p. 70-77 and 86-99 at p. 86.

[132] R. KOVAR "La Contribution de la Court de Justice à l´édification de l´ordre juridique communautaire, *Collected Courses of the Academy of European Law*, IV-1, 15 quoted in SIMON, supra note 7, at p. 307.

[133] SIMON, supra note 7, at p. 307.

Which of the four following routes the Court chooses to take depends on the nature of the claim before the national court, as well as the nature of the person against whom the claim has been brought[134].

A) The "Minimal Justiciability"

Under this heading we gather those different effects which, as a consequence of the Principle of Supremacy, are accorded by Community Law to unimplemented directives even if they do not comply with the requirements of direct effect, including the requirement that it must not be a horizontal relationship.

The concept of Supremacy had thus for a long time been reduced to a mere "prevalence", in situations of conflicts of Community Law over national law. But, in reality, the implications of Supremacy are far wider, even though they have just been unveiled very recently, in the series of judgements that has come to be called "second generation judgements"[135]. The prevalence of Community Law can be rendered useless if these consequences are not taken into account.

A.1) The "Invocability of Consistent Interpretation" (the so-called "indirect effect" or "Marleasing doctrine")

There would not be many differences with the traditional view of this doctrine, except that it should always be expressly based in Supremacy. The binding effect of Community Law imposed by articles 189 and 5 of the Treaty on Member States reaches the national courts by virtue of the principle of Supremacy. Thus, as is well known, national courts are obliged to interpret national law in the light of the wording and purposes of Community Law. *Marleasing* cannot be used to invoke a *contra legem* interpretation of national law, so cases like *Bellone*, *Centrosteel* and *Océano Grupo* should not be solved via *Marleasing.*

A.2) The "Invocability of Exclusion"

The theory of the invocability of exclusion that is applied by the French Conseil d'état[136], it is submitted, should be used by the ECJ in this area. The obligation to ensure the prevalence of Community Law leads to the obligatory non-application of any national norm that is contrary to Community Law. The "invocability of exclusion" derives also from the principle of Supremacy and it exists independently of the Direct Effect of the Community norm in question. This, it is submitted, is the doctrine used in the environmental assessment cases (*WWF* and *Linster*), and this, it is also submitted, should be the theoretical construction used to explain most of the cases studied above, like *CIA*, *Bernáldez*, *Bellone*, *Centrosteel* and *Océano Grupo*.

The Court, though not particularly clearly, has followed this explanation in *Unilever* :

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[134] M. LENZ, D. SIF TYNES, L. YOUNG "Horizontal What? Back to Basis" [2000] *ELRev* 25 at p. 518.

[135] SIMON, supra note 7. At p. 291. The division in generations should not be over-emphasised, as it does not refer to a strict chronological division but to a recent emphasis on the case law on tendencies that were already inbuilt in the earlier case law.

[136] See P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, *Introduction to the Law of the European Communities*, Kluwer Law International, London-The Hague-Boston, 1998. At p. 541. A.M. SLAUGHTER, A.S. SWEET , J.H.H. WEILER (eds), *The European Court and National Courts-Doctrine and Jurisprudence. Legal change in Its Social Context*, Hart Publishing, Oxford, 1998; ISAAC, supra note 7, at p. 181; D. SIMON, *La Directive Européenne*, Dalloz, Paris, 1997, at p. 89. See the following French cases: *Compagnie Alitalia* [1990] 1 CMLR 248; *Nicolo* [1990] 1 CMLR 213 and *Boisdet* [1991] 1 CMLR 3; *Rothmans International* [1993] 1 CMLR 253 and *Opposants à la Chasse* [1990] 2 CMLR 831.

