OPINION OF ADVOCATE GENERAL LENZ
delivered on 9 February 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The request for a preliminary ruling from the Giudice Conciliatore (Judge-Conciliator), Florence, which is now before the Court raises questions concerning the interpretation and application of Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises. [1] In the event that the question as to the applicability of the directive should be answered in the affirmative, the national court asks about the legal consequences of its application for the period between the date by which it should have been implemented (23 December 1987) and the date when it was actually transposed into Italian law (2 March 1992), as regards both relations between individuals and the State and as regards relations between individuals *inter se*. Whilst the question as to the effects of the directive in relations between the individual and the State is evidently hypothetical for the purposes of deciding the case before the national court, the question as to the effect of an unimplemented directive on relations between individuals *inter se* bears on the vexed issue of the horizontal direct effect of directives.

2. The dispute stems from a contract for a English-language correspondence course which was concluded near Milan Central Railway Station. The party in the main proceedings who lodged an objection to an order, Ms Dori, relied on the right of renunciation provided for in Article 5 of Directive 85/577 in order to release herself from the contract.

3. The national court does not expand further on either the facts or the substantive content of the directive, merely observing that 'evidence of the conclusion of the contract off the premises of the undertaking providing the service and of the exercise of the right to renounce it' has been adduced.

4. The national court considers it necessary to consider Ms Dori's argument to the effect that Directive 85/877 should be recognized as being fully effective in the Italian State. It has doubts about whether this argument is right in view, among other things, of the wording of Article 189 of the EEC Treaty [2]

* Original language: German.

1 — Council Directive 85/577/EEC of 20 December 1985, OJ 1985 L 372, p. 31.

2 — Since 1 November 1993, the EC Treaty as a result of the Treaty on European Union of 7 February 1992 (OJ 1992 C 224, p. 1).

and of the fact that there is no obligation to publish directives. [3] However, since the content of some directives is precise and substantively that of a regulation, the question arises as to whether in such a case a directive can acquire 'legislative force' in excess of the inherent effects of directives. The national court refers to the Court's case-law and considers that the results are in some respects unsatisfactory, for example, where a measure is legislative in nature between some subjects and not in relation to others. It takes the view that a preliminary ruling is called for, on the ground that the 'only sure factor is the uncertain effects of directives'.

5. The questions referred to the Court for a preliminary ruling read as follows:

'Is Community Directive 85/577/EEC of 20 December 1985 to be regarded as sufficiently precise and detailed and, if so, was it capable, in the period between the expiry of the 24-month time-limit given to the Member States to comply with the directive and the date on which the Italian State did comply with it, of taking effect as between individuals and the Italian Member State and as between individuals themselves?'

6. Initially, the parties to the main proceedings, the Commission and the German, Greek and Italian Governments took part in the proceedings. The Court put a question to all the Member States in which it asked them for their views on the question raised by the national court as to 'whether the provisions of a directive which has not been transposed into national law within the time-limit set could be relied upon directly by an individual in a dispute with another individual', and this prompted the French Government also to submit written observations. Lastly, representatives of the Danish, German, Greek, French, Italian, Netherlands and British Governments took part in the oral procedure. All the representatives of the Governments of the Member States, with the exception of the representative of the Greek Government, argued, in common with the Commission, that the court's case-law to date should be maintained. The oral procedure revealed the complexity of this case, although, for the most part, the arguments for and against cover common ground. I shall be returning to the various arguments when I carry out the legal assessment.

B — Discussion

I. *The precise and unconditional nature of Directive 85/577*

1. *Overall assessment of Directive 85/577*

7. The national court's first question asks whether the provisions of the directive are precise and unconditional, which is the *sine*

3 — This has no longer been the case since 1 November 1993 as a result of Article 191 of the EC Treaty.

qua non for direct applicability. [4] The national court has not targeted its question at specific provisions of the directive, even though not all of them are potentially applicable in this case.

8. As regards the Member States' margin of discretion for the transposition of Directive 85/577 into national law, the starting premiss is that a Member State has various possibilities open to it in the context of its freedom to choose the 'form and methods'. [5] It may incorporate the provisions of the directive into an existing legislative code, adopt a separate law or refer in a separate law to provisions of the general civil law.

