Holes in the safety net? State liability and the need for private law enforcement

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Holes in the Safety Net?
State Liability and the Need for Private Law Enforcement

ABSTRACT. Following Francovich and Bonifaci v Italy [1991] it was widely considered that State Liability would be an enforcement mechanism which would end the problems the European Court of Justice (ECJ) had contended with through its battle over the adoption or denial of Horizontal Direct Effect of Directives (HDE). In the subsequent years it has been demonstrated that the debate for and against HDE's adoption has continued. This has been due in part to the limitations of State Liability as an effective enforcement mechanism which provides individuals not with their rights, but rather a damages action against the State. This article critiques State Liability and demonstrates the severe limitations which this enforcement mechanism has for those who wish to avail themselves of EC rights denied to them. Such limitations include the piecemeal nature of this method of enforcement; whether cases, particularly from employment law issues, should be heard against the State or the employer causing the problem complained of; and the nature of an enforcement mechanism based on the award of damages. It concludes by analysing this evidence as to whether State Liability is an adequate alternative to HDE, and hence should the enforcement of EC law be brought back from a public law action to the private sphere.

KEY WORDS: enforcement of EC law, Horizontal Direct Effect, private law, public law, remedies, State Liability.

INTRODUCTION

Methods of enforcing EC laws have evolved over the life of the EC in an attempt to provide mechanisms which enable the law of this international Treaty to be respected by the signatory Member States and enforceable by the individuals in that State to whom these obligations and rights are applicable[1]. These mechanisms began with Direct Effect

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[1] Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) [1963] ECR 1, [1963] CMLR 105 was an opportunity for the ECJ to express this philosophy of the EC becoming a 'new legal order' and as such remarked: "The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty, which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens… The conclusion to be drawn from this is that the Community creates a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".

(Van Gend en Loos) whereby the primary laws of the Treaty could be given effect directly in the Member States' domestic courts; there was then the extension of this doctrine to secondary laws such as Directives (Spa SACE v Italian Ministry of Finance[2]), but limited to the Vertical direction; this was followed by the enforcement mechanism of Indirect Effect (Von Colson v Land Nordrhein-Westfalen[3]), which was necessary as a consequence of the ECJ not allowing Direct Effect to be used Horizontally and is a process of purposive statutory interpretation (Litster v Forth Dry Dock & Engineering Co. Ltd[4]); and these remedies have been complemented by State Liability (as outlined in Francovich and Bonifaci v Italy[5]) which sought protection for individuals through a system of non-contractual liability for losses arising from denial of an EC law in the Member State. Whilst the benefits for individuals to claim for damages as a result of a State's non-implementation of a Directive are acknowledged, there is a grave danger in thinking that it provides a true alternative to HDE. Hervey and Rostant (1996)[6] and Snyder (1993)[7] see the Francovich decision as a method of effective enforcement, but that it should not be seen as a charter for private sector employees. Ross (1993)[8] sums up the value of the Francovich decision when he states "Francovich acts as a safety net to provide individual remedies at the Community level where there has been a breakdown in securing them in the originally designated national manner" (p. 60).

Many articles have been produced on the subject, addressing the viability of these enforcement mechanisms from the standpoint of the legal possibility of the adoption of HDE (Barmes 1996[9], Dougan 2000[10]), whether State Liability has any theoretical justification (Lee 2000[11]), and the necessity for an effective remedy for breaches of EC laws (Prechal 1997[12]). This article is concerned with the use of State Liability as the key method of enforcement due to the severe restrictions of the alternative mechanisms, and whether public law is actually the most appropriate forum for the enforcement of breaches of EC law. State Liability has been considered the 'safety net' of the mechanisms for enforcement (Ross 1993) and as such was developed to be used when the other mechanisms were either inappropriate or unavailable. State Liability is the safety net to stop individuals from suffering losses due to the inaction of the Member State by enabling the individual to sue in damages the State as a result of the breach.

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[2] [1970] (Case 33/70) [1970] ECR 1213.
[3] [1984] (Case 14/83) [1984] ECR 1891.
[4] [1989] 1 All ER 1134; [1990] 1 A.C. 546.
[5] [1991] ECR I-5357, [1993] 2 C.M.L.R. 66
[6] Hervey, T. K., and Rostant, P. (1996) "After Francovich: State Liability and British Employment Law" Industrial Law Journal, Vol. 25, No. 4, December, pp. 259-285.
[7] Snyder, F. (1993) "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" The Modern Law Review, January 1993, pp. 19-54.
[8] Ross, M. (1993) "Beyond Francovich" The Modern Law Review, January 1993, pp. 55-73.
[9] Barmes, E. (1996) "Public Law, EC Law and the Qualifying Period for Unfair Dismissal" Industrial Law Journal, Volume 25, pp. 59-63. Oxford University Press, Oxford and New York.
[10] Dougan, M. (2000) "The 'Disguised' Vertical Direct Effect of Directives?" Cambridge Law Journal, 59, 3, pp. 586-612.
[11] Lee, I. B. (2000) "In Search of a Theory of State Liability in the European Union" Harvard Law School, ISSN 1087-2221.
[12] Prechal, S. (1997) "EC Requirements for an Effective Remedy" in Lonbay, J. and Biondi, A. (1997) Remedies for Breach of EC Law John Wiley and Sons (Chichester, New York, Brisbane, Toronto, Singapore).