"Thus, it follows from the Case-Law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with article 8 of the directive 83/189 can be invoked in proceedings between individuals (…) and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the CIA Security case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings. (…) *In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those governments is concerned [Faccini Dori], Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.*"[137]

And this, no doubt, is the analysis adopted by AG LÉGER in *Linster*:

"Les consorts Linster ont invité le juge saisi à procéder à un contrôle incident de la légalité d´un règlement grand-ducal. Qu´elle ait été choisie ou imposée par les circonstances ou les caracteristiques du droit national applicabe en la matière, c´est la voie de L´exclusion de la norme nationale qui a donc été retenue."[138]

No conflict exists with the use of this theory and the denial of horizontal effect to directives, as here the Community norm is merely used to avoid the application of national law and not as a regulation for the relationship in question[139]. Thus, the principle of Supremacy is safeguarded without calling the distinction between directives and regulations into question, which would be the result of a solution that is quite frequently invoked in this field, that is, the granting of horizontal direct effect to directives[140], and, of course, avoiding another radical solution that has been proposed, namely the complete denial of direct effect to directives.[141]

A.3) The "Invocability of Reparation"

The right to reparation, that is, the liability of the Member States for breaches of Community Law, including the non transposition or erroneous transposition of a directive, which is explained above, is also a consequence of the Supremacy of Community Law and also takes place in the absence of direct effect of the norm in question. The relationship between the absence of direct effect and the possibility of a invocability of reparation was shown by the Court in such important judgements as *Brassiere du Pêcheur-Factortamte III*[142] and *Dori*.

B) The "Reinforced Justiciability" (traditionally "direct effect")

If it is true that all the norms of the Community, whether they produce direct effect or not in the traditional meaning of the term, benefit from a minimal justiciability. Those norms that are recognised as producing "direct effect" enjoy a "reinforced" justiciability that is correlative to their applicability of substitution[143]. By making a difference between the "invocability of exclusion" and the "invocability of Substitution" it is stressed that the conditions of direct effect

[137] Case C-443/98 *Unilever* (unreported) judgement of the 26 September 2000, at paras. 49 and 51.

[138] Supra, at para. 78.

[139] The decision of the Court in Case *C-28/99 Jean Verdonck*, [2001] (not yet reported) can be understood from this perspective. In para. 38 the Court outlined the obligation of the referring court to disapply those national provisions which run counter to a transposed directive, even though the specific juridical argument in support of this affirmation was not expressly stated.

[140] See note 39.

[141] See H.G.SCHERMERS "No Direct Effect for Directives", [1997] *EPL*, V3 I4 p. 527-540, who considers that after *Francovich* the individual has a better alternative and directives should not be directly applied (?!).

[142] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame III* [1996] ECR I-1029

[143] SIMON, supra note 7, at p. 312.

have to be fulfilled for the second, but not for the first. *Accordingly, the line to be drawn in the tricky cases, such as those seen above, depends on whether we are facing a case of invocability of exclusion or a case of invocability of substitution.*

C) Beyond legal formalism: exclusion and substitution as the two sides of the same coin?

> *"We have discovered that rules alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all"*
>
> K.N. LLEWELLYN[144]

From the point of view of the writer, the proposed theory of the effects of Community Law provides us with a plausible analysis of the case-law on "pseudo-horizontal direct effect of directives". *The difference between invocability of exclusion and invocability of substitution proves useful to explain coherently the motives behind the decisions of the Court in this field*. More concretely, it permit us to reconcile the apparent inconsistencies in its rulings, where though formally maintaining the prohibition of horizontal direct effect of directives, the Court accords *de facto* certain effects to unimplemented directives between individuals. *More importantly, we are convinced that this construction of the case-law is based on solid legall arguments: The need for a harmonious balance between the two principles of Supremacy and the division of competences between the Community and the member states.* At the end of the day, it is the very sensitive nature of the matter subject to a ruling what leads the Court to split hairs in its legal reasoning.

However, given that distinction between exclusion and substitution is so subtle, it ought not be forgotten that it might prove hard to be grasped and some may even show reluctance to accept it. Indeed, for the reader born in the Common Law tradition the construction proposed in this paper may appear to be too formal or even artificial. To what extent are we not speaking here about the two sides of the same coin? What is the line which can clearly be drawn between these two ideas of exclusion and substitution?