9. In addition, in several respects the content of Directive 85/577 leaves Member States with leeway to implement it in different ways. For instance, *Article 3* allows Member States to decide that the directive is to apply only to contracts exceeding a minimum amount. The last sentence of *Article 4*, which requires traders to give written notice of certain particulars, leaves the Member States a relatively broad discretion in so far as they are to lay down 'appropriate consumer protection measures in cases where the information referred to in this Article is not supplied'.

10. The consumer's right of renunciation laid down in *Article 5* is the central core of the directive and is to be carried out 'in accordance with the procedure laid down by national law'. That form of words warrants doubts as to whether this is a reference to the general civil law — such as the rule on the lodgement of declarations of intention — or to independent rules which are to be laid down in the implementing measure.

11. *Article 7* provides that the legal effects of renunciation are to be governed by national laws. The very terminology used, which in the German version employs first the term 'Rücktritt' (withdrawal) and then the term 'Widerruf' (revocation), shows that very different legal effects may be attached to the right of renunciation. According to the stage reached in the performance of the contract, very different legal effects can be envisaged as attaching to revocation, withdrawal or cancellation.

4 — Leading judgment of 5 April 1979 in Case 148/78 *Ratti* [1979] ECR 1629, paragraph 23; judgment in Case 8/81 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 25.

5 — See Article 189 of the EEC Treaty.

12. Consequently, in several respects the directive leaves the Member States room to exercise their legislative discretion. However, for the purposes of the instant case, it might be sufficient to consider merely the interpretation and application of those provisions containing a *minimum guarantee* [6] for the consumers who are to be protected.

13. Although the national court has not brought the facts of case under any particular provision of the directive, it would appear that the application of Articles 1 and 5 is inescapable. Article 1 defines the scope of the directive *ratione materiae* and Article 5 creates the consumer's right of renunciation. Each of those articles should therefore satisfy the requirements of unconditionality and precision on which the Court's case-law makes the direct applicability of a provision of a directive depend.

2. *Article 1 of Directive 85/577*

14. Article 1(1) of Directive 85/577 reads as follows:

'This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

— during an excursion organized by the trader away from his business premises,

or

— during a visit by a trader

(i) to the consumer's home or to that of another consumer;

(ii) to the consumer's place of work;

where the visit does not take place at the express request of the consumer.'

15. In itself, that paragraph is precise and unconditional, since it covers clearly defined

6 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 20.

operative facts, such as an excursion organized by a trader or a visit by a trader to the consumer's home or place of work. Moreover, Article 1(1) does not, in my view, afford any possibility of an extended interpretation since that would entail forgoing the application of those operative facts, which are essential ingredients.

16. Article 1(2), which extends the scope of the directive to cover to cover certain contracts concluded during a trader's visit to a consumer, may be disregarded, as far as can be judged, for the purposes of deciding this case, since there is no evidence to suggest that the contract was concluded during a visit made to Ms Dori's home or place of work at her request. [7]

17. It can therefore be considered at this stage that Article 1(1) is sufficiently precise to qualify for direct applicability.

18. In contrast, the application of Article 1(3) and (4), each of which paragraphs covers 'conditions similar to those described in paragraph 1 or paragraph 2', could prove awkward. It is open to question whether paragraphs 3 and 4 of Article 1 extend the scope *ratione materiae* of the directive by comparison with paragraphs 1 and 2 so as to include other consumer contracts not concluded on the trader's premises — on the highway or in public places, for instance — or whether they do not include within the scope of the directive circumventing transactions concluded in locations or fact situations covered by paragraphs 1 and 2.

19. That question could be of practical importance for the purposes of deciding this case, since — as has already been seen with regard to paragraph 2 — there is no evidence that the contested contract was concluded, as paragraph 1 requires, during an excursion organized by the trader or during a visit by the trader to Ms Dori's home or place or work.

20. It therefore turns on whether Article 1(3) and (4) may be interpreted so as also to bring contractual offers made in other locations or fact situations within the scope of the directive. Article 1(3) and (4) read as follows:

'(3) This Directive shall apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in paragraph 1 or paragraph 2

7 — The contract was concluded 'near Milan Central Railway Station', whereas Ms Dori lives in Monza.

although the consumer was not bound by that offer before its acceptance by the trader.

(4) This Directive shall also apply to offers made contractually by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 where the consumer is bound by his offer.'

21. All the parties who took part in the hearing were asked whether they considered that the directive was applicable to the main proceedings. Some answered in the negative, others in the affirmative. Consequently, the answer to the question is by no means obvious. If, in addition, account is taken of the fact that the directive has given rise to controversy in academic writings, it is, in my view, scarcely possible to consider that Article 1(3) and (4) exhibit the precision required in order for a provision of a directive to be directly applicable.

