

**Access to justice: a deconstructionist approach to horizontal direct effect**

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Access to Justice:  
A Deconstructionist Approach To Horizontal Direct Effect

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(Heading) **Summary**

Access to justice of European Community (EC) law rights has been a concern of the Member States, the EC Commission, and individuals who have experienced the effect of denial of these rights due to inaction or misapplication by the particular State. This problem has been exacerbated with the continued abjuration of Horizontal Direct Effect of Directives (HDE), which has been exemplified in employment relations where the majority of EC laws are enacted in the form of Directives. This paper considers the issue of HDE and how it impacts on access to EC laws for workers. It investigates the practical problems experienced with the denial of this method of enforcing rights in conjunction with the dismantling of the previous arguments as to its denial. The paper concludes by establishing that HDE can be given effect if the European Court of Justice (ECJ) and the Member States have the desire, and how it would offer true access to justice for workers of their EC rights.

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### (Heading) 1 - Introduction

Directives have frequently been the mechanism utilised by the EC to implement laws throughout the Union as it enables harmonisation of the law without the uniformity and rigidity issues which Regulations had created. Direct Effect was a tool which would enable an affected individual to use a Directive's provisions in a domestic court after the date of transposition if the Member State had been guilty of either non- or incorrect implementation. HDE of Directives is the use of the law between two private individuals (particularly relevant in employment situations where the individuals are generally a private sector employer and worker) where the court recognises the EC law and gives it effect as it would a domestic law. 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 State should not be able to gain an advantage from its own failure to incorporate EC law as it was required to. The ECJ further stated that there were rules which needed to be satisfied which would allow a provision of EC law to gain Direct Effect, and further that this application of EC law domestically could only be enforced where the EC considered it had competence – via Vertical Direct Effect of Directives. Direct Effect is only possible (explicitly), in the case of Directives, in the vertical direction (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 are intended to give rights to, and as such, 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) and this is all the more problematic when there are two sets of workers trying to access 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 (Barnes, 1996). This causes great problems to workers who are attempting to gain access to their rights and results in public sector workers being able to use the right in the domestic tribunal or

court, while the private sector worker has to take the case ultimately to the ECJ for a ruling and wait for its effect in the domestic courts (Snyder, 1993).

HDE has been discussed by many academics and from varying standpoints since the creation of the EC. It has been the subject of such debate because of the problems which the EC has created for those who wish to access the rights they are granted under this 'new legal order' and its denial due to the ECJ's consideration that this remedy would be too much of an interference with Member States' domestic legal systems and autonomy. The reason for this paper considering HDE is because there have been gaps in this previous research which still require examination and the academic debate has often been to overlook the most obvious and (arguably) important point - the access to rights of those individuals who have are suffering because they are unable to access their EC law rights.

The issues which this paper consider are 1) many of the arguments in studying HDE fail to consider the practical problem which this creates for workers in the UK or how its instigation could assist both workers and advisers in asserting EC laws with greater speed and success, and hence make the Member State more accountable (Craig 1997, Ward 2000); and 2) the work on the denial of HDE and its effects have been generalised and are not focused on how this impacts on specific groups of workers (Ward 2000, Tridimas 1999, Lenz et al. 2000).

Case law has demonstrated that unimplemented or incorrectly transposed Directives may have Vertical Direct Effect<sup>1</sup> (VDE) but that HDE<sup>2</sup> has proved to be a step too far for the overt recognition – although it appears from some judgments that HDE has been attempted but, as has been described by some authors (Dougan 2000), in a disguised way. HDE may appear to be a subject which has been discussed at length (Barnes 1996, Barnard and Hepple 2000, Craig 1997, Dougan 2000, McColgan 2000, Tridimas 1999, Ward 2000). It is however still a valid area for discussion as it is an issue which is still causing controversy within the EC and is important as most laws which individuals will use, or seek to gain access from, will be in the form of secondary legislation - namely Directives. It is essential in assessing whether EC law has given access to justice to UK workers to establish if those rights are enforceable against their employers and for most workers against a private sector employer.

Previous work in this area (Marson 2002, and Meager et al. 2002) have identified that many workers throughout a variety of industry sectors lack an awareness of many employment laws and certainly not those derived from EC law. It is also evidenced that those offering advice may not be inclined to refer readily to the primary EC laws because of the problems with statutory interpretation<sup>3</sup>, and the limitation of initiating a public law action for damages against the State. HDE can assist in far greater protection for UK workers and would encourage those in advice positions to be more proactive in asserting the rights of affected individuals, which would consequently make the EC more relevant to individuals in the Community.

The argument advanced in this article concludes that the empirical data demonstrate that the workers in the study have a very limited awareness of their employment rights. This places a focus on the source of advice and representation to the workers, which is undertaken by advisers. Many advisers do not use EU laws proactively because of the existing enforcement mechanisms which are expensive and inaccessible. Therefore this empirical evidence leads to the proposition that EU laws would increase in relevance to workers and advisers, and offer the protection they intended, if Directives (the most common method of establishing employment laws from the EU) could be enforced horizontally.

The paper first outlines the concept of access to justice and its role in the effective control of EC law to give workers access to the protection they are entitled to. The reasons for HDE are specified to justify the discussion, before the practical problems of denial of HDE are discussed with evidence from case law of the UK's transposition of EC Directives. The ECJ has provided many arguments as to the non-application of the doctrine of HDE. These arguments are established before rebuttal arguments are presented to demonstrate that a theoretical limitation to this remedy is non-existent and hence there is no constraint in the principle of creating or enabling HDE.

Whilst the ECJ has not applied HDE explicitly, it has softened its approach to HDE and has given this effect in recent cases. This possibly demonstrates the ECJ's providing this effective remedy, and the encouragement for HDE's adoption by the Advocates-General, and details are provided for the necessity of the remedy in enabling access to justice to EC law with a conclusion of how greater access to justice is achievable through the extension of HDE.

## **(Heading) 2 - Access to Justice**

The term access to justice is used here to describe the way in which workers in the UK can obtain the rights they are afforded under EC law. Taken at a very broad level, the justice system of any country should be available and accessible by all citizens, and the EC, if it is to be a true union of States, needs to have its laws respected and enforced fully in those States in order for the citizens of the EC to be able to fulfil their obligations and enjoy the rights granted to them (a point recognised by the Lord Chancellor's Department).<sup>4</sup> Access to justice is fundamental in ensuring that the laws of the EC are applied fairly and that all laws are applicable to each Member State when required. This equality principle is the cornerstone of many democratic jurisdictions and, as the name implies, must be available to all citizens, especially the poor, vulnerable, and those without legal assistance. This requirement for access to rights and the need for effective mechanisms of enforcing laws has been addressed by academics and the EC itself. A most authoritative study was performed by Genn (1999) considering factors which influenced people's decisions to seek advice; why people take legal action; and issues surrounding dispute resolution. This study on access to justice demonstrated the claimants' problems, and their reaction to them, but was not focused on the issue of EC law as this paper is. Snyder (1993) begins his study by establishing how the Community has become more aware of the need to provide effective remedies for breaches of EC law.