In our opinion, it is the problematic relationship between the concepts of right and obligation what lie at the very core of the confusion. The reader may think that where the Court states that a directive precludes inconsistent national legislation which imposes an obligation on an individual, it is implicitly deriving from the directive rights in favour of that individual. From this perspective, the logical consequence would be that it is the directive itself that is the norm regulating the horizontal relationship at stake. However, the writter cannot share this conclusion. *A deeper analysis of these situations clearly leads us to affirm that the inapplication of national rules contravening a directive (invocability of exclusion) cannot be assimilated to an "a contrario" application of the directive itself (invocability of substitution).*

There is no doubt about the fact that in cases of both exclusion and substitution the legal positions of the parties before the court are affected because of the presence of a directive. But it must be stressed that the effect of the Community norm is not the same in both situations. It is only when the directive substitutes inconsistent national legislation that individuals are granted *a right on the very basis of the directive*. On the contrary, when the Community norm limits itself to exclude those inconsistent national provisions, individuals are better off not because of the direct application of the directive to the matter, but because of the *disappearance of the obligations that the excluded national rules imposed on them*.

[144] K.N. LLEWELLYN, *The bramble bush: On our law and its study*, Oceana Publications, Dobbs Ferry, New York, 1981 (1930), at p. 12.

In order to illustrate this explanation, let us take a classical case such as Dori. It is remembered that the Court refused here to extend its case-law on direct effect of directives to horizontal relationships. In the terms proposed in this paper, the Court reaffirmed its unwillingness to grant directives a "reinforced justiciability" as against individuals. In order to assess the validity of the proposed concept of substitution, the question should be whether this case can be properly explained in terms of invocability of exclusion. Coherent with our previous analysis, that possibility must be ruled out. In the absence of national legislation recognising the right contained in the directive, the plaintiff´s claim amounted to deriving that *right against another individual directly from the directive and on the sole basis of it*. This is to say, it asked the national court to consider the directive as the norm regulating a contract between individuals. It is obvious that if the Court of Justice had granted this petition, it would have crossed the line and entered the field of substitution. It would have recognised unimplemented directives a capacity which goes further than that of merely *excluding* inconsistent national legislation. It would have amounted to a recognition of the capacity of this kind of norm to be the *substantive* basis of a legal relationship between individuals. More graphically, and paraphrasing Judge LENAERTS in his explanation of judicial remedies under Community Law, the directive would have been used by the individual not only as a *shield* against national provisions contravening it, but also as a *sword* against another individual[145].

Dori proves that substitution instances cannot be successfully explained in terms of mere exclusion. Accordingly, it may be concluded that the line separating both concepts is clear from the perspective of the invocability of substitution. In order to complete the circle, however, one question remains to be answered. Is the border line between both concepts equally evident from the perspective of the invocability of exclusion? *Unilever, Centrosteel* and *Océano Grupo* must be considered as cases in support of an affirmative answer. The directive plays a more simple role here than in *Dori*, since it is invoked only to exclude national legislation inconsistent with it. The significant point is that here the "justiciability" of the Community norm is not driven further than that. It starts and concludes at the level of *exclusion*. As a consequence, the directive will never be enshrined as the norm regulating the horizontal relationship at stake. The responsibility for this still lies with the national legislator. Accordingly, *national provisions will still apply* as long as they respect what has been agreed by means of a directive. Following the example set out above, the directive will act here *only as a shield*: individuals will be able to rely on it *only to prevent the application of national legislation which impose on them obligations vis-à-vis other individuals in contravention of Community provisions*[146]. Admittedly, this may have a positive effect on the legal position of an individual, but it cannot be regarded to be the same as allowing individuals to exercise rights on the sole basis of the directive[147]. Since it is for the national legislator to grant those rights by means of implementing measures, the directive will not be allowed to be used as a sword against other individuals. In short, in these situations the directive will relieve from obligations, but will not give rise to rights. This being so, it follows that the requirements will not be the same for the directive producing the first or the second effect. The conditions for the traditional "direct" effect will have to be met only in case the directive, in addition to precluding the inconsistent national legislation, regulates as of themselves the juridical relationships at issue[148].

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[145] K. LENAERTS , D. ARTS, *Procedural Law of the European Union*, Sweet & Maxwell, London, 1999, at p. 82.

[146] Namely, the obligation for commercial agents to register in order to be paid (Cases *Bellone* and *Centrosteel*) and the obligation for consumers to submit their claims to the courts of the domicile of the vendor (Case *Océano Grupo*).

[147] For a similar analysis in *CIA*, see C. TIMMERMANS, "Rapport communautaire" in *Les directives communautaires: effects, efficacité, justiciabilité*, XVIII Congrès FIDE, Stockholm, 3-6 juin 1998, at p. 31.