22. On the other hand, the Court is called upon to give a binding interpretation of the directive. Consequently, in replying to the national court's questions, it can provide that court with the criteria which it needs in order to decide the case.

23. The title of the directive suggests that it is intended to apply generally to contracts negotiated away from business premises. The preamble confirms this. The fourth recital in the preamble reads as follows:

'Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect; whereas the consumer is often unable to compare the quality and price of the offer with other offers; whereas *this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises*'. [8]

24. The words 'under conditions similar to those described in paragraph 1 or paragraph 2' could be construed, against the background of the other forms of contract 'concluded by the trader away from his business premises' referred to in the preamble, as meaning that contracts negotiated in geographical and factual conditions differing from those mentioned in paragraph 1 should also be covered. On the other hand, there is a substantial difference between paragraphs 3 and 4, on the one hand, and paragraphs 1 and 2, on the other, in so far as they take

8 — My emphasis.

account of the contractual *offer*. Accordingly, I consider that the correct view is that paragraphs 3 and 4 extend the effects of the directive to cover possible circumventing transactions.

25. In the absence of a binding interpretation by the Court of Article 1(3) and (4), those provisions are not, in my view, sufficiently precise and unconditional to be capable of being directly applicable.

26. It is for the national court to apply the provisions to the facts of the main proceedings. The national court manifestly started out from the premiss that the facts of the case fall within the scope *ratione materiae* of the directive. The Court will not assess the relevance of a request for a preliminary ruling for the purposes of deciding the case. It is therefore for the national court to draw the necessary conclusions from the above considerations for the case before it. [9]

3. *Article 5 of Directive 85/577*

27. The applicability of the directive is of practical utility for the consumer only if he can rely on the right of renunciation provided for in Article 5 in order to release himself from a contract concluded away from the trader's premises. Ms Dori expressly relied on Article 5 of the directive in the main proceedings.

28. As I have already observed in my general remarks on the Member States' margin of discretion in transposing Directive 85/577 into national law, [10] Article 5(1) is worded so as to leave a discretion as to where in the national legal system and with what content the conditions for the exercise of the right of renunciation are to be governed. The Community legislator manifestly started from the premiss that the conditions for the exercise of right of renunciation may differ from one Member State to another, since it grants that renunciation is to be notified 'in accordance with the procedure laid down by national law'. In my view, that openness to variable implementation of the directive is not compatible with the directive's having direct applicability.

9 — Judgment in Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545, paragraph 11.

10 — See section 10.

29. The idea that the provision in question is sufficiently precise could be assumed at the most from the limited angle of the main proceedings, in which — as far as appears from the documents before the Court — the contract was not in any way performed. Notification of the exercise of the right of renunciation within seven days would then be the minimum requirement for triggering the legal consequence described in Article 5(2), namely:

'The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract'.

The release of the consumer from his contractual obligations can therefore be construed as a *minimum guarantee* [11] for the consumer. To my mind, therefore, Article 5 of Directive 85/577 is eligible for direct applicability only subject to the reservations set out above.

II — *The effects of a directive which has not yet been implemented*

1. *Relations between the individual and the State*

30. In the event that the question as to whether the directive is particularly precise is answered in the affirmative, the national court wishes to know whether the directive could have effects between the individual and the Italian State after the period for its implementation elapsed and before it was actually implemented. As the Court has consistently held, [12] an individual may, after the expiry of the period prescribed for implementation, rely directly against the Member State in default upon a provision of a directive which is in his favour, unconditional and precise. In such circumstances, the Member State may not take advantage of its conduct contrary to the Treaty. [13]

31. That effect attaching to directives, which may also be described as vertical direct effect, affords satisfactory protection for the legal interests of individuals only if the directive is intended and fit to have effects in such vertical legal relations. The directive will not be directly applicable where the obligation in question is incumbent, not on the State, but on a private individual.

32. However, that is precisely the case in the main proceedings. The obligation to release a party from the contract is incumbent, not on the State, but on the other party to the contract. The fact that the directive can be relied upon as against the State and all its institutions does not assist in resolving the actual issue in a dispute between private persons.

11 — Judgment in *Francovich and Others*, cited above, paragraphs 20, 21 and 22.