This safety net is available under public law but the qualifications for using the alternative remedies make them inaccessible to many individuals which makes the safety net approach actually a well used and primary forum for enforcing rights. The article considers these alternative remedies of Direct Effect and Indirect Effect and outlines why they are limited private actions and hence why the reliance has been placed on State Liability to enforce EC laws. It considers the use of these enforcement mechanisms in relation to cases involving employment laws which primarily entail the use of EC Directives to provide the rights to individuals, and involve disputes between private individuals. Protections of working hours and holidays[13]; rights to qualify for unfair dismissal[14]; rights for women[15]; part-time[16] and fixed term workers[17] have each derived, or been heavily influenced in the UK from the membership of the EC. As many of the rights have been either brought into effect (transposed) late or incorrectly, then individuals face practical problems accessing their rights. The scope of the article is to consider how individuals gain access to rights and can enforce these. Article 234 EC[18] actions do play a substantial role in the access to EC rights through reference to the ECJ on interpretation of EC laws, but often require a piece of legislation which is capable of interpretation and there are many examples of the UK failing to transpose laws on time. This article considers individuals' timely access to EC rights and how this is limited through public law actions and can be best served through moving to the field of private law remedies. It is proposed that HDE is the most effective method of allowing individuals to enforce EC rights and being a private law action it is more appropriate than an action in damages against the State.

PROBLEMS WITH EXISITING PRIVATE REMEDIES

It is beyond the scope of this article to offer an in-depth critique of the existing alternative enforcement mechanisms but this section is included to demonstrate the problems of the existing private law remedies; why HDE is considered to be the most appropriate alternative to a public law action; and why HDE is necessary when compared to the existing private mechanisms.

Direct Effect of EC law was developed by the ECJ to allow individuals and organisations to use the provisions of EC law within their Member States' domestic courts without having to wait for the Member State to fulfil some obligation which it had omitted to do. This was decided upon as it was felt that under the EC Treaty, a Member

[13] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.
[14] The Employment Rights Act 1996.
[15] E.g. The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001.
[16] Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.
[17] Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
[18] The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) The interpretation of this Treaty; (b) The validity and interpretation of acts of the institutions of the Community and of the ECB; (c) The interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

State should not be able to gain an advantage from its own failure to incorporate EC law. The ECJ further stated that not all EC laws would be capable of use directly in the domestic courts and created rules which needed to be satisfied which would allow a provision of EC law to gain Direct Effect[19]. It furthered that this application of EC law domestically could only be enforced where the EC considered it had competence – via Vertical Direct Effect of Directives[20] (VDE). Direct Effect is only possible (explicitly), in the case of Directives, in the vertical direction[21] (against the Member State or its emanations) and this has led to one of the most important limitations of the provision. Directives, particularly in the case of employment and social policy, are one of the main mechanisms in which laws are passed and these generally involve relationships between private individuals - the employer and worker. With the continued denial of HDE many workers cannot get access to the rights they are entitled to (Hepple and Byre 1989[22]) and this is all the more problematic when there are two sets of workers trying to get access to the rights, those in the public sector who can potentially use the Directive against their employer and those in the private sector who are denied such an option (see Barmes 1996, Snyder 1993). There are clearly problems involved with the principle of the Direct Effect of Directives[23], which seem to provide for a two-speed track of rights for UK workers. This seriously undermines the access to EC rights of the majority of the UK workers, and limits its effectiveness as evidenced in this review. It also begs the question as to why private sector workers are denied rights which workers for an 'emanation of the State' are provided. It could be argued that the organ of the State which these workers are employed by has no power to make legislation or agree to international Treaties, and are controlled to a similar degree by central government as many private sector organisations are, so the difference in access at a practical level creates imbalances in rights.

The ECJ recognised the problem posed by the lack of access to EC laws through a Member State not transposing a Directive, or doing so incorrectly, and hence how this denied access to rights and was an embarrassment to the EC in terms of its requirements that Member States should be made to follow the law. A mechanism was developed where, as the Member States had refused to allow the ECJ to develop the doctrine of Direct Effect horizontally[24], they were under a duty to give effect to EC laws and as such a method of statutory interpretation was adopted by the ECJ under Indirect Effect (Von

[19] The provision must be clear and unambiguous; the provision must be unconditional; the provision must not be dependent on further action being taken by the EC or Member State.

[20] Such as by a private party against the State or an 'emanation of the State' (a body which is controlled by the State such as a school, hospital, university etc.).

[21] Marshall v Southampton and South-West Hampshire Area Health Authority (Case 152/84) [1986] ECR 723; El Corte Ingles v Cristina Blazques Rivero (Case C-192/94) [1996] ECR I-1281; Belinda Jane Coote v Granada Hospitality Ltd. (Case C-185/97) [1998] ECR I-5199.

[22] Hepple, B., and Byre, A. (1989) "EEC Labour Law in the United Kingdom - A New Approach" Industrial Law Journal, Vol. 18, pp. 129-143.

[23] Evidence of inequalities in the use of Directives has been stated by Hepple and Byre (1989). An example of such double standards can be witnessed when the question is raised as to why both Article 119 (Defrenne v Sabena [1976] Case 43/75, ECR 455, [1976] 2 CMLR 98) equal pay and Directive 75/117 "which facilitates the practical application of Article 119" have horizontal direct effect, whilst Directive 76/207 (equal treatment) has been judged only to possess vertical direct effect (Marshall [1986]) (p. 131).