These concerns were raised in light of the Member States incorporating the Single European Act following 1992. The concerns were to culminate in a 'Declaration on the Implementation of Community Law', annexed to the Maastricht Treaty. The Declaration enjoined the Member States to incorporate EC Directives fully and adequately into national law within the specified deadlines. This enforcement is carried out by the Commission, the ECJ, and the Court of First Instance, but mostly by the national legal systems of the Member States, as secondary laws are implemented by national authorities. This requirement of access to rights was further publicly demonstrated by the EC Annual Report (1997)<sup>5</sup> which considered the issue of effective remedies. It states that "Over the years the Court (of Justice) has evolved a number of principles applying to the procedures and remedies which are the guarantees to the effective enforcement of Community law rights... The Court's case law on remedies in the field of equal opportunities can be organised around four themes: effective remedies; access to justice; time limits; the burden of proof and remedies and sanctions" (p. 106).

Access to justice has been a controversial issue throughout the life of the EC, with the ECJ deciding important points as to how EC laws are to be given effect in the Member State and, following the Community becoming a Union of citizens, how to give these laws effect to the individuals within the Member State. These methods of making the laws available and relevant to individuals have been identified as crucial and as such have increasingly been moved into the domestic sphere as noted by Szyszczak (1997);

(Indent)"Community law produces autonomous rights which are brought to citizens by way of a series of devices which in turn ensure that superior Community rights are enforceable in national legal systems: the principles of direct effect, indirect effect and state liability. The logic of a Europe of citizens rather than a Europe of States would suggest that Community rights must be enforceable against the immediate parties in litigation, both public and private" (p. 353).(Endent)

Szyszczak demonstrates the 'to-ing and fro-ing' of EC law between ensuring EC laws are obeyed and not placing too restrictive a hold on the Member States and how they govern their citizens. In developing the concept of rights and justice and their availability to workers, attention needs to be paid primarily to the issues workers face in bringing legal actions based on their EC rights.

### (Heading) 3 - **Reasons for HDE**

The aim of this paper is to discuss the accessibility of EC law to UK workers. As such, it investigates the common problems found in asserting EC law rights and argues why a revised method of enforcement through HDE would provide a more effective method of remedying breaches of EC law than those currently available. These problems are not only of academic concern but more importantly they are of concern to individuals in the UK as they act as a very real detriment in the pursuit of access.

There are several reasons for the need for HDE's adoption by the ECJ and acceptance by Member States which are summarised in this section. The necessity for HDE has been

addressed by the ECJ as in Case 8/81, *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 where it was commented:

(Indent)“Particularly in cases in which the Community authorities have, by means of a Directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.”(Endent)

If this access is prevented due to current enforcement mechanisms not fulfilling obligations on Member States and individuals, then alternative enforcement mechanisms are required to be considered.

One of the main arguments in favour of HDE’s adoption is the difference which exists between the Member States and their application of EC Directives. Directives are intended to create a bare minimum of protection, which Member States are entitled to transcend in the security of individuals’ rights, but may not go below. This source for the creation of laws is chosen because of the discretion afforded to Member States in how and in what form the law is transposed, and gives greater power to Member States so that EC obligations are not overly intrusive. This level of discretion produces, in theory, harmonisation of laws so that a Directive’s provision can be adopted in the most appropriate way for each individual Member State without the burden of uniformity and the inconsistencies that can occur between the 15 Member States. The problem with discretion is that Member States often default in the correct and timely application of EC obligations, and therefore individuals in different Member States have varying levels of protection depending on whether the Member State has fully implemented the Directive or not. This has implications for the protection of workers depending on the correct adoption by the Member State, but also diminishes the power and validity of EC laws as Member States have latitude as to how and when to apply EC law, and many breaches exist, demonstrating individuals being denied their rights. HDE would still require Member States to transpose EC obligations, but would not leave individuals unprotected if the Member State had not performed its role correctly, and it would harmonise the laws throughout the Member States as envisaged by the EC. The ECJ has stated that EC law must be maintained so as not to distort competition and allow a Member State which breaches EC obligations to benefit – such as can occur in equality and social policy which can reduce production costs for organisations in recalcitrant Member States.

This different application is not only a problem inter-Member State but it also has an intra-Member State dimension of different applications between groups of workers – depending whether their employer is in the public or private sector. The ECJ obviously saw a potential problem of two sets of workers, with the same legal issue and no transposed Directive, and the variances of EC law enabling the workers in the public sector (potentially) to utilise provisions from the Directive under VDE whilst no similar rights were available to the worker in the private sector. In so doing the ECJ retreated to an almost bizarre comment that “such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law”<sup>6</sup> (Case C-

152/84, *Marshall v Southampton & South West Hampshire Area Health Authority* [1986] ECR 723, [1986], 1 CMLR 688). This is true, but the point about the remedies mentioned, and their necessity, is precisely due to Member States not implementing Directives and hence leaving individuals with no redress.

The anomaly of the distinction between public and private bases of claims becomes an discomfiture for the EC's legal system and a practical problem for workers when it is considered that Member States which do comply with their obligations will allow workers to avail themselves of the legal entitlements afforded by EC law. Those workers who reside in a non-compliant Member State are left with a prospect of a difficult claim or series of hurdles in order to gain access to rights which should be available already in their Member States' legal systems. This difference has been artificial because workers are often confused why laws are applied differently just because an employer is in the public sector. HDE would lessen the distinction between public and private sectors and enable all workers to benefit from using EC Directives in their domestic courts.

Member States would benefit from HDE because, as the remedy would be enforceable in a quicker and more effective manner, it would reduce potential damages actions against Member States and would encourage workers and their advisers to proactively use EC laws and bring their attention to individuals. An improvement in the legal protection of all private individuals would be achieved from HDE as this would make the rights from Directives more accessible. Individuals must have access to laws, otherwise those laws are diminished in value and inconsistencies in treatment between workers demonstrate inequality and unfairness. Evidence has demonstrated that many workers do not recognise the EC's involvement in UK law (Marson 2002) and HDE could encourage greater interest and awareness.

HDE would also be of benefit in removing the interpretative function of the judiciary as is the situation under Indirect Effect which can be a haphazard and inconsistent method of allowing access to rights. Whilst there is an obligation on the domestic court to interpret, as far as is possible, domestic laws to give effect to that EC parent, the court is still capable of using internal methods of interpretation in this obligation. Demonstrations that national rules of construal are still applicable and adversely affects the mechanism of interpretation have been outlined in *Bhudi v IMI Refiners*<sup>7</sup> [1994], ICR 307, IRLR 204, 2 CMLR 296, *Re Hartlebury Printers* [1994] 2 CMLR 704, [1993] 1 All ER 470, [1992] IRLR 516, Case 312/93, *Peterbroeck van Campenhout et Cie SCS v Belgium* [1995] ECR I-4599, and *British Fuels v Baxendale* [1999] 1 CMLR 918, [1998] 4 All ER 609.