12 — See, for instance, the judgments in *Ratti* and *Becker*, cited above.

13 — See the judgment in *Becker*, cited above, paragraph 24.

The Court has evolved various approaches in its case-law in order to overcome this obstacle.

(a) Broad meaning for the concept of the State

33. With a view to setting broad limits to the direct applicability of directives, the concept of the State has to be understood in the broad sense. The broad definition covers local or regional authorities, [14] public authorities [15] and bodies coming under the State [16] even in the form of nationalized undertakings. [17] It is above all the inclusion within the definition of the State of State-controlled undertakings which has given rise to criticism. It is doubtless the cases in which it was possible to rely on a directive against a nationalized undertaking in its capacity as an employer, [18] and not against a private person, to which the national court adverts when it states that 'a legislative measure takes effect as between some individuals who are subject to a particular legal system and not others'. [19]

34. In my estimation, the Court's case-law based on a broad definition of the State [20] is perfectly coherent. It covers not only holders of direct public power but also holders of indirect public power. [21] Nevertheless, the limit on extending the definition of the State has certainly been reached where an undertaking controlled by public bodies is linked to the State, whilst a change in the majority on the supervisory organs means that the same undertaking is a private undertaking.

(b) Obligation on all State institutions to apply Community law by way of interpretation

35. Another means of procuring the widest possible application of directives which, by default, have not yet been transposed into national law or have been insufficiently transposed consists of the obligation on all public authorities to take all appropriate measures within their jurisdiction, whether general or particular, to ensure fulfilment of the Member States' obligation arising from a

14 — Judgment in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839, paragraph 31.

15 — Judgments in *Becker*, cited above, in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, in *Costanzo*, cited above, and in Case C-221/88 *Busseni* [1990] ECR I-495.

16 — Judgment in Case 31/87 *Beentjes* v *State of the Netherlands* [1988] ECR 4635.

17 — Judgment in Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 20.

18 — Judgment in *Foster*, cited above.

19 — See the national court's order, p. 11 of the original version.

20 — For the functional concept of the State, see the judgment in *Beentjes*, cited above.

21 — Purely incidentally, I would observe that in labour law it does not only make a difference as far as the effect of directives is concerned whether the contract of employment was concluded with an employer subject to public law or with a private employer.

directive. [22] That Community obligation on national institutions means, for example, that national courts are under a duty to interpret and apply their national law, to the entire extent of their discretion, in conformity with the requirements of Community law. [23]

36. The obligation to ensure the effectiveness of Community law by way of interpretation does not relate only to the legislation adopted in order to implement a directive, [24] but to the national legal system as a whole. [25] The public administration is also bound by an obligation to comply with directives which is comparable to that to which national courts are subject. [26]

37. There are, however, natural limits to the possibility of construing national law in conformity with Community law. They are discernible when the Court refers to the obligations incumbent, under Community law, on all public authorities to take appropriate measures *'within their jurisdiction'*. [27] Consequently, the limits on the interpretation of the law also constitute limits on the power of the national courts to ensure the implementation of unimplemented directives in national law.

(c) Entitlement to compensation from the State

38. A third attempted solution designed to optimize the judicial protection of the individual in the event of a prior infringement by the Member State of its obligation to implement a directive within the prescribed period consists in granting a right to compensation on the basis of Community law. [28] In such case, an individual can bring an action against the State on account of the loss of a right or the absence of legal protection. The State is bound to compensate the private individual by reason of its liability under Community law.

Intermediate conclusion

39. *(aa)* Consequently, in so far as the national court's question relates to the effects of Directive 85/577 in relations between an individual and the Italian State in the period between the expiry of the period prescribed for the transposition of the directive into national law and its actual implementation, its attention should be drawn to the existence of the right to compensation on the basis of Community law.

22 — See the judgments in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, in *Beentjes*, cited above, paragraph 39, in Case C-106/89 *Marleasing* [1990] ECR I-4135 and in Case C-373/90 *X* [1992] ECR I-131, paragraph 7.

23 — Judgment in *Von Colson and Kamann* v *Land Nordrhein-Westfalen*, cited above, paragraphs 26 and 28.

24 — Judgment in Case 111/75 *Mazzalai* v *Ferrovia del Renon* [1976] ECR 657, paragraphs 7/9 and 10/11.

25 — Judgments in *Von Colson and Kamman*, cited above, paragraph 26, and in *Marleasing*, cited above.