[24] In the ECJ's submission to the Member States before its decision in Faccini Dori v Recreb Srl [1994] (Case C-91/92) ECR I-3325, [1995] 1 C.M.L.R. 665.

Colson and Marleasing v La Comercial Internacionale de Alimentacion SA[25]). Whilst being a rather contrived way of achieving effectiveness of EC law, it did enable all workers potential recourse to the Directives' provisions in the domestic court[26]. Clearly though, this doctrine had very real limitations as it required a piece of existing legislation which was capable of such an interpretation; a requirement of the judiciary to give such an effect when the Parliament had not (or incorrectly) transposed the particular Directive to be interpreted; as well as a change in policy regarding interpretation of Statutes which may have been alien to the judges. Indirect Effect creates a potential access to EC laws through the requirement upon the Member States to give effect to EC laws, and its obligations under the law, as expressed in Article 10 EC[27]. However, problems have been noted by the EC and academics as to why its effectiveness may be compromised. The European Commission has produced reports on the need for greater transparency in EC law in terms of the documents that are available to individuals and organisations within the Member States. The Commission outlines the Member States' responsibility in this respect but further demonstrates the necessity for individuals to know where and how EC laws are transposed and hence where they can gain access to them. As acknowledged in its report in 1997[28], access to justice requires access to the laws themselves and a knowledge of where those laws are contained. Without such knowledge, Indirect Effect is not a particularly effective remedy because, as noted by Ross (1993) it is merely a substitute for the better remedy of HDE - "the real contribution of Marleasing is that it enables the protection of individuals to take place where direct effect is not available" (p. 56).

Evidence from Hepple and Coussey (1999)[29] has demonstrated that a review of the enforcement of certain EC laws should be conducted in the UK to ensure rights and remedies are accessible and that there are no problems in understanding where various laws exist. This issue of transparency is evidenced via the Law Society's Employment Law Committee which is cited by Hepple and Coussey (1999) as finding that individuals' knowledge of laws is not being addressed, and the mechanisms for enforcement are confusing:

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[25] [1990] (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305.

[26] Indirect effect of Directives is evidenced in the following ways; 1) Where legislation has been passed in the UK to implement a requirement derived from an EC Directive, then the UK courts are obliged to adopt a more purposive style of interpretation which seeks to read the obligations in light of the meaning and purpose of the Directive; 2) Where the law has not been passed to implement the requirements of a Directive, and its terms cannot be read so as to conform with the Directive then the national legislation will be applied (Duke v GEC Reliance [1988] 1 AC 618); and 3) Where the law has not been passed to implement the requirements of a Directive, but the terms of the law are capable of being read in light of an EC Directive, then the national law is capable of being read as though it had been so enacted (Webb v EMO Air Cargo (UK) Ltd [1994] 2 CMLR 729).

[27] Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks; They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

[28] Commission of the European Communities. (1997) "Equal Opportunities for Women and Men in the European Union: Annual Report 1996" Employment and Social Affairs, Office for Official Publications of the European Communities, Luxembourg.

[29] Hepple, B., and Coussey, M. (1999) "Independent Review of the Enforcement of UK Anti-Discrimination Legislation" Centre for Public Law in association with The Judge Institute of Management Studies. URL http://www.law.cam.ac.uk/ccpr/antidisc.html.

> "... clients' experience of this area of law (anti-discrimination legislation) is that it is not as clear nor as easy to operate as it could be. Further, important decisions may be slow to be reached, causing additional uncertainty - for example the Seymour-Smith[30] case. More generally, confusion may be created by the numerous sources and varying status of new laws and thinking - decided cases here and in the ECJ, UK statutes, European Treaties, EC recommendations" (p. 79).

Indirect Effect is further cited as a problem for all parties concerned in the consideration of employment and equality legislation. Hepple and Coussey (1999) produce evidence that all those involved in employment law are required to have a good awareness of EC law, and that people have no confidence in the domestic laws because of the uncertainty of interpretation.

These private law remedies are demonstrated to be limited in their effect to ensure individuals can access their rights from social policy based Directives and further demonstrates why State Liability has been utilised proactively rather than as the safety net envisaged.

BACKGROUND TO STATE LIABILITY

Public law actions were a mechanism developed by the ECJ to involve the domestic courts in the enforcement of EC rights and to enable individuals to gain compensation if they had been denied rights by a recalcitrant Member State. The ECJ had invoked the enforcement mechanisms of Direct Effect and Indirect Effect but these were not successful in ensuring EC laws were being upheld and observed, and the distinction between HDE and VDE was causing potential embarrassment for the validity of this method of enforcing EC rights. The ECJ recognised problems it had in ensuring EC law was being followed as required and had been widely criticised by academics and other commentators for denying HDE. It hence established the alternative remedy of State Liability to alleviate these criticisms. The case of Francovich began the process of holding the State liable for breaches of EC laws and provided the affected individual with a public law damages action against the State (see Craig 1997[31]) rather than methods of gaining access to the law through the private actions of Direct Effect and Indirect Effect against the employer. Public law, it was felt, would give the individual the remedy they required whilst also ensuring the State was involved in the process and would be thereby 'encouraged' through the action in ensuring the laws were complied with to limit future claims and damages actions.