#### (Heading) 4 - Practical Need for HDE

A political will for the acceptance of HDE is necessary to ensure compliance and implementation of this doctrine in the domestic courts, and beyond the purely political aspect there is the facet of the European Community moving to the European Union and as such bringing the EC in ever more direct contact to the citizens of the Member States. This is brought into the context of HDE by Szyszczak (1996) and Dougan (2000) who consider 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 towards 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). HDE does not seek to usurp the power of the Member State or alter the EC Treaty to elevate Directives to the position enjoyed by Regulations. Rather it seeks to provide an effective enforcement mechanism for those who suffer a breach of EC law until the Member State correctly transposes the Directive’s provisions, thereby maintaining the State’s significant role in the transposition of EC law into its own jurisdiction.

It is clear that recalcitrant Member States have deliberately misapplied EC Directives as a tactic to give more time for employers to exclude employee rights, and encourage organisations to move to the UK in order to avail themselves of increasingly lax regulations. The UK government has been accused of this in the ‘Hoover’ situation;<sup>8</sup> the incorporation of equal pay legislation which necessitated the ECJ to take action in *European Commission v United Kingdom* [1982] IRLR 333 to fully incorporate the Equal Pay Directive<sup>9</sup> to include a claim for work of equal value; and recently in its admission to misapplying an EC Directive (*Ardron, Ball and Bradley v Department of Employment* [1997] Unreported) in the knowledge of limited consequences due to the mechanisms in place to ensure compliance.

There are many examples of the practical problems encountered when a State incorrectly transposes a Directive, or fails to implement on time, and some of these are discussed to highlight the need for a re-evaluation on the issue of access to justice and effective enforcement mechanisms. An example of a breach of EC law affecting UK workers has been recently considered in the case of *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] 3 CMLR 7, [2001] IRLR 559 involving the Working Time Directive.<sup>10</sup> The Directive, introduced in the UK via the Working Time Regulations on 1<sup>st</sup> 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 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 which led to his opinion, delivered 8<sup>th</sup> February 2001. In the opinion 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;<sup>11</sup> they in effect undermined the function of the

Directive's objectives of protecting the health and safety of workers.<sup>12</sup> He also went further to demonstrate how the incorrect application of an EC law affects workers in a practical way and stated that the effect 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."<sup>13</sup> Further, he 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."<sup>14</sup> 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.

The need for HDE becomes clearer as a more rapid, accessible and cost effective method of accessing EC law rights is necessary to limit Member States gaining an advantage from denying rights to workers and would introduce more transparency to assist workers and their advisers. However, the ECJ has often stated it is legally bound not to give effect to Directives in this way and arguments have risen to justify this position.

## **(Heading) 5 - Arguments For Non-Application of HDE**

The ECJ has in its judgments consistently upheld the decision that Directives cannot be enforced horizontally even in the face of objections from academics, advisory bodies such as the Trades Union Congress and Equal Opportunities Commission (EOC), and even from the Advocates-General in their advice to the ECJ. Even facing arguments advanced by these bodies for Directives' horizontal application the ECJ has, in its judgments, outlined a number of arguments why it could not give such effect. These arguments are established, and then deconstructed to confirm the possibility of HDE's adoption.

### **(Sub-Heading) 5.1 - Argument 1 – The Wording of the EC Treaty (Article 249 EC)**

The classic rationale for denying HDE has been Article 249 EC, which reads that obligations under this form of EC law are applicable to Member States only (as opposed to Treaty Articles or Regulations) and it follows that no obligations fall on private individuals / bodies. This reasoning led the ECJ to pronounce that it was bound to not allow such laws to be used against private individuals, even where there was a clear breach of EC law through failure by the Member State. The ECJ has been willing to provide Direct Effect of Directives, but has confined this to the vertical direction. The limitation of HDE was demonstrated in the decisions of *Marshall* [1986] and Case C-91/92, *Dori (Faccini) v Recreb Srl* [1994] ECR I-3325. The reason for the decision in *Marshall* [1986] was that the binding nature of a Directive exists only to "each Member State to which it is addressed,"<sup>15</sup> and follows therefore that Directives are incapable of imposing obligations upon individuals. This was a point made by the Advocate-General in the case who stated "I remain, despite the arguments in this case and in *Roberts v Cleveland Area Health Authority* [1979] 1 WLR 754, of the view expressed in my opinion in the *Becker* case that a Directive not addressed to an individual cannot of itself

impose obligations on him. It is, in cases like the present, addressed to Member States and not to the individual. The obligations imposed by such a Directive are on the Member States.”

**(Sub-Sub-Heading) 5.1.1 - Counter Argument 1 – The Wording of the EC Treaty (Article 249 EC)**

Besides the various reasons expounded by the ECJ for allowing VDE while denying HDE, it continues to justify this distinction by reference to the wording of Article 249 EC. Certain Advocates-General have been dismissive of this argument and encouraged the use of HDE, and Jacobs, in his opinion in Case C-316/93, *Vaneetveld v SA Le Foger* [1994] ECR I-763, 2 CMLR 852, criticised the judgment in *Marshall* [1986] by relying on Article 189 (now Article 249 EC). Authors such as Craig (1997) have also stated that this reading of the Article was a misunderstanding of the Article’s intentions and as such there is no legal restriction against HDE. Dougan (2000) argued that the wording of Article 249 EC could be interpreted so that the words “the choice of the form and method for their implementation” suggested that this form of law was incomplete and hence required further action on the part of the Member State to make the law become fully effective. The problem clearly with this proposition is that, whilst further action is required from the Member State, the ECJ and Article 10 EC state that Member States which fail in their obligations under EC law should not be able to take advantage of this wrong and subsequently deny those rights to individuals whom the Directive sought to protect. Craig (1997) also offers a reason for a different interpretation of this sentence when he states that it may have been worded so that the Directive could be addressed to particular States, and not to all States, and that it is the State’s duty to take the requisite measures to achieve the ends stipulated therein. Craig concludes that this interpretive method of reading the Directives’ function is that Article 189 (now Article 249 EC) states that a State will be bound if the Directive is addressed to it and then it will have the obligation to take the implementing measures. Craig (1997) states the phrase merely seeks to provide a distinction between States, and not between a State and the individual.

Adherence to the wording of Article 249 EC has for a long time been a somewhat artificial and unrealistic reason for denying HDE. It is true that in the UK’s jurisdiction, for example, statutory interpretation has often focused on a literal interpretation to ensure certainty but even this has altered in recent years due to the membership of the EC, and requirements of the ECJ to give effect to the spirit and intent of EC Directives. The ECJ has used a teleological approach to statutory interpretation and has been a key figure in extending EC law - just one example is the concept of what constitutes ‘pay’ under the Equal Pay Directive and Article 141 EC.