[148] S. PRECHAL goes even further by proposing to drop the examination of the conditions in both cases, on the basis of a reassessment of the rationale behind the direct effect. *Does direct effect still matter?*, [2000] *CMLRev* 37, vol. 5, at p. 1064 et seq.

The explanation of this important difference must be found in the attitude of the Court towards the obligations entered into by the member states at the Community level. In general terms, the Court must rule in such a way as to remain as a neutral adjudicator[149] of the disputes before it, this is to say, it is to strike a balance between the legitimate interests of the Member States and those of the Community. This entails on the one hand that by no means will the Court allow an individual to derive directly from an unimplemented directive a right *vis-à-vis* other individuals. The court will acknowledge the limited character of the obligations entered into by the member states under the directive and will fully respect the main role of these States in making those rights effective for their citizens by means of implementation (*denial of invocability of substitution in horizontal relationships* in *Dori* and *El Corte Inglés*).

On the other hand, this will not, however, prevent the Court from assuring the compliance of the Member States with those obligations assumed through the directive. In order to do so, it will grant individuals the possibility to rely on the Community norm *vis-à-vis* the defaulting Member State (invocability of substitution in vertical relationships) and, what is more important for our purposes, it will grant a limited effect to the directive as between individuals (minimal justiciability). Firstly, the refering courts will be obliged to interpret national rules in accordance with the directive (consistent interpretation). Secondly and more importantly for our explanation, those courts will have to set aside national provisions which are inconsistent with the rights that the State is obliged to grant to individuals in the light of the directive (*invocability of exclusion in horizontal relationships* in *CIA, Bernáldez, Bellone, Océano Grupo*...) [150]. In this last case, it is important to stress that the Court will not take the place of the Member State by implementing the directive and consequently this will not become the substantive regulation of the horizontal relationship at issue. More simply, the Court will limit itself to using it as a parameter of legality[151], easing the path for the future transposition of the Community norm by the Member State.

This difference between exclusion and substitution may be clearly seen by means of a last example such as *Ingmar*[152]. In this instance, the proposed theory is useful to fully understand the reasoning of the Court and to discard any possible inconsistency with its previous case-law. Ingmar had concluded a contract with an American undertaking under which it was appointed as commercial agent of the latter in the United Kingdom. A clause of the contract stipulated that the contract was governed by the law of the State of California. When the contract was terminated, Ingmar instituted proceedings on the basis of English law seeking payment of commission and compensation for damage suffered as a result of the termination of the contract. The English court held against it on the ground that English law did not apply, since the contract was governed by the law of the State of California. On appeal, the court wondered whether Council Directive on self-employed commercial agents could have any bearing on the case and referred the matter for a preliminary ruling to the ECJ. That ruling stated that

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[149] Formal reasoning is broadly used by the Court to preserve an image of neutrality and impartiality. On the consequences of this attitude, see POIARES MADURO, supra note 4, at p. 22.

[150] See D. EDWARD, "Direct effect, the separation of powers and the judicial enforcement of obligations", in *Scritti in Onore di Giuseppe Federico Mancini*, volume II, Diritto dell'Unione europea, Dott. A. Giuffrè Ed., Milan, 1998, at pp. 438-439. This difference between the obligation on the State to grant rights and the rights themselves is particularly stressed in Case *C-431/92 Commission v. Germany* [1995] ECR I-2189, at paras. 24-26.

[151] The ECJ has expressly endorsed this perspective in the relationship between international and Community Law. See for example, Case 162/96 *Racke v. Hauptzollamt Mainz* [1998], ECR I-3655, paras. 46-47, where the Court stated that according to the legal hierarchy, the international agreements can be used as a parameter of the legality of regulations, independently of the judicial recognition in favor of the individual of the right granted by the former; in *C-112/80 Dürbeck v. Haupzolllamt Frankfurt/Main Flughafen* [1981] ECR 1095, at paras. 45-46, the ECJ decided on the compatibility of a number of regulations with some provisions of GATT without assessing the "traditional" direct effect of the latter.

[152] Case *C-381/98 Ingmar GB Ltd v. Eaton Leonard Technologies Inc*. [2000], not yet reported.