It will be remembered that in the Francovich case, the ECJ established the non–contractual liability of Member States for breaches of EC law, as a principle of Community law, by issuing the now famous quote that: "Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for

[30] R v Secretary of State for Employment, ex parte Seymour-Smith and Another [2000] 1 All ER 857.

[31] Craig, P. P. (1997) "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation" European Law Review, December, pp. 519-538.

which they can be held responsible" (para. 4). This was to involve three tests. These were: 1) the Directive should grant rights to individuals; 2) these rights should be clear and identifiable from the Directive; and 3) there should be a causal link between the breach of the Member States' obligation and the loss or damage suffered by the party claiming. These tests, to be successful in holding the State to account, were further developed by the ECJ in the increasing case law which followed (e.g. Brasserie du Pecheur SA v Germany[32], R v Secretary of State for Transport, ex parte Factortame[33], R v HM Treasury, ex parte British Telecommunications plc[34]) due to the different administrative bodies which were included in State Liability actions (R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd[35]) and because, following Francovich, many Member States would at least attempt to transpose the effects of a Directive on time. They may however do so incorrectly and the ECJ had to include the element of discretion which exists for Member States (from Article 249 EC[36]) so as not to make these public actions unfair, or draconically hold Member States liable. The tests were thus modified in Brasserie (para. 4) and are now:

1) the rule of law infringed must have been intended to confer rights on individuals;
2) the breach must be sufficiently serious; and
3) there must be a direct causal link between the breach and the damage suffered.

State Liability has many limitations to the access it provides for enforcing EC rights and these are outlined and discussed in the following section. The requirement for a 'sufficiently serious breach' of EC law has created a very great barrier to the usefulness of this enforcement mechanism and is linked to the prospect of gaining a successful decision of such a breach by the EC Commission's action under Article 226 EC[37] which is a mechanism which has the authority to determine whether the breach does satisfy the requirement of being sufficiently serious. The section then continues by discussing the nature of bringing an essentially private action between an employer and employee into the public sphere by transferring the liability from the employer to the State and whether this is appropriate in employment cases. It considers the nature of the award in public law actions, and if damages does provide an adequate remedy, to identify if they adversely affect workers' access to their rights.

[32] [1996] (Case C-46/93) [1996] ECR I-1029, [1996] 1 CMLR 889.
[33] [1996] (Factortame III) (Case C-48/93) [1996] ECR I-1029, [1996] 1 CMLR 889.
[34] [1996] (Case C-392/93) [1996] ECR I-1631.
[35] [1996] (Case C-5/94) [1996] ECR I-2553, [1996] 2 CMLR 391.
[36] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
[37] If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations; If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

REQUIREMENT OF A 'SUFFICIENTLY SERIOUS BREACH'

In the rules to establish State Liability there is a requirement that the claimant demonstrates that the State has committed a breach of EC law which should amount to liability in damages. The rules were established so that Member States would be held liable if they breached their obligations under the Directive, and generally under Article 10 EC, but if they had made a legitimate attempt to transpose the Directive, but failed, they should not suffer a damages action unless the breach was intended or was due to deliberate misinterpretation. As such, the test to be established was whether the Member State had 'manifestly and gravely'[38] disregarded its obligations. In cases of incorrect transposition of Directives this had proved difficult and the level of discretion was the pertinent factor. However, classic thinking by the ECJ was that non-transposition of a Directive would satisfy the requirement of a 'sufficiently serious breach' because the Member State had no discretion in applying the Directive so any inaction by the State before the Directive had to be implemented satisfied this condition (Steiner 1993[39]). This principle has been challenged recently as commented upon by Tridimas (2001)[40] who restates the old case law of non-transposition which would satisfy the condition for 'sufficiently serious' breach but which had been altered by the ECJ in Brinkmann Tabakfabriken GmbH v Shatteministeriet[41]. The case was discussed as it ruled that if no transposition of a Directive had taken place, but that a domestic administrative authority had attempted to comply with the provisions of the relevant Directive, then the non-transposition would not automatically create a 'sufficiently serious' breach. The outcome of this case clearly has the potential to create problems for individuals and the different domestic institutions which may differ on the EC law's interpretation:

> "It is possible that, in the absence of implementing measures, separate administrative authorities, in one and the same Member State may understand the meaning of a Directive differently. It is conceivable then that some of them might be found to have committed a serious breach but others might not" (p.306).

Discretion, therefore, becomes a defence in State Liability claims as well as in the interpretation of the Directive's provisions. This clearly affects individuals who may seek to challenge for non-transposition and struggle with which authority has interpreted the provisions, how they have done so, and to what extent (evidence of which may be difficult to obtain). There are also important elements of transparency of EC laws and knowing that the Member State has a duty to provide details of where and how the laws have been transposed. The test of a sufficiently serious breach is one of the most significant problems which claimants encounter when attempting to enforce an EC Directive through the public law system. It is problematic as it has been demonstrated above that it is a requirement for a successful action to prove that the breach was

[38] Bayerische HNL Vermehrungsbetriebe G.m.b.H & Co. K.G. v. Council and Commission of the European Communities (Joined Cases 83 and 94/76 and 4, 15 and 40/77) [1978] E.C.R. 1209. p. 1224.
[39] Steiner, J. (1993) "From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law" European Law Review, February, pp. 3-22.
[40] Tridimas, T. (2001) "Liability for Breach of Community Law: Growing Up and Mellowing Down?" Common Market Law Review, Vol. 38, pp. 301-332.
[41] [1998] (Case C-319/96) ECR I-5255 [1998].