**(Sub-Heading) 5.2 - Argument 2 - Unfair Burden on Non-Legislators**

The theory of denial of HDE continues to the nature of Directives, in that they require the Member State to take action to incorporate the provisions of the Directive in their own jurisdiction. As this is a requirement of the State, and individuals cannot transpose laws or make such decisions, then Directives by their nature are only matters between the EC

and the Member State and do not concern individuals or cannot be used directly by them. Holding a private individual or body responsible for non-transposed or incorrectly implemented Directives imposes an unfair obligation on them as they have no legislative responsibility and hence the action, naturally, should be against the State – not against a private individual who is simply complying with domestic law.

(Sub-Sub-Heading) **5.2.1 - Counter Argument 2 - Unfair Burden on Non-Legislators**

Having said so forcefully and in such clarity that Directives should not be enforced horizontally, the Advocate-General went on to consider why there should be the distinction between Horizontal and Vertical Direct Effect. “The State can legislate but a private employer cannot. It is precisely because the State can legislate that it can remedy its failure to implement the Directive concerned. This consideration puts it at the outset in a fundamentally different position from a private employer, and justifies its being treated differently as regards the right of a person to rely upon the provisions of a Directive.” (p. 413). Whilst these arguments are legally correct in a strict sense, it appears to miss or fail to recognise that fundamentally Directives in the social sphere are concerned with granting rights to individuals to assist them and offer protection in areas such as equality in treatment; in pay; in working conditions and so on. It is also that when Member States fail to fulfil obligations under these measures that individuals should have some reasonable recourse to the right as often monetary damages (available in State Liability actions) fails to fulfil what the Directive sought. If this is by an action against the employer, the essential point is that the provisions being sought are available in the court and should have been given effect, and the fact that the employer is a non-legislator should not excuse their EC obligations or deny the individual who has been provided these rights from seeking their application through the domestic courts. It is a point raised by Szyszczak who commented upon the access to justice of EC rights:

(Indent)“Community law produces autonomous rights which are brought to citizens by way of a series of devices which in turn ensure that superior Community rights are enforceable in national legal systems... The logic of a Europe of citizens rather than a Europe of States would suggest that Community rights must be enforceable against the immediate parties in litigation, both public and private”. (p. 353).(Endent)

An argument against the ‘non-legislators’ proposition was created in Case C-424/97, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123 with the development in State Liability case law whereby the obligation to pay damages for breaches of EC law may transfer to bodies who operate under statutory duties and possess funds (not necessarily the State itself). Of course this refers to State Liability claims, not HDE, and has been criticised as creating problems of that enforcement mechanism (Anagnostaras 2001), but it also has implications for HDE. This method of remedying breaches has meant the ECJ holding another body responsible for the State’s obligations under the Treaty, and along with the extension of VDE moving liability further away from the State, this judgment is also moving State Liability further away from the State and to other bodies which also (such as British Gas in *Foster v British Gas* [1991] ICR 84 (ECJ), ICR 463 (HL)) do not have any specific legislative function. The argument

towards a burden on ‘non-legislators’ becomes increasingly problematic for the ECJ and if there is a move away from holding only the State liable for breaches of EC law then could HDE be advanced for holding private parties liable in the same way?

(Sub-Heading) **5.3 - Argument 3 - Uncertainty of Which Law To Follow**

A clear argument used to deny HDE is that it would place too heavy a burden on individuals who may be complying with domestic law but would (or could) consequently find themselves in breach of EC law and so lead to uncertainty and evermore litigation. This uncertainty would further lead to unfairness as employers would need to be aware of two sets of law and be knowledgeable about which aspects of the UK law did give full effect to the Directive and which may lead to actions against them.

(Sub-Sub-Heading) **5.3.1 - Counter Argument 3 - Uncertainty of Which Law To Follow**

There is an argument that HDE would place an unfair obligation on individuals who could not be sure which laws would take effect and to what extent. This argument is flawed if considered in the light of Indirect Effect. There has been since Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305 an obligation on Member States to interpret national legislation in light of the relevant Directive and wherever possible to give effect to it. This has led to confusion and often distortions of the law and it could be argued that HDE would in fact make the law more certain for those who have obligations under it. With the recent changes in laws of Working Time Regulations, Equal Pay, and Pension rights it may well be the case that those individuals who went to court and argued that the national law was clear, only to have it altered in light of a Directive, may have been better advised on their obligations if they were told to use the Directive as their benchmark rather than the domestic law. The argument that individuals (such as employers) would have to look at the Directive; be aware when the provisions should have been transposed; be aware if any of the Articles were capable of Direct Effect; and further if any domestic law which sought to transpose this Directive had done so correctly, fails to appreciate that fundamental points of laws are evident in this county’s legal system. Ignorance is no defence on any point of law and it is the responsibility of the individual, in this instance the employer, to ensure they are aware of the relevant laws which will affect them.

One of the arguments advanced as to why Directives should not have HDE is that to do so would harm the interests of the individual against whom the obligation is made. It would, it is argued, result in individuals complying with domestic law but still being liable via another source of obligations (the EC law). This argument is incorrect when based on Directives for a number of reasons. First, in order for any provision of a Directive to have Direct Effect it must satisfy the rules involved. Having done so, then the time-limit for transposition must be considered. HDE would only take place after the date for transposition has passed, and with any other law, the individual must make themselves aware of it. Directives are now published<sup>16</sup> and available in a number of sources - public libraries, over the internet, the Department of Trade and Industry, from

public bodies and so on. Also, many lawyers or trained individuals can predict with some degree of confidence which aspects of the Directive would be likely to achieve Direct Effect status.<sup>17</sup> Therefore the individual to whom any obligation from a Directive would fall has the opportunity to avail themselves of the relevant law and act accordingly. Those Articles of the Directive which are by their nature ambiguous or unclear would not be capable of being directly effective and consequently would not unfairly interfere with the private employer.

As regards a difference between the Directive and an implementing piece of legislation, the Government seeks opinions from interested parties regarding laws and gives access to draft documents. The points of contention are known then before the Act comes into existence and this aids in ensuring the private individual knows any areas of concern and can, if in doubt, always use the Directive rather than the domestic Act, as it is a settled point of law that if any doubt exists, the Directive must take precedence.

It is unfair that arguments of legal certainty can be advanced for lack of HDE when it takes an individual under VDE or State Liability to undertake a legal action against the State in order for the domestic law to be brought into line with the EC Directive. This process is very expensive and requires, in the most part, an organisation like a trade union or the EOC to give funding to challenge this law. Why this process is necessary to preserve legal certainty, which evidently is not certain (e.g. Indirect Effect), is unclear. Why employers should be able to avoid their duties under EC law just because their Member State has not insisted on them complying has been a question posed by academics with regards to HDE. Indeed, Tridimas (1994) states "... the inability to enforce (the Directive) in the national courts gives no more than a windfall benefit to the individual on whom the obligation is imposed."<sup>18</sup> Employers are often aware of rights available to workers but, under the present legal reasoning, can comply with a domestic interpretation in full knowledge that any action as to a shortfall in rights must be taken by the worker against the State, with all the practical and legal problems that carries, and in the knowledge that they can continue with their actions until (usually) a lengthy court case has been undertaken.