26 — Judgment in *Costanzo*, cited above.

27 — Judgments in *Von Colson and Kamann*, cited above, paragraph 26.

28 — Cf. judgment in *Francovich*, cited above.

40. *(bb)* Another question — to which, in the final analysis, the Court also does not have to reply — concerns the extent to which the national court may determine the case in the context of its obligation (described in section II.1(b)) to interpret its national law in conformity with Community law.

41. The Commission provided information about Italian civil law both in its written observations and at the hearing, and mentioned two provisions which, in its view, are suitable for the implementation of the right of renunciation.

42. The Court may not rule on the application of national law. The burden imposed on individuals indirectly by the proposed interpretation was, admittedly, allowed by the Court in *Marleasing*. [29] As has been rightly objected, renunciation of the effects of the contract presupposes the existence of a right of renunciation. The Court is under a duty to rule on that condition where it is asked about the effects of the directive during the interim period — between the end of the period for transposition and actual implementation — on relations between private individuals *inter se*. To refer in that context to the obligations arising for the national court under Community law and that court's exclusive jurisdiction to interpret national law would be to ignore the true issue.

29 — Cited above.

2. *Horizontal applicability of directives*

43. The answer afforded by the Court's consistent case-law to question as to the effects of an unimplemented directive on legal relations between private persons — also known as horizontal effect — is straightforward and clear: a directive may not of itself impose obligations on an individual. [30]

44. The Court's justification for this is as follows: '... according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed". It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person'. [31]

45. Consequently, emphasis is clearly placed on the refusal to impose a burden on a private person. According to the wording of the Treaty, an obligation is imposed only on the Member States to which the directive is addressed.

30 — Judgments in *Marshall*, cited above, paragraph 48, in Joined Cases 372 to 374/85 *Traen* [1987] ECR 2141, paragraph 24, in *Pretore di Salò* v *Persons unknown*, cited above, paragraph 19, in *Busseni*, cited above, paragraph 23, and in *Marleasing*, cited above, paragraph 6.

31 — Judgment in *Marshall*, cited above, paragraph 48.

46. It would be possible to draw the line at this point and argue that the existing case-law should be maintained.

47. However, such an approach appears unsatisfactory to me. Following the judgments in *Foster* [32] and *Marleasing*, [33] calls have increasingly been heard in academic circles for directives to be given horizontal effect. Among the members of the Court, to date Advocate General Van Gerven [34] and, recently, Advocate General Jacobs [35] have spoken out in favour of the horizontal applicability of directives — albeit not in response to questions having a bearing on the determination of the cases then before the Court. [36]

48. Considerations favouring the horizontal effect of directives reflect a drive to do justice by the beneficiary of a provision which the Community legislator intended to be binding and not to abandon his situation for an indefinite period to the whim of a Member State in default of its obligations.

49. At the time of the completion of the internal market — an area without internal frontiers [37] — when harmonizing provisions governing legal relations between private individuals are increasingly being adopted, it seems to me to be appropriate to reconsider the effect of directives. In the preamble to Directive 85/577, the Community legislator referred to the need to approximate legislation in completely unambiguous terms:

'Whereas any disparity between such legislation may directly affect the functioning of the common market; whereas it is therefore *necessary* [38] to approximate laws in this field'. [39]

50. Foremost among the arguments in favour of directives' having horizontal effect is that relating to equality of the conditions of competition. Moreover, in the absence of horizontal effect, persons in Member States which comply with Community law are frequently placed at a disadvantage.

51. The principle of the *prohibition of discrimination*, which ranks as a fundamental right, also militates in favour of directives'

32 — Cited above.

33 — Cited above.

34 — Section 12 of his Opinion of 26 January 1993 in Case C-271/91 (judgment of 2 August 1993) *Marshall* v *Southampton and South-West Hampshire Area Health Authority* ('*Marshall II*'), [1993] ECR I-4367.

35 — Section 15 et seq. of his Opinion of 27 January 1994 in Case C-316/93 *Vaneetveld*, [1994] ECR I-763, at I-765.

36 — Judge Schockweiler has also spoken in favour of the horizontal effect of directives in his contribution *Effets des directives non transposées en droit national à l'égard des particuliers* to Mr Díez de Velasco's Festschrift *'Hacia un nuevo orden internacional y europeo'*.

37 — Since 1 January 1993, in accordance with Article 8a of the EEC Treaty, which has since become Article 7a of the EC Treaty.