sufficiently serious and subsequently which body is in a position to grant such status to the alleged breach. It has been the case in the UK that only the House of Lords is of a sufficient standing to pronounce on whether a breach is sufficiently serious and further that the House of Lords has to take into account the damages which are likely in such cases. In the case of R v Secretary of State for Transport, ex parte Factortame Ltd. & others (Factortame III)[42] the Daily Telegraph newspaper estimated[43] that the damages for the Spanish fishermen was likely to be £80 million. Whether the House of Lords is willing to make such judgments in the future is open to question and without it providing the claimants with such a declaration, the only other method is to wait for a successful ruling by the ECJ under Article 226 proceedings to demonstrate the breach is 'sufficiently serious'.

ARTICLE 226 EC PROCEEDINGS

As has been discussed, where formerly non-implementation of a Directive would have satisfied the requirement of a 'sufficiently serious breach' of EC law, this has subsequently been thrown into doubt (Brinkmann). Without this recognition and evidence the aggrieved worker has a difficult time convincing the courts that a sufficiently serious breach has occurred. The courts have looked to the ECJ for evidence and have gathered this from successful actions by the EC Commission under Article 226 EC. However, the Commission has discretion over which cases it chooses to investigate and this has implications for both individuals and the jurisprudence of the ECJ through its decision making capabilities.

The ECJ is not in a position to unilaterally select the cases it hears or the subjects it comments upon and hence, no natural progression of points or subjects are possible in this judicial rather than legislative forum. There is thus a requirement for individuals to bring cases in their own States' legal systems to challenge laws which are not in accordance with EC law - enabling the ECJ to give judgments and open up the possibility of Francovich actions if the breach persists. A further problem with Article 226 EC is that it is primarily interested in the enforcement of EC laws against the State than the remedy or the injured party. This specific problem has been noticed by Szyszczak (1997)[44] who examined the issue of Member States retaining their discretion to implement Directives in light of their national approaches, relying on national procedures and remedies for their implementation. In doing so, the ECJ must ensure that these procedures are credible by maintaining control over the national mechanisms. This has proved difficult specifically in terms of the Equal Treatment Directive[45] as the "provisions often involve the enforcement of directly effective provisions of EC law against private parties whereas much of the focus of the Court of Justice's approach on

[42] [1996] (Case C-48/93) [1996] ECR I-1029, [1996] 1 CMLR 889.
[43] Daily Telegraph 29th October 1999.
[44] Szyszczak, E. (1997) "Remedies in Sex Discrimination Cases" in Lonbay, J., and Biondi, A. (1997) Remedies for Breach of EC Law John Wiley and Sons (Chichester, New York, Brisbane, Toronto, Singapore).
[45] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

effective remedies is upon bringing the Member States into line with their EC obligations". (p. 106). As it appears the ECJ is unwilling to provide HDE, so it attempts to control the activities of the Member States, and leaves the private parties to find other means to enforce their rights. This is just another of the factors the ECJ must balance in terms of the rights conferred on individuals, and its role in ensuring compliance of the Member States, whilst not unduly interfering with the internal legal systems of Member States.

FORUM FOR THE REMEDY

Having witnessed that State Liability claims are difficult to bring and are being made more arduous to access by alterations to the rule as to what constitutes a 'sufficiently serious breach', it has been considered in the literature that this remedy may fundamentally be an incorrect way of solving disputes whose basis is rights conferred by a Directive, and this is particularly salient in employment relationships. It is questionable whether the philosophy of requiring individuals to bring claims against a Member State in a private matter is the best way to ensure access to justice. As Szyszczak (1996)[46] questions, is it appropriate for the Community legal system to encourage cases of action outside their normal environment? Szyszczak continues that if the action is due to an act of sex discrimination, for example, the action should lie against the employer in the Employment Tribunal and not against the State in the public law arena (p. 361), relying on the State to underwrite the responsibility.

Removing the particular conduct of the individual or company is generally what the claimant wishes in many actions in employment law, and to oblige the action to be heard against the State can cause great problems. Based on general employment laws, the worker who wishes to bring an action lodges the claim at the Employment Tribunal and it brings them in contact with the person or body who is causing the worker the problem. With a State Liability remedy the case would stop at the Tribunal and require the worker to seek a solicitor who could bring an action for damages against the State in public law. This area of law is very different from the action instigated, involving, perhaps, new legal advisers, new laws and new courts. It is further a prospect that few workers would want to begin, and is not generally accessible to any worker who does not have funding from either the Equal Opportunities Commission (EOC) or a Trade Union. A recent study has found that only 43% (111 respondents) of workers belong to a Trade Union and of all the workers questioned only 9% (24) of them would consider bringing an action against the State (Marson 2002[47]). This forum therefore creates limitations to the effective access and enforcement of EC based rights and hence some form of domestic remedy which can be heard in private law should be considered to ensure workers can access their rights.

[46] Szyszczak, E. (1996) "Making Europe More Relevant to its Citizens: Effective Judicial Process" European Law Review, Vol. 21, October, pp. 351-364.