#### **(Sub-Heading) 5.4 - Argument 4 - The Distinction Between Directives and Regulations Would Become Blurred**

An opinion held by the ECJ (as demonstrated in *Faccini Dori*)<sup>19</sup> for denying HDE was because Article 189 (now Article 249 EC) differentiated the sources and powers of EC law and if a Directive could be used directly without an implementing law in the Member State then Regulations (which are directly applicable) and Directives could almost be merged in their powers – and the ECJ is not permitted to alter the Treaty through its case law.

#### **(Sub-Sub-Heading) 5.4.1 - Counter Argument 4 - The Distinction Between Directives and Regulations Would Become Blurred**

This argument is incorrect because the distinction is maintained via the period and method of implementation which Directives still have. Clearly, in theory Directives would never need to have HDE because, if the Member State performs the job of transposition correctly and on time, then the individual will use the domestic transposing legislation and the distinction between Directives and Regulations will be maintained. Directives still require transposition and HDE will only become necessary to protect individuals if the Member State defaults in its obligations. The distinction further does not appear to cause a problem in the enforcement mechanism of VDE where the ECJ has been happy to allow Directives to be used where there is a tenuous link with the State rather than a private employer. Directives, ultimately, would still require transposition and the aim would never be to limit the State's obligations to implement the law, but rather to offer a safeguard in ensuring access to justice. Therefore Article 249 EC would not be altered or usurped, but the requirements for a Member State to adhere to EC law could allow the ECJ to enable this remedy to be made available.

The ECJ has stated in *Faccini Dori* that to give HDE 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."<sup>20</sup> Regulations impose an obligation on the conduct of Member States whilst Directives impose a result to be achieved by the Member State - leaving it discretion as to how it does this. The Directive, even if given HDE, would still only give the EC law right to the individual whom the EC wished to benefit from the provision and as such would be the bare minimum that the individual could expect. It still would not remove the obligation on the Member State to provide some implementing legislation or procedures to give effect to it. It would merely seek to provide the remedy to which the individual is entitled until the Member State has correctly implemented these provisions.

#### (Sub-Heading) **5.5 - Argument 5 - The Individual Has Other Remedies Available**

The ECJ in *Faccini Dori*<sup>21</sup> also shied away from granting HDE because the remedies of Indirect Effect and State Liability were also available and, as such, affected individuals could have the right from a Directive via statutory interpretation or if this was unavailable then damages can be claimed if the individual has suffered any loss.

#### (Sub-Sub-Heading) **5.5.1 - Counter Argument 5 - The Individual Has Other Remedies Available**

There are alternative enforcement mechanisms available but there have been problems noted with the two mechanisms – Indirect Effect and State Liability. Essentially Indirect Effect is problematic because of the issue of transparency and the fact that individuals and their advisers, due to this problem with opaque laws, often have little awareness of EC parent laws or use them in their advice because of the legal arguments and litigation involved. It further requires a piece of legislation capable of interpretation which may not be available or may leave the State or employer an argument regarding the interpretation of the domestic law.

*Wagner Miret* [1993] has demonstrated the problems this expectation of using alternative remedies can cause for individuals attempting to access the EC law rights. *Wagner Miret* could not use a domestic law which Spain considered had adequately pre-empted the Directive<sup>22</sup> and it was considered by Advocate-General Lenz that the domestic Regulations could not be read to give effect to *Wagner Miret*'s claim. The remedy for the claimant was therefore to abandon this action and begin an entirely new cause of action against the State through State Liability. Whilst such an action is possible, it is unlikely that an individual will commence new proceedings, particularly when the action, as in the present case, was for unpaid wages which it may be considered would not amount to a substantial figure compared with the effort and time involved in this new action. This is hardly an alternative remedy with the practical effect that many people would be reluctant to use it.

State Liability actions cause problems due to the nature of the remedy – being a damages action rather than an assertion of rights; there are strict criteria for a successful action; and it involves a public law action from a private law problem. The complaints are usually, in employer / worker disputes, between private parties and the thoughts of an expensive action in different courts away from an Employment Tribunal can lead to a lower take-up of rights from EC law. These actions also take far longer than claims in Employment Tribunals and require an advocate with expertise or a specialism in the area rather than a Citizens Advice Bureau or Law Centre adviser making an argument to a Tribunal Chairman on the application of a Directive's provisions (as would be the case under HDE).

#### **(Heading) 6 - The Legal Position of HDE – Is A Change Possible?**

This section was designed to demonstrate that the arguments forwarded for the position of denying HDE have no legal basis and if the ECJ did wish to extend the doctrine of HDE it would be legally enforceable. It is a pertinent point to note that before delivering its judgment in *Faccini Dori* the ECJ sought opinions from the Member States as to whether they would accept and give effect to HDE to unimplemented Directives. As eleven of the (then) twelve Member States rejected the proposition the decision was given to restrict HDE. Therefore denial of HDE is a more political than purely judicial decision, and if the ECJ does decide to follow arguments to allow HDE there are no legal arguments or restrictions preventing this. This political decision and stance against HDE may be softening, and with the Labour Government moving the UK to a more 'Euro-friendly' standpoint, the ECJ may be willing to re-consider this doctrine, or, as it appears to be doing to provide the remedy albeit in a disguised way (see Dougan 2000). The rebuttal arguments have demonstrated that HDE is possible and, with the increasing arguments from some Advocates-General, there is a movement to allow HDE which the ECJ is free to adopt.

#### **(Heading) 7- Evidence from Workers**

The paper intends to discuss workers' access to EC laws and how this has been made more difficult because of the available enforcement mechanisms. The workers' responses



as to their access to EC law rights were therefore an important element to this and this research presents evidence of a group of workers' access to their rights. The evidence was collected from 257 (80% response rate) workers in one region of the UK to gain a perspective of how a group of workers accessed their rights, rather than a mere hypothetical study. The workers were selected from large organisations and Small and Medium Enterprises from Retail, Manufacturing, Service and Public sectors to gain a complete perspective and involved male and female; full and part-time; and permanent and temporary workers. The research instrument used was a self-administered questionnaire with closed-answer questions which investigated the workers awareness<sup>23</sup> of various EC inspired employment rights. This further included the workers' membership of Trades Unions; their awareness of the EC as a source of protective rights; and their willingness to initiate claims to enforce their rights. This evidence could identify workers' access to justice and the difficulties experienced in the current infrastructure of accessing rights and information.

### (Sub-Heading) **7.1 - Awareness of Employment Rights**

The findings of the workers' awareness of rights demonstrated a trend that dissemination of information has a positive influence on the respondents' awareness. There was a very high level of awareness of the rights of the National Minimum Wage and Working Time Regulations amongst the workers (99% (254) and 88% (227) respectively) but with the other rights there was less than fifty percent awareness of any of those laws. In Equal Pay only forty five percent (117) were aware of the right; in Sex Discrimination the level of awareness was thirty five percent (90); in the case of unfair and wrongful Dismissals the awareness was forty four percent (114); and the lowest level of awareness of any right was Parental Leave where only thirty percent (78) of respondents expressed an awareness. What is evidenced from these data is that many of the workers are unaware of many important employment rights and hence require assistance from advisers or their Union representatives in order to gain protection of denied rights.