38 — My emphasis.

39 — Second recital in the preamble to Directive 85/577.

being given horizontal effect, from several points of view. First, it is unsatisfactory that individuals should be subject to different rules, depending on whether they have comparable legal relations with a body connected with the State or with a private individual. Secondly, it is contrary to the requirements of an internal market for individuals to be subject to different laws in the various Member States even though harmonizing measures have been adopted by the Community.

52. If those disparities were to be maintained, it would go against the stated aim of the approximation of legislation. That finding cannot be refuted by arguing that it is in the nature of directives that there are bound to be different conditions as between Member States until such time as the directives are transposed into national law. [40] Such inequality should be allowed only during the period prescribed for implementation. It is one of the aims of directives that comparable conditions should prevail after that period has expired.

53. The discrimination argument has gained even more substance since the entry into force of the Maastricht Treaty and of citizenship of the Union, enshrined in the EC Treaty. According to the intention of the Contracting States, [41] the Treaty on European Union marks 'a new stage in the process of European integration undertaken with the establishment of the European Communities'. Articles 3a and 7a of the EC Treaty stress the importance of the internal market. Articles 2, 3 and 3a of the EC Treaty promote the placing of economic policy more on a common footing. Article 3(s) requires a contribution to be made to the strengthening of consumer protection. More detailed provisions in that regard are set out in Article 129a. The introduction of citizenship of the Union raises the expectation that citizens of the Union will enjoy equality, at least before Community law.

54. In the case of directives whose content is intended to have effects in relations between private persons and which embody provisions designed to protect the weaker party, [42] it is obvious that the failure to transpose a directive deprives it of *effet utile*. Following the expiry of the period for transposition, the application of protective provisions with precise and unconditional content should be possible. A provision of a directive, which the Community legislator intended to be binding, should be recognized as having substantive effect and the conduct of a Member State contrary to the Treaty should not be able to impede the assertion of legal positions which are in themselves complete.

40 — See section 8 of my Opinion of 10 October 1989 in Case C-38/89 *Blanguernon* [1990] ECR I-83, at I-87.

41 — Expressed in the first recital in the preamble to the Treaty on European Union, cited in footnote 2.

42 — See, for example, 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 the employer (OJ 1980 L 283, p. 23; see in this regard the judgment in *Francovich and Others*, cited above) or Directive 85/577/EEC, which is the subject-matter of the present proceedings and of the judgment in Case C-361/89 *Di Pinto* [1991] ECR I-1189.

55. In order to come out in favour of the horizontal direct effect of directives, the starting point should be that the *rationale* and manner of effect are fundamentally different than in the case of directives having vertical direct effect. Whereas, on the traditional view of the direct applicability of directives, conduct contrary to Community law on the part of the Member State directly determines legal relations between the individual and the State, a third party who is a private person has no influence on the implementation of a directive. [43] The arguments and legal principles [44] put forward in support of the direct applicability of directives vis-à-vis the Member State to the effect that the Member State is not entitled to profit by its conduct contrary to Community law [45] apply no more in relations between private persons *inter se* than the reference to the nature of a sanction [46] of direct effect vis-à-vis the State.

56. The direct applicability of directives as between private persons would cease to be in the nature of an objection in the sense that the favourable provision is 'relied upon'. The directly applicable provision of a directive would in contrast be given effects *erga omnes*. It would as a result be equated with the directly applicable provisions of the Treaty. [47] The provision of a directive producing horizontal effects would participate in the primacy of Community law, which would be desirable in the interests of the uniform, effective application of Community law.

57. Although horizontal direct effect of directives appears desirable for the reasons given above, substantial arguments exist against such a change in the case-law.

58. Reference is made regularly in those arguments to the *wording of Article 189 of the EEC Treaty* and to the *nature of directives*, which are binding only on Member States and then only as to the results to be achieved.

59. In my view, those arguments can be refuted. As regards in the first place the freedom given to the Member States as to the choice of the form and methods for implementing directives, that freedom is completely unaffected until the transitional period expires. Even after that, the Member States retain — also where individual provisions have direct effect — leeway wherever

43 — Admittedly, even in the context of the existing case-law on the effect of directives, direct responsibility for the infringement of the Treaty is not necessary, as witness the broad interpretation given by the Court's case-law to the concept of the State; see section II.1(a), above.

44 — *Nemo auditur, venire contra factum proprium*, estoppel.