[47] Marson, J. (2002) "The Necessity for Horizontal Direct Effect of Directives in Accessing EC Employment Laws – An Empirical Perspective" Paper Presented to Departmental Seminar, University of Sheffield, September 16th 2002.

WHO IS LIABLE?

State Liability claims are certainly recognised as a valid and effective method of enforcing EC rights and add to the existing body of enforcement mechanisms but it has the limitation of who it holds accountable. State Liability actions are necessarily claims brought against the State to claim damages for losses derived from the State's failure to comply with EC law but this in itself creates a fundamental problem in enforcing rights from an employment perspective. The State gives effect to the law by issuing some transposing legislation but the effects of the law, and indeed its very obligations, rest on the individual employer to give effect to the right – such as with the Working Time Directive[48] where the State creates the implementing measure (the Working Time Regulations 1998) but it is the individual employers which have to provide these protections to workers. As such, asking a worker to enforce their rights by holding the State responsible is questionable. Of course the State is given overall responsibility for transposition under Article 249 EC, but this is merely a facilitation role and not the actual obligation to enforce the right. To hold the State liable while the perpetrator is given almost licence to continue denying the right until the State has taken some action, given all individuals' obligations under the doctrine of supremacy of EC law, is unfortunate and is compounded by having to use State Liability as a mechanism to access a remedy for a non-transposed Directive.

DAMAGES / AWARD

Damages awards are designed to place the injured party, as far as money can, into the position they would have been had the damage not occurred and this, clearly, can limit the EC right's effectiveness. With legislation designed to deal with wages, for example, calculating damages may be relatively straightforward but when dealing with opportunities or workplace practice the damages may be more difficult to quantify. Also, this returns to the problem of State Liability claims generally. They deal with monetary payments rather than the enforcement of the right and as such still do not address the central issue of the claim, which is access to the right entitled to by the worker. The issue of effective remedies for breaches of EC law has been dealt with by many authors, but what really constitutes an effective remedy? Certainly, an effective remedy in one case will be far from such in another. In terms of damages, in the case of Francovich the ECJ stated the amount "must be commensurate with the loss or damage sustained so as to ensure the effective protection (of)... rights" (Para. 82). This idea of damages would, it seems, provide an effective remedy especially in the aforementioned case where the non-implementation of the Directive had cost the claimants monetary loss which they sought to recover. However, there are, as Prechal (1997) points out, other situations where monetary awards would not provide such an effective remedy:

> "Just as issuing an injunction or a declaration may provide little comfort to individuals who suffer considerable losses, a damages remedy may be inadequate

[48] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

in other circumstances. For instance, in cases where it is extremely difficult to prove the damage or to quantify the damage, and, obviously, where the damage is irreparable" (p. 11).

Prechal continues along this theme by considering the position of pressure groups such as Greenpeace and the EOC who may bring a case for a piece of legislation to be changed as it is incompatible with EC law. Monetary damages in such a case would be inappropriate as the organisations are unlikely to have suffered any material loss: "In particular in these circumstances it might be necessary for the courts to have the power to compel action in accordance with Community law" (p. 12).

Damages actions against the State (as held possible under Hedley Lomas) is a possible action to give some form of remedy but is wholly insufficient to ensure compliance with the law and to give the individual their rights. Laws derived from the EC influence UK employment law to a considerable extent and require a remedy which provides the opportunity for protection under that law for affected workers.

STATE LIABILITY NO SUBSTITUTE FOR HDE

Public law actions dominate the area of enforcement of EC laws domestically (Bercusson 1999[49]) and have proven successful to an extent, however the flaws in this enforcement mechanism further demonstrate why a movement should be made available to bring this back into the private law field. EC laws have to be made available to individuals and as those individuals can have obligations and duties placed on them, they should also have the mechanisms to avail themselves of rights if they are denied these or have them obstructed. The argument presented in this article is not simply to demonstrate the inherent problems with State Liability and therefore suggest that some other enforcement mechanism should be made available until a better mechanism is provided. It is to outline the need for effective remedies which are necessary to ensure the UK's membership and subsequent obligations under EC law are maintained, and as such to enable the individual to have access to a remedy which can provide access to, and enforcement of, the right as necessitated by the EC.

An example of the success of the public law route was the case of Ardron, Ball and Bradley v Department of Employment[50] which involved the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and how the UK government has caused workers losses in the transposition of the Acquired Rights Directive[51] (ARD). The UK had misapplied ARD by excluding public sector workers and a State Liability action was brought to recover the losses sustained by the claimants but whilst this involved a level of success for these workers, the case raised important limitations to the lack of effective private law remedies. The claimants produced

[49] Bercusson, B. (1999) "European Labour Law in Context: A Review of the Literature" European Law Journal, Vol. 5, No. 2, June, pp. 87-102.
[50] Unreported.
[51] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

evidence from the UK government which highlighted its awareness, since 1983, that TUPE failed to fully transpose ARD, yet it waited until the EC Commission brought infringement proceedings before altering the law[52].

State Liability has benefited some individuals but has also been an enforcement mechanism which takes time to implement and use, and is only a reactive remedy which fails to offer proactive private law mechanisms to access rights. HDE is a truly proactive alternative as it would allow the Directive's provisions to be utilised quickly in the domestic courts and tribunals; it would assist in those in advisory agencies to use the EC and UK laws in conjunction (see Marson 2002); and it would allow remedies to be sought quickly (as opposed to the problems of the Working Time Directive as evidenced in R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematograghic and Theatre Union (BECTU)[53]) and would make laws transparent (Biggs v Somerset County Council[54]) and more effective.