### (Sub-Heading) **7.2 - Perception of Protection From Rights**

Despite the findings that the majority of workers did not have an awareness of many important employment rights, this did not appear to adversely affect their perception of protection. Fifty six percent (143) of the respondents stated they felt protected with one third (84) of workers stating they specifically felt unprotected. This may have an implication for the role of advisers and more publicity of employment rights as the respondents to this study may feel protected due to a lack of awareness of their rights, and advisers would have to take into account this lack of awareness and the greater assistance needed, in EC based laws in particular.

### (Sub-Heading) **7.3 - Awareness of EC Based Laws**

The workers' awareness of a distinction between UK laws and those implemented to transpose the provisions of an EC Directive is of importance to the protection of rights. Workers can empower themselves with this information which in turn can enable them to

seek advice from an appropriate source and ensure their adviser can discuss these issues and options with an individual who has an appreciation of the differences in law. It was also questioned because lack of awareness and appreciation places further obligations on advisers to be aware and do the work for the worker who seeks help. In this study only seventeen percent (43) of workers were aware of a distinction which demonstrates a barrier workers face in awareness of employment rights and their lack of awareness of the role played by the EC in protection of rights.

#### (Sub-Heading) **7.4 - Membership of Trades Unions**

Trade union membership can assist workers as they can have regular up-dates on laws, and there is a greater awareness of employment rights from trade union members (trade union membership is often a corollary to greater awareness of employment rights due to the advertising of the Union and work of regional organisers and shop stewards). There was greater awareness of Equal Pay<sup>24</sup>, Sex Discrimination<sup>25</sup> and dismissals<sup>26</sup> from those who described themselves as Union members; they have support in actions they may take to enforce their rights, and they can often rely on Unions to advance rights for workers without the member having to put themselves in a position of a target of retribution from the employer (see Leonard 1986). Forty three percent (111) of workers in the study were members of a trade union and this percentage was distributed among the Case Organisations: the manufacturing and public sector organisations (79% (59) and 51% (34) respectively) had the highest number of trade union members, with the service sector organisation contributing the smallest number of members (14% (7)).

#### (Sub-Heading) **7.5 - Workers' Confidence in The Advice Provided**

The workers who responded that they were members of a trade union were questioned as to whether they were confident in the advice they would receive if they had an employment problem and sought advice from their union. Eighty four percent of these workers expressed their confidence in advice which places a responsibility on advisers to be well versed in the laws on which they give advice, and also to ensure the full effect of the law is made available and accessible as soon as possible to workers whose level of understanding is less than complete.

#### (Sub-Heading) **7.6 - The Issue of Costs in Pursuing A Remedy**

Whether costs would be a factor in their choice of bringing an action to enforce their rights was enquired of the respondents. This question had implications for access to justice because a claim at an Employment Tribunal is relatively cheap compared with undertaking a State Liability action and if workers are to be encouraged to enforce their rights, the costs involved could create an obstruction which would result in a slow process of remedying breaches of EC law. Eighty five percent (218) of respondents felt cost would be a consideration in a claim and this has implications for the remedy chosen by these workers and whether they have appropriate funding to pursue these rights.

#### (Sub-Heading) **7.7 - Workers' Claims Based on Their Employment Rights**

Workers were asked of their willingness to bring an action against their employer to secure access to their rights, because if there are no workers willing to initiate proceedings then the issue remains unresolved. Only fourteen percent (36) of the respondents stated that they would bring a claim against their employer which may be due to experiences from personal actions or knowledge of treatment of other claimants (see Gregory 1993).

It was further enquired if they would bring an action against the State to enforce their EC employment rights. This question was asked, not to identify if workers had an awareness of the concept of State Liability, but rather to determine if these workers would even contemplate suing a public body, not the employer, to enforce rights. Bearing in mind the current mechanism to enforce rights in the private sector available to all workers, (regardless of transposition status) is a State Liability action, if workers were unwilling to undertake an action in this way then a serious barrier in access to justice is present. Only 9% (24) of the respondents stated they would bring such an action against the State and this demonstrates the need for a more accessible enforcement mechanism. These workers were probably unaware of the details and procedures of a State Liability action including costs, time, legal expertise needed, not to mention the fact that all they would essentially be claiming was damages and not the right which they had been denied. Therefore, the current enforcement mechanism can be seen as a limitation to true access to justice and, for these workers at least, a mechanism whereby the case would lie against the employer and be heard in an Employment Tribunal rather than in the public law sphere; and one which dealt with providing access to the right, not a monetary damages claim, may be more conducive to workers' enforcing their rights.

#### (Sub-Heading) **7.8 - Necessity for HDE Derived From Workers' Evidence**

An argument can be made for HDE's adoption from the workers' evidence which demonstrates that they face difficulties in gaining full access to their EC law rights. Workers do not have a wealth of understanding of many of their employment rights and this has implications for their likely distinction between UK and EC laws and the possibility of Indirect Effect claims. Despite this lack of awareness, the majority of workers in this study felt protected by their employment rights and hence would be unlikely to have an analytical perspective on their access. This also has an implication for awareness generally as the lack of understanding by these workers between UK and EC based rights further limits the workers' access to the full effect of their rights if the State fails to transpose rights and leaves the burden to be taken up by a body such as a trade union which is problematic as the majority of respondents to this study were not in trades unions (57% (146)).

Issues of cost were questioned of the worker respondents because as State Liability is a remedy available to access rights, albeit in a contrived way, it is an expensive remedy and involves protracted litigation when compared to HDE or Indirect Effect. State Liability usually requires funding by a trade union (which most workers were not members of) or backing by an organisation such as the EOC (which most workers were unaware of or

placed low in the rank of advisory organisations when asked) so costs were important. As presented, eighty five percent of workers at the Case Organisations stated costs would be an issue in their pursuit of rights so State Liability moves further away as providing access to justice. The workers have also demonstrated why HDE would provide greater access to justice when asked if they would bring a claim against their employer and the State. Workers were largely reluctant to instigate either claim but there was a fifty five percent increase in respondents who stated they would bring a claim against their employer over bringing a State Liability action. This therefore places an obligation on the State to provide access to justice (which they often fail to do) and hence leads the movement toward a more effective enforcement mechanism.