> "Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, which guarantee certain rights to commercial agents after termination of agency contracts, *must be applied* where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country".

Setting aside tthe fact hat the judgement was given by a three-judge chamber, the ruling may appear to be a landmark in the case-law of the Court. Is the ECJ finally and expressly granting direct effect to directives in horizontal relationships where it states that the directive applies to the commercial relationship between the principal and its agent? A proper understanding of the difference between exclusion and substitution precludes that possibility.

The relevant directive had been implemented in the United Kingdom within the prescribed period. In fact, the plaintiff based his claim on the transposing British legislation. The main concern was the way this implementation had taken place. Whereas the national provisions at issue allowed the parties to agree that the agency contract was to be governed by the law of a State other than the United Kingdom, article 19 of the directive provided that the parties may not derogate from articles 17 and 18 to the detriment of the commercial agent. Articles 17 and 18 set up the obligation on the member states to ensure that commercial agents are, after termination of the agency contract, indemnified or compensated for damage. In short, the Court had to rule on whether those provisions of the directive applied in favour of the plaintiff irrespective of the will of the parties to the contract. After taking into consideration the purpose of the directive and the referred provisions, the Court ruled that the regime established by the directive was mandatory in nature and that articles 17 and 18 must therefore be observed throughout the Community for their objectives to be attained. Accordingly, it held that those provisions had to be applied in the case before it.

The conclusion reached by the Court in its ruling seems to be correct in juridical terms. It appears to be clear that, since the concerned provisions were mandatory, the parties may not derogate from the protection afforded by them to the commercial agent. None the less, some problems may arise when the referring court applies this ruling to the case before it. Is it to directly apply the directive in order to grant damages to the claimant? The wording of the ruling seems to afford this possibility, but to do so would amount to substitute the directive for the contravening British legislation. In other words, it would mean to grant direct effect to a directive in a horizontal relationship, in contravention with the ECJ case-law in this field.

At this point, the proposed differentiation between exclusion and substitution may clarify what the decision of the referring court should be and why. Contrary to what may seem at first sight, the British court cannot directly apply the directive instead of the transposing national legislation contravening it. In other words, the referring court in this case is not being allowed by the ECJ to consider the provisions of the directive as the *substantive* law of the relationship. As we have explained above that would amount to granting rights to individuals on the sole basis of the directive and without taking into account the role of the United Kingdom in determining the exact way in which those rights shall be granted to its citizens. In short, a judicial decision like that one would equate a directive with a regulation and consequently would impair the division of competences between the Community and the member states.

However, if the British court would rule on the sole basis of its national legislation, it is clear that the Supremacy of Community Law would be called into question. Then, how is the conflict to be solved? In order to assure the effectiveness of the community provisions while respecting the character of the directive as such, the referring court should simply *exclude* the national provisions contravening them (as it is obvious that a construction of such provisions in conformity with the directive would lead to a *contra legem* interpretation). More concretely, the