MOVE TO PRIVATE LAW: HDE AS THE ANSWER

At its essence HDE will enable individuals to gain access to their EC law rights and hold Member States accountable by not allowing them to withhold rights through opaque or inaccessible enforcement mechanisms. HDE would provide a benefit to the State by affording access to the relevant laws which had been denied to workers. As the Member State will obviously want to transpose the Directive on time or correctly then they should welcome individuals to assist them in ensuring the domestic law adheres with its EC law parent. If on the other hand the Member State did in fact not want to transpose the Directive or deliberately did so to incorporate the provisions incorrectly or not on time, then HDE would act as a safeguard to ensure the appropriate rights were available until the government fulfilled its obligations and enacted or altered the law.

The denial of HDE has been considered by many academics as a serious deficit in the pursuit of effective remedies (including Curtin 1990[55]; Dougan 2000; Szyszczak 1996; and Tridimas 2001), and it has also been a question addressed by Advocates-General in their decisions. Advocate-General Van Gerven is one such member of the judiciary who considered this point, obiter dicta, in Marshall (No 2)[56] and further in a paper published in 1993[57]. The Advocate-General outlined the current problems of denying HDE and how the case law from the ECJ had suffered because cases were brought to it in a piecemeal basis, it could only hear those cases referred to it, and then could only provide answers to the references made. This, claimed Van Gerven, had led to distortions in the law and inconsistencies which were to the detriment of the law and a progressive method of extending the law was missed. Advocate-General Jacobs advanced

[52] Commission of the European Communities v United Kingdom [1994] (Case C-383/92) ICR 664.
[53] [2001] 3 CMLR 7, [2001] IRLR 559.
[54] [1996] ICR 364 (CA).
[55] Curtin, D. (1990) "Directives: The Effectiveness of Judicial Protection of Individual Rights" Common Market Law Review, Vol. 27, pp. 709-739.
[56] Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II) [1993] ECR I-4367, 4368.
[57] Van Gerven, W. (1993) "The Horizontal Effect of Directive Provisions Revisited – The Reality of Catchwords" Institute of European Law Public Lecture Series, University of Hull. .

similar ideas in the later case of Vaneetveld v SA Le Foger[58]. Although advising the ECJ not to consider the issue of HDE as this was not necessary, he considered the matter as it was a topic of interest to Member States and the national court who referred the case. In his arguments, the Advocate-General immediately challenged the decision of Marshall which had relied so heavily on the strict interpretation of the wording of Article 189 EC (now Article 249 EC). This challenge was quite easy to make, and had been by academics before, as the ECJ had not previously considered itself limited by the wording of Treaty Articles. Certainly the concepts of Effet Utile, Ius Communitaire, and Article 119 (now Article 141 EC) could not on strict interpretation of the wording put obligations on individuals. The Advocate-General also felt that even if a general acceptance of HDE could not be achieved, the Directive in the case should be granted HDE because of the facts and the nature of the Directive and parties involved.

Most recently, academics have been looking at the judgments of the ECJ itself and how, whilst still not providing HDE explicitly, it is giving the same effect but in a disguised way. Dougan (2000) considers the problem of denying HDE when considering the movement of the Treaties in recent years – beginning with Maastricht in 1992 when the Community began to move to a Union whereby people in Member States became citizens of the EC. With the nature of citizenship, the individual citizens are entitled to receive the same benefits throughout the EC and hence have access to the same rights and be subject to the same obligations, whilst being able to use these rights in the correct context in their own Member States. Dougan (2000) concludes this point by stating "… the (European) Court's denial of horizontal direct effect for Directives generates imbalances in the levels of legal protection enjoyed by different groups of citizen which should be viewed as politically unacceptable in the modern Union" (p. 589). Cases from the ECJ have demonstrated that the issue may not be settled and the ECJ is coming under increasing pressure, from academics and judiciary, to allow HDE in order for effective access to the laws of the EC and because its arguments for denial of HDE are increasingly being successfully countered. The ECJ had traditionally stopped the extension of Direct Effect horizontally but it has been highlighted in recent cases that the ECJ is providing the same remedy of HDE, but disguising this so as not to alter the rules limiting the doctrine. These cases, CIA Security International SA v Signalson SA & Securitel SPRL[59], Panagis Pafitis and Others v Trapeza Kentrikis Ellados A. E. and Others[60], Bic Benelux SA v Belgian State[61], Nils Draehmpaehl v Urania Immobilienservice OHG[62], Barbara Bellone v Yokohama SpA[63], and Unilever v Smithkline Beecham[64] have demonstrated that the ECJ has given effect to HDE either through a form of Indirect Effect or VDE to ensure that the EC law was accessible in the Member State but also that it was aware that the Member States, following the question being raised in Faccini Dori v Recreb[65] as to whether the Member States wanted HDE

[58] [1994] (Case C-316/93) ECR I-763; [1994] 2 CMLR 852.
[59] [1996] (Case C-194/94) ECR I-2201, [1996] 2 CMLR 781.
[60] [1997] (Case C-441/93) ECR I-1347.
[61] [1997] (Case C-13/96) ECR I-1753.
[62] [1997] (Case C-180/95) ECR I-2195.
[63] [1998] (Case C-215/97) ECR I-2191.
[64] [1999] (Case C-77/97) ECR I-431.
[65] [1994] (Case C-91/92) ECR I-3325, [1995] 1 C.M.L.R. 665.

given effect, that as these States would not welcome HDE the ECJ did not wish to alter its official position of denial and risk the political backlash of non-compliance.