### (Heading) 8 - HDE's Effect on Access to Justice

The ECJ has led an instance on real and effective remedies in EC law, through its extension of various terms of Treaty Articles or doctrines developed to ensure EC law is supreme. As such, remedies have been created to ensure the 'new legal order' which imposed obligations on individuals in the Member State also enabled those individuals to access the rights provided to them. HDE is often cited as the most appropriate and effective way to achieve this, but the Member States have resisted this advance due to the EC's ever expanding reach into their domestic legal systems. How HDE would affect the Member States can be witnessed through the ECJ's case law and its creativity in providing the effects of HDE, through what may be termed 'incidental' Direct Effect, whilst still maintaining the obvious denial of HDE. Explicit recognition of HDE is necessary however, as access to rights has to involve a transparent remedy or a haphazard approach to enforcement is the result

Case C-215/97, *Barbara Bellone v Yokohama SpA* [1998] ECR I-2191 involved a situation where an individual sought payments under a contract which had been made with a private organisation. The problem arose because national Regulations made it a stipulation that compulsory registration was required which had been overlooked and not complied with. The ECJ was asked to consider this case in terms of whether the domestic Regulations were in contravention of Directive 86/653<sup>27</sup> which had sought to harmonise laws on self-employed agents and specifically prohibited national laws which purported to make the validity of such contracts dependant upon registration with a national authority. The Advocate-General followed previous opinion by stating explicitly that the Directive was incapable of having HDE; however, he stated that the ECJ should continue on the assumption that the Italian State had correctly transposed the Directive by interpreting the provisions of the Directive into the national provisions. This allowed the Directive's provisions to be given effect in the private sphere whilst preserving the *Faccini Dori* approach on HDE, despite the fact that the domestic and EC laws were contradictory (hence Indirect Effect was not applicable), and Direct Effect was being given in a situation involving two private bodies.

Similar issues of differences between a Directive and national rules occurred in Case C-77/97, *Unilever v Smithkline Beecham* [1999] ECR I-431, concerning a conflict on the importation of toothpaste which had claims on the packaging regarding prevention of

tartar and other oral diseases. An injunction was sought to prevent marketing on these products, as according to the domestic laws on the necessary ingredients to prevent such diseases, the toothpaste was found to be lacking and hence those claims could not, under domestic law, be made. Smithkline Beecham were facing a situation whereby they could not market their product in Austria so they questioned whether the domestic Regulations were actually in contravention of Directive 76/768<sup>28</sup> which concerned the harmonising of EC law on cosmetic products. The Directive required that Member States ensure the free movement of cosmetic goods imported to sell within the national marketplace. The one stipulation to this was that the Member States had to stop the marketing of items which were misleading in their advertising. Austria was under the EC obligation of proportionality and as such the ECJ held that Austria's domestic Regulations were inappropriate in this regard<sup>29</sup> and hence contravened the Directive. The result of the case was that as Austria's domestic law was contrary to an EC Directive, the application of that law had to be stopped with the result being one private party being able to use the provisions of an unimplemented Directive to stop an action by another private party due to inconsistent domestic laws.

The ECJ has been bound to allow Directives to be accessed and is more likely to allow a variation of HDE when an individual seeks protection from another and where they would suffer by not being able to defend themselves against an action from another body – using Directives as a shield not a sword. However, these cases have demonstrated that sometimes they do appear to be used as a source of action as opposed to a defence. Case C-441/93, *Panagis Pafitis and Others v Trapeza Kentrikis Ellados A. E. and Others* [1996] ECR I-1347 was such a case. In this situation a Greek national authority had used its power to intervene in a bank which was in financial difficulty. By doing this the authority had not complied with the Second Directive on safeguarding members' interests<sup>30</sup> which required a general meeting of the bank's shareholders to be held. Due to this breach a body of the shareholders brought an action against the others stating as their reason that the raising of capital was in breach of the provisions of the Directive. The ECJ ruled the domestic laws were in breach of EC law and that the shareholders could rely on the Directive to stop the raise in capital. Once again, this decision gave a remedy and effect to an unimplemented Directive between two private parties.

These cases demonstrated the necessity for access to EC rights for individuals and organisations with private sector claims and the willingness of the ECJ to provide such access through whatever means at its (political) disposal.

### (Heading) 9 - ECJ Movement Towards HDE

The ECJ's stance on denial of HDE has altered in recent decisions whereby Direct Effect has been applied to Directives between two private parties (hence in effect to give HDE). This has been provided in a disguised way under the explicit heading of VDE, but the fact remains that the effect has been to grant the provisions of a Directive between two private parties. *Marshall* and *Faccini Dori* have previously identified that both the Member States and the ECJ were reluctant to extend Direct Effect horizontally to Directives. Where the question has arisen or been specifically asked, the ECJ has

explicitly and consistently denied HDE in many cases including Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, 1 CMLR 1, *Marshall* [1986], *Faccini Dori*, (Criminal Proceedings Against) Case C-168/95, *Luciano Arcaro* [1996] ECR I-4705, Case C-472/93, *Luigi Spano & Others v Fiat Geotech SpA & Fiat Hitachi Excavators SpA* [1995] ECR I-4321, Case C-192/94, *El Corte Ingles v Cristina Blazques Rivero* [1996] ECR I-281, and Case C-185/97, *Belinda Jane Coote v Granada Hospitality Ltd.* [1998] ECR I-5199. Some cases though have been brought which give essentially the same effect as HDE including Case C-194/94, *CIA Security International SA v Signalson SA & Securitel SPRL* [1996] ECR I-2201, [1996] 2 CMLR 781, Case C-13/96, *Bic Benelux SA v Belgian State* [1997] ECR I-1753, Case C-180/95, *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195, Case C-215/97, *Bellone v Yokohama SpA* [1998], *Unilever v Smithkline Beecham* [1999] and Case C-441/93, *Panagis Pafitis* [1996], and which hence appear to be an argument against the rigid stance by the ECJ and demonstrate that the legalistic proposition against the doctrine is questionable. From these cases it is demonstrated that although the doctrine of HDE was not going to be brought to an end by the ECJ, the rules were being softened to allow use of a Directive between private parties but also, as Advocates-General began to consider HDE in their opinions, there appeared to be a movement in the position of explicit recognition of HDE, and this began to be highlighted in their opinions.

#### (Heading) 10 - Need for HDE - The Advocates-General's Views

One of the first cases where an Advocate-General spoke of the benefits of HDE and its possible adoption by the ECJ was *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)* [1993] ECR I-4367, 4368. Advocate-General Van Gerven stated in the case, though *obiter dicta*, that in his opinion Directives should have the ability to be enforced horizontally. In a paper<sup>31</sup> he expressed in greater detail why he held this view and outlined the current problems of denying HDE. One such problem was 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. Further, the restriction to just vertical effect was also unjust because of the responsibilities placed on these organisations. To recap, one of the arguments advanced for denial of HDE is that it places a burden on those who have no legislative power and responsibility to transpose EC law. This also occurs in VDE because often the concept of 'the State' for the purposes of VDE includes many public sector organisations which also do not have legislative power and are themselves involved in competition with private sector organisations. Placing a burden on the public sector whilst not on the private sector under this ruling from the ECJ on Article 249 EC appears somewhat arbitrary. Finally, the Advocate-General considered that ambiguity would be removed with HDE as Indirect Effect would be limited. At present it is quite uncertain how an Act of Parliament (for example) would or could be interpreted by a court and this can cause problems for those using the law, those claiming that the UK law is incorrect, or those attempting to use the national law as a shield to defend themselves against a claim. It can often depend upon the judge and how he or she interprets statutes,

or their view on EC law which will result in a case being decided. HDE would remove this confusion and distortion of the national law.