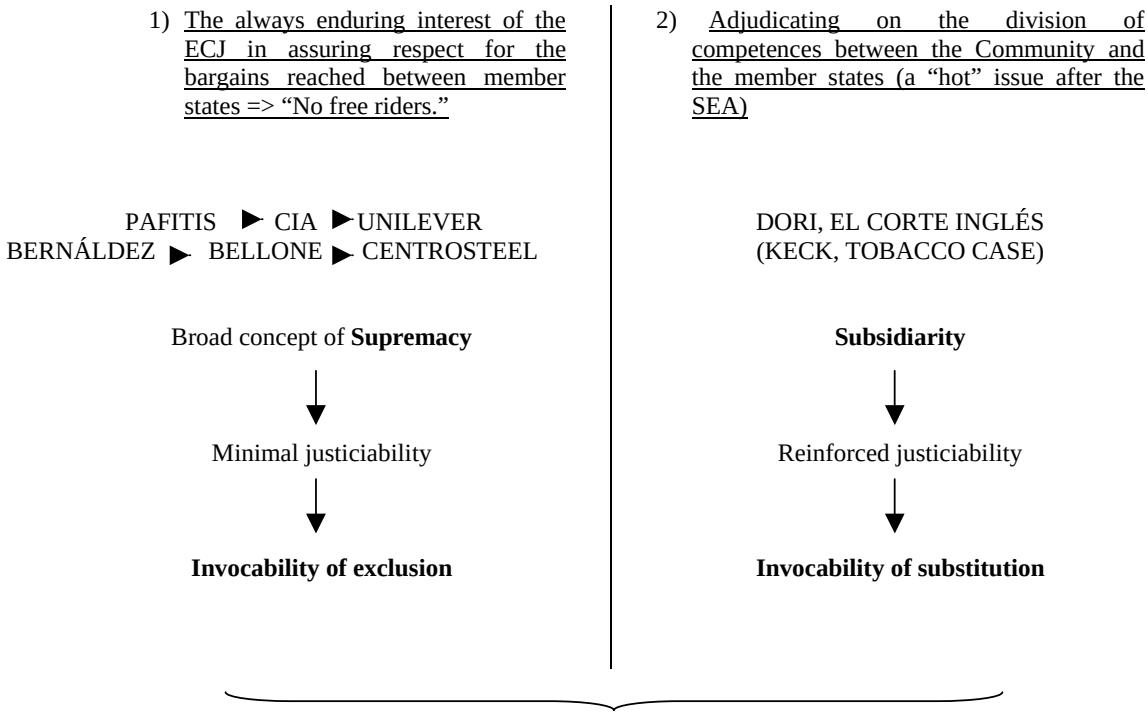
national provisions according to which the parties to the agency contract may agree for it to be governed by the law of a non-member State should be disapplied. The contract would be ruled by the British transposing measures and as a consequence the national court could comply with the directive by granting damages on the basis of national legislation.

This case shows clearly that exclusion and substitution cannot be seen as the two sides of the same coin. When excluding national norms contravening a directive, the Community norm is not substantively regulating the horizontal relationship at issue. At the most, it relieves an individual from obligations imposed on him by national provisions contrary to the directive (in the case above, the obligation to abide by the law of a non-member State where it has been chosen by the parties to rule an agency contract). Admittedly, this may cause the directive to have a negative impact on the legal position of an individual, but such adverse effect does not correspond to a right directly derived from the directive by another individual (in *Ingmar*, the exclusion of the national provisions allowing choice-of-law clauses in an agency contract prejudiced the principal of such a contract, but if the national court was finally to award damages to the agent, it did so not on the basis of the directive itself, but on the basis of its British transposition).

5.- Conclusions. The Rule of Law, Legal Certainty and Future developments in the Case-Law

The rulings of the Court in recent cases such as *Bellone*, *Océano Grupo* or *Unilever* cannot be reconciled with the traditional case-law on horizontal direct effect of directives. The Court still keeps *Dori* as good law by formally denying any effect to directives between individuals while at the same time it *de facto* grants some effects to unimplemented directives in horizontal relationships.

Leaving apart whether the Court's decisions are right or wrong, what proves essential at this point is to find out what are the reasons behind them and, more importantly, where and why will the Court draw the line when facing future similar cases. From a thorough analysis of this case-law, it is submitted that the Court will try to arrive at some kind of balance between these principles:



The Court's willingness to emphasise the line that divides the competence of the Community and that of the member states through the formal denial of horizontal direct effect to unimplemented directives reaches its limit when the Supremacy of Community law can be called into question. The old role of the Court of making the bargains achieved by the member states stick is still to some extent alive as its death would undermine the foundations of the Community legal system. The Court will adjudicate on the division of competences (it has for the first time stricken down a Community measure on the grounds of lack of competence of the Community in the *Tobacco*[153] case), but it will not knock down the very basis of the Constitutional architecture of the Community[154].

[153] Case C-376/98 *Federal Republic of Germany v. European Parliament and the Council of the European Union*, judgement of 5 october 2000 (unreported).