The private law remedy is a further answer when the empirical evidence is analysed and its implications are considered against the problems of State Liability. Recent studies into the knowledge and awareness of various EC-based employment rights of workers in the UK has demonstrated that there are significant gaps in their awareness (Marson 2002, Meager et al. 2002[66]). The source of these workers' rights has been found to be largely influenced by the employer (Marson 2002) and a report by the Blackburn and Hart (2002)[67] has discovered that employers often have little knowledge of the full extent of employment rights themselves. Therefore their ability to pass this information on to their workers is limited. The general lack of awareness of EC rights is due in part to the problems of enforcing these laws in the private sphere and a method of making these available and accessible would assist in the advancement of employment protections as required under EC law.

It is possible for HDE to be adopted explicitly by the ECJ and there is a further need for this movement to private law when it is demonstrated that individuals are being denied rights by Member States and denial of an effective private law action is enabling Member States to evade their EC obligations. A more accessible remedy, closer to enabling the use of rights is necessary. This is ultimately because the ECJ has already stated that Member States should not be able to benefit from their own breach of the law and as Ardron, Ball and Bradley v Department of Employment demonstrates, the current enforcement mechanisms have allowed this. Clearly public law actions under State Liability are limited in their success and range, and are inadequate substitutes for HDE.

CONCLUSION

This article has demonstrated the limitations to the enforcement mechanism of State Liability and that it is not an adequate alternative to the remedy found under HDE. It has approached this from the perspective of whether the State should be held liable in a public law action because it has erred in some legal sense under its EC obligations, or should the enforcement of EC rights take place in the private forum against the perpetrator of the wrong. The State is an obvious choice for a claim as it is the body which has to create provisions to implement EC laws, as in the case with Directives. However, it is questionable whether public law provides the necessary mechanism to access rights and as such whether the State should provide the remedy or whether a private employer should be held accountable in the first instance for breaches such as in actions under the Working Time Directive[68]. It is considered that the EC creating a 'new

[66] Meager, N., Tyers, C., Perryman, S., Rick, J., and Willison, R. (2002) "Awareness, Knowledge and Exercise of Individual Employment Rights" Employment Relations Research Series No. 15.

[67] Blackburn, R. and Hart, M. (2002) "Small Firms' Awareness and Knowledge of Individual Employment Rights" Employment Relations Research Series No. 14.

[68] An example of a breach of EC law affecting UK workers has been recently considered in the case of BECTU v UK [2001] involving the Working Time Directive. The Directive, introduced in the UK via the Working Time Regulations on 1st October 1998, regulated the working hours and holiday entitlement of workers; however, in the original draft of the UK implementing law the workers were required to be employed for 13 weeks before the rights accrued. The BECTU brought an action against the Secretary of

legal order', and the awareness that in cases of controversy the EC law is to be given supremacy, then individuals have little excuse for relying only on the domestic law to evade their EC obligations. They should be subject to private law actions based on HDE in the pursuit of rights and workers should not have to rely only on State Liability in cases where Direct Effect and Indirect Effect of Directives would not provide adequate access. A movement away from the public law action of State Liability to the private sphere under HDE is possible; it would help all the players involved; and it would make the EC more visible and relevant for workers, their advisers and employers, freeing the worker to exercise their rights and not being denied access until the State had taken its necessary action. The reactive nature of State Liability does indeed provide a safety net which can assist individuals who have been denied their rights and require compensation for any losses they have incurred. This article has outlined the inherent problems of using this remedy and why HDE is required to ensure individuals can gain protection from their EC law rights, and why private law actions should be the primary mechanism to enforce EC rights, with State Liability merely as the safety net, rather than the primary mechanism as appears to be currently the case.

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State on the basis that the Working Time Directive did not require a minimum period of continuous employment with the same employer, and this issue was referred to the ECJ for consideration as to whether the UK was allowed this level of discretion.

The issue was considered by Advocate-General Tizzano and in his opinion, delivered 8th February 2001. He made several comments regarding how the UK had incorrectly applied the Directive and limited the practical effect of this right to UK workers. The Advocate-General described how the UK's actions appeared to run contrary to the aims of the Directive (para. 36); they in effect undermined the function of the Directive's objectives of protecting the health and safety of workers (para. 38). He also went further to demonstrate how the incorrect application of an EC law right affects workers in a practical way and stated that the effects of the UK law meant that "…workers whose contract of employment is less than 13 weeks – and many BECTU members have such contracts – could never, or only rarely, acquire any entitlement to leave" (para. 35). He went further and also hypothesised that the UK legislation might lend itself to "…encouraging employers to offer contracts of less than 13 weeks in order to evade the general legislation" (para. 38). The importance to these workers of having the UK legislation brought into line with its EC obligations is evident and further demonstrates the requirement of a proactive and effective mechanism to ensure these laws are given their full effect to workers who require protection.