Advocate-General Jacobs also held this view and advanced similar ideas in the later case of *Vaneetveld*. Although advising the ECJ not to consider the issue of HDE as this was not pertinent to the case, 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* [1986] which had relied so heavily on the interpretation of Article 189 (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 to relevance to this study, Article 119 (now Article 141 EC) could not on strict interpretation of the wording place 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.

Again an argument was made based on how denial of HDE proved to be unfair and furthered the need for EC Directives to be given their proper effect in the Member States' domestic courts:

(Indent)“It would be consistent, in particular, with the recent emphasis in the Court’s case law on the overriding duty of national courts to provide effective remedies for the protection of Community rights. It is perhaps because a new approach to Directives is required by the Court’s recent case law that the views of commentators have tended, recently, to advocate assigning horizontal effect to Directives. As for the argument based on the need for uniform application of Community law, the case is self-evident; but it is necessary to ensure that Community legislation is uniformly applied not only as between Member States but within Member States.”<sup>32</sup>(Endent)

The issue of this point, and indeed the principal aspect of this section is to demonstrate that what concerns individuals regarding EC law rights is the mechanism for getting access to these rights and hence how to enforce these in the individual’s Member State. If the EC is to state that individuals are now citizens of the EC and that Directives impose rights and duties upon them and not simply the Member State, then such individuals should have the opportunity to access these rights and obligations as soon as the Member States have established the date on which these rights will have effect. It seems peculiar that the Member States have rigidly stopped all mention of HDE, and that the ECJ has allowed them to set this agenda, when in other areas the impact of EC law on domestic jurisdictions has been so fundamental. Issues of sovereignty, supremacy and competence have all ensured that Member States accept that on joining the EC their constitutions would be substantially altered. There is widespread case law evidence which establishes that the EC has effect on the supremacy of legal matters in its competence (*Van Duyn*), on the non-application of domestic law in breach of EC law (Case C-48/93, *R v Secretary of State for Transport, ex parte Factortame Ltd. & others (Factortame III)* [1996] ECR I-1029, [1996] 1 CMLR 889), and damages being available for breaches of EC law to

individuals (Cases C-6 & 9/90, *Francovich & Bonifaci v Italy* [1991] ECR I-5357, [1993] 2 CMLR 66). All these issues have sought, merely, to ensure the law is followed correctly, fairly and universally to every individual in the Member State, and ending the loopholes of non-compliance which so-minded Member States could avail themselves of.

## (Heading) **11 - Conclusions**

This paper has considered the effectiveness of HDE and the practical problems of the current enforcement mechanisms, with examples of their limitations. It has considered the theoretical justifications as to why HDE can be adopted to improve enforcement and deconstructed the previous arguments for denial of HDE. 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. Why should Member States not want HDE or appear to be against its implementation? If a naive approach is taken, the Member States have already agreed to the principles within the relevant Directive, or at least agree to be bound by them, then it appears a rather moot point why they should wish to restrict individuals' access to these. There are already in place rules regarding which Articles of the Directive can have Direct Effect, and hence the Member State will know which articles can be given effect in a domestic jurisdiction. As the Member State will obviously want to transpose the Directive on time or correctly then they should welcome individuals assisting them in ensuring the domestic law adheres with its EC parent. If on the other hand the Member State wanted to evade giving effect to the Directive or deliberately transposed it to incorporate the provisions incorrectly, then HDE would act as a safeguard to ensure the appropriate rights were available and did not need to wait for action by the State.

As evidenced, there are no credible reasons why HDE should be withheld. The unusually restrictive interpretation of Article 249 EC by the ECJ demonstrates the fear it has of a Member State led backlash, but this too is confusing as it has always been the defender of the individual's rights and extended the law as widely as possible. Overall, a change is necessary in the provision of remedies available for non- or incorrect transposition of a Directive. The current remedies allow too much scope for Member States to avoid their obligations, domestic remedies can be very difficult to use, and ultimately fining a Member State (as the EC did of the Greek Member State in 2000) and holding it liable still does not address the crucial point. Directives, particularly in employment law, are aimed at assisting and bettering the lives of individuals and as such, the current enforcement mechanisms do not adequately replace HDE. It has been demonstrated that individuals cannot rely upon their own Member State, judiciary, or advisers (see Marson 2002) to assist them in accessing their rights. Case law examples have been used to demonstrate the need for HDE and the empirical evidence has demonstrated why HDE would improve the accessibility of EC law to workers. Evidence abounds of how HDE would be a fair and beneficial way in which the EC will ensure rights are accessible and discrimination amongst workers and States will be eradicated.

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<sup>1</sup> Application against the State or emanation of the State.

<sup>2</sup> Application between private entities.

<sup>3</sup> This is because the UK law may be the simplest to offer as it will be recognised in the courts, while a conflicting EC law may require skills in persuading a judge to agree to the adviser's interpretation.

<sup>4</sup> As noted in the Report 'Legal and Advice Services: A Pathway out of Social Exclusion'. November 2001.

<sup>5</sup> 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.

<sup>6</sup> Para. 51 – Marshall [1986].

<sup>7</sup> An example in this case was the decision of the court – "In any event, even if, after Enderby, indirect discrimination can be established under EC law without the necessity for showing the application of a "requirement or condition", it is not possible to construe s. 1(1)(b) so as to accord with the EC provision. There is no obligation on a national court to distort the meaning of a statutory provision in domestic legislation in order to enforce against an individual a Community Directive which has no direct effect as between individuals." (Source: Lexis-Nexis).

<sup>8</sup> Where the UK deliberately marketed the UK workforce to Europe on the basis of having the least onerous employment protections (including EC based rights) thereby undercutting the competition in other Member States who had complied with EC law.

<sup>9</sup> Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

<sup>10</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

<sup>11</sup> Para. 36.

<sup>12</sup> Para. 38.

<sup>13</sup> Para. 35

<sup>14</sup> Para. 38.

<sup>15</sup> Article 189 EC.

<sup>16</sup> Following the Treaty on European Union there is now compulsory publication of Directives, and before this most Directives were published and available for public inspection.

<sup>17</sup> This evidence was gathered through conversations with lawyers in the case study region.

<sup>18</sup> pp. 631-632.

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<sup>19</sup> Para. 24.

<sup>20</sup> Para. 24.

<sup>21</sup> Paras. 26 and 27.

<sup>22</sup> Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

<sup>23</sup> Awareness was examined rather than knowledge as awareness would enable the workers to seek assistance if they recognised a right existed and they required advice.

<sup>24</sup> Of 117 respondents who stated an awareness, 78 were members of trades unions.

<sup>25</sup> Of 90 respondents who stated an awareness, 50 were members of trades unions.

<sup>26</sup> Of 114 respondents who stated an awareness, 83 were members of trades unions.

<sup>27</sup> Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

<sup>28</sup> Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products.

<sup>29</sup> Despite the element of discretion they had in the area of misleading advertising.

<sup>30</sup> Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguarding which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

<sup>31</sup> 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.

<sup>32</sup> Para. 29.