45 — Judgment in *Becker*, cited above, paragraph 24.

46 — See my Opinion in *Costanzo*, cited above, section 23.

47 — For example — Article 12: judgment in Case 26/62 *Van Gend & Loos* [1963] ECR 1;
— Articles 53 and 37(2): judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585;
— Articles 9 and 13(2): judgment in Case 33/70 *SACE* v *Ministry for Finance of the Italian Republic* [1970] ECR 1213);
— Article 48: judgment in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337;
— Article 119: judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

that is intended by the directive. Only a fraction of provisions of directives will lend themselves to horizontal applicability. For the rest, the Member States are not entitled to invoke, after the expiry of the period for transposition, freedoms which were conferred on them only for the purposes of the due implementation of the directive within the time-limit laid down.

60. The obligation for the Member State to achieve the results intended by the directive exists immediately that the directive takes effect. As far as the results intended to be achieved by a directive are concerned, the Member States do not normally have any discretion. Such results include, for example, making protective provisions binding by no later than the end of the period for implementation. [48] The binding nature of such rules is — as I have already observed — intended by the Community legislator and inherent in the nature of directives. Directives are not measures of lesser quality but are addressed, with a view to their implementation, to the Member States, which are under an obligation under the Treaty to transpose them into national law in full and in good time.

61. In my view, the nature of directives does not preclude their having horizontal effect. Neither would that eliminate the demarcation between regulations and directives, since directives cannot have direct effect until the period for transposition has elapsed and only in the case of clear and unconditional provisions.

62. Another argument put forward against horizontal applicability for directives relates to the *burden imposed on third parties on the ground that it is incompatible with the rule of law*. That argument cannot in fact be dismissed forthwith. It is questionable whether a private person whose conduct is lawful under the national legal system may have burdens imposed upon him under an unimplemented directive not addressed to him for which, moreover, he will have scarcely any remedy against the Member State in default. [49]

63. On grounds of legal certainty the horizontal effect of directives appears to me to be extremely problematic from the point of view of the third party suffering the burden. The fact that private individuals have had burdens imposed on them indirectly as a result of directly applicable directives — for example, owing to irregularities committed in a tender calling in question the legal situation of the other tenderers and, possibly, the contractor [50] or owing to the effect of such directives resulting from their interpretation in conformity with Community law in a dispute between companies subject to private

48 — Judgments in Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825, paragraphs 10 and 13, and in *SACE*, cited above, paragraph 11.

49 — Asserting a claim for compensation will raise problems as regards the time of the damage, since if the Member State had transposed the directive in good time, the burden on the private individual would still have existed.

50 — Judgment in *Costanzo*, cited above.

law [51] — cannot eliminate the reservations evoked by horizontal effect on grounds of the rule of law.

64. The basic condition for a burden imposed on the citizen by legislative measures is their *constitutive publication* in an official organ. [52] That condition is not fulfilled by directives adopted on the basis of the EEC Treaty. [53] The usage of publishing directives in the *Official Journal of the European Communities* as measures whose publication is not a condition for their applicability does not remedy that situation. Publication in the *Official Journal of the European Communities* is purely declaratory and is not a condition for directives to take effect, which is sometimes clarified by a footnote indicating the date on which the directive was notified to the Member States, [54] since directives take effect by notification. [55] The fact that it is possible to take cognizance of a measure does not replace its constitutive publication.

65. In the case of directives adopted and to be adopted following the entry into force of the Maastricht Treaty on 1 November 1993, the situation is fundamentally different. Article 191 of the *EC Treaty* also requires directives to be published in the *Official Journal of the Community*. An objection based on absence of publication could therefore no longer be raised against the horizontal effect of such recent directives.

66. For reasons of *legal certainty*, which is a fundamental right of the citizen on whom a burden is imposed, the public must be prepared as of now for the fact that directives will in future have to be recognized as having horizontal direct effect. For those reasons, too, one must be gratified at the aforementioned stands taken by members of the Court. [56]

67. The principle of *legitimate expectations* is invoked in favour of private individuals on whom a burden is imposed and against the horizontal effect of directives. Expectations deserving of protection certainly exist, in so far as a private individual does not have to reckon with the imposition of additional burdens provided that he acts lawfully within the context of his national legal system. On the other hand, once a directive has been published and the period for transposition has expired, the burden is foreseeable. I would ask whether the expectation that the national legislature will act contrary to Community law is worthy of protection.