[154] Given the present state of European integration, where the Member States are to take significant decisions on the future of the Union and some doubts about the very concept of *acquis communautaire* have arisen, it is not surprising that the Court attempts to assure the primacy of EC law. A somewhat

From this point of view, the understanding of the recent decisions of the Court in this field turns difficult because of the Court's stubbornness in trying to justify cases via a legal reasoning which was built up in accordance with a different vision of the juridical problem at stake[155]. Consequently, cases such as *CIA*, *Bernáldez*, *Bellone* and *Océano Grupo* show clearly that a new theory of the effects of Community Law in the national juridical orders is needed, as the old *summa divisio* of norms with and without direct effect no longer explains coherently the developments of the law. This new theory takes as its basis the principle of Supremacy which, conceived in adequate terms, embraces much more than a mere rule of prevalence so that its implications provide for an authentic gradation of possibilities of invoking of Community norms before national courts. A minimal justiciability can be distinguished from the classic concept of Direct Effect, and it is said to exist for all Community norms, independently of their possible Direct Effect. The doctrine of the invocability of exclusion is part of this minimal justiciability, and thus can be used in cases where traditional direct effect is impossible, notably in horizontal relationships. The environmental assessment cases show that the theory will not in any case be new as it is already being used by the Court in vertical relationships. *Unilever* can be seen as a timid acceptance by the court of the views of this paper. The opinions of AG SAGGIO in Océano Grupo and mainly of AG LÉGER in *Linster* are an open acceptance of those views.

The ECJ enhanced the respect for the Rule of Law by recognising direct effect in the Community legal order when no express provision was made for it in the Treaty. The ECJ enhanced the respect of the Rule of law by refusing to recognise horizontal direct effect to directives[156], thus refusing to give a fatal blow to the distinction between directives and regulations, and thus accepting its role as adjudicator in the division of competences between the Community and the Member States. The Court has also enhanced the respect of the Rule of Law by (in a quite sophisticated way) distinguishing the cases in which the above mentioned division of competences is at stake from those in which Supremacy is at the centre of the problem, and by correctly stressing the fact that the emphasis in sharpening the boundary line between competences will not be achieved by hindering the principle of Supremacy. But the Rule of Law also implies legal certainty, and, it is respectfully submitted, that is not exactly the dominant characteristic of this area of law, with some cases that at first sight look incoherent with each other, and for which no clear explanation is given. If the Court does not make explicit the reasons and principles underlying its decisions, a juridical difference as subtle and complex as the one at issue may be easily overlooked by the doctrine and even by the national courts[157].

Of course, it is a well known[158] and a much spoken about fact that the Court is a collegiate body and, due to its search for consensus and the absence of individual opinions (such

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similar situation happened in the past, the Court compensating the lack of activity on the part of the Member States in cases such as C-2/74 *Reyners v. Belgium* [1974].

[155] From this perspective, this is not but another example of a more general issue in European integration. See POIARES MADURO, supra, at p. 11: "Therein lies part of the dilemma of the European Court of Justice caught between the need to secure legitimacy, according to the traditional adhesion to the rule of law, and the political role and strategy that it has had to develop to promote market integration and the constitutionalism of Community Law".

[156] F. MANCINI, "The Making of a Constitution for Europe", [1989] 26 *CMLRev* 595.

[157] See for a recent example J. STUYCK, who in an analysis of the decision of the Court in *Océano Grupo* leaves his position defending the vertical character of this kind of relationships (see supra note 77) to conclude that the Court in that case is *in reality* confering horizontal direct effect to the provisions of a directive; Notes to case *Océano Grupo*, [2001] *CMLRev*, 38, n. 3, at p. 735. The confusion is broadly extended among Spanish courts, whose case law on unfair terms in consumer contracts admits literally the "horizontal direct effect of unimplemented directives" (see for example the Spanish Supreme Court judgements on 30 Sep. 1996 (source: Aranzadi, RJA 1996/8457), 5 Jul. 1997 (RJA 1997/6151) and 20 Feb. 1998 (RJA 1998/604).

[158] See HARTLEY, supra note 7 at p. 56; see also T.TRIDIMAS, "The Role of the Advocate General In the Development of Community Law: Some Reflections" (1997) *CMLRev* 34: 1349-1387.

as can be found in some other high Tribunals, for example in the Constitutional Court of Spain) its judgements are terse and laconic, specially when compared with the opinions of the AGs

Though one can understand and explain the lack of clarity in the case-law, this does not change the fact that clarity is better than obscurity in Law, and it is to be hoped that the Court will clearly state the principles that it is actually using in practice. It is respectfully submitted this must happen sooner or later.

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6.4. Scientific Literature

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