68. An argument based on the *democratic principle* is put forward against the horizontal effect of directives. According to that

51 — Judgment in *Marleasing*, cited above.

52 — Judgment in Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* [1990] ECR I-3461, paragraph 24.

53 — That objection cannot be raised against the direct applicability of provisions of the Treaty.

54 — For example, the footnote to Article 9 of Directive 85/577/EEC.

55 — See the second paragraph of Article 191 of the EEC Treaty.

56 — See section 47 and footnote 36, above.

argument, the democratic deficit, which is deplored in any event in the context of Community legislation, is increased where national parliaments are by-passed when directives are implemented.

69. As far as the alleged democratic deficit is concerned, I would observe, on the one hand, that the European Parliament's rights to collaborate in drawing up Community legislation have gradually been increased by the Single European Act and the Maastricht Treaty. On the other hand, it cannot be argued, I submit, that the national legislature is by-passed.

70. The national legislature has every freedom during the period for transposition to choose the form and means of transposing the directive into national law. [57] Even after the period for transposition has elapsed, the obligation [58] on the national legislature to transpose the directive continues to exist, as well as leeway to fulfil that obligation in one way or another to the extent permitted by the directive. Only provisions of directives or protective rules which are sufficiently precise to be asserted without being fleshed out in any way and therefore have to be taken over by the national legislature would have legal effects as between the addressees of the legislation in question within the national legal system. To my mind, fears that there will be a hiatus between the legal situation existing during the intermediate period preceding the transposition of the directive into national law and that existing thereafter are groundless, since the provisions suitable for horizontal applicability must also be found in the implementing measure.

71. The objection that recognition of the horizontal direct effect of directives would increase Member State's carelessness in transposing them does not convince me, since the national legislature remains responsible for their implementation in full. Recognition in principle of horizontal effect might possibly encourage Member States to effect transposition within the prescribed period in order to forestall horizontal application by the authorities and courts of the Community and the Member States. In my view, the arguments on the educative effect of horizontal applicability balance themselves out and hence do not tip the balance for or against.

72. Before concluding, I would further observe that, if directives are recognized as having horizontal effect, the necessary consequences should be drawn as regards *legal protection*. Thus they should be capable of

57 — Judgment in *Grad*, cited above, paragraph 13.

58 — Judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12.

being challenged — as regulations and decisions are — under the second paragraph of Article 173. [59]

73. In the final analysis, I consider that for reasons of legal certainty it is not possible to envisage directives having horizontal effect as regards the past. As far as the future is concerned, however, horizontal effect seems to me to be necessary, subject to the limits mentioned, in the interests of the uniform, effective application of Community law. In my view, the resulting burdens on private individuals are reasonable, since they do not exceed the constraints which would have been applied to them if the Member State concerned had acted in conformity with Community law. Lastly, it is the party relying on the unconditional and sufficiently precise provision of a directive who will have to bear the risk of the court proceedings.

C — Conclusion

74. In view of the foregoing provisions, I consider that the reply to the national court's questions should be as follows:

(1) Article 1(1) and Article 5 of Directive 85/577/EEC have the precision necessary for direct applicability in so far as it is possible to infer from them a minimum guarantee as to renunciation of the effects of a contract which has not yet been performed. For the rest, the directive leaves the Member States leeway in several respects as regards the measures for the transposition of the directive into national law.

(2) (a) On the basis of the case-law to date, an unimplemented directive can have effects vis-à-vis the State in so far as all public authorities, in particular, the courts, are under a duty to take all appropriate measures, whether general or particular, to ensure fulfilment of obligations arising from a directive.

59 — See my Opinion in Case 298/89 *Gibraltar* v *Council* (judgment of 29 June 1993), [1993] ECR I-3605.

(b) Shortcomings in the implementation of the directive may entail an obligation on the Member State to compensate a private individual who benefits from its provisions.

(3) In accordance with that which the Court has consistently held, an unimplemented directive cannot have direct effect in relations between private individuals. That case-law should be maintained on grounds of legal certainty as regards past situations.

(4) For the future it appears necessary that the law based on the EC Treaty should develop in the interests of the uniform, effective application of Community law so as to recognize the general applicability of precise, unconditional provisions in directives in order to respond to the legitimate expectations nurtured by citizens of the Union following the achievement of the internal market and the entry into force of the Treaty on European Union.