OPINION OF ADVOCATE GENERAL JACOBS
delivered on 27 January 1994 *

My Lords,

1. On 2 May 1988 Mrs Nicole Vaneetveld was injured in a traffic accident; she was a passenger in a car driven by her husband Mr Jean Dubois.

2. Initially Mr Dubois' insurance company, SA Le Foyer, accepted liability. It paid a part of Mrs Vaneetveld's damages and reimbursed part of her medical expenses which had been met by her social insurance fund, the Fédération des Mutualités Socialistes et Syndicales de la Province de Liège ('FMSS'). Subsequently however SA Le Foyer, having learnt that at the time of the accident Mrs Vaneetveld was separated but not divorced from her husband, repudiated liability. It did so on the basis of the terms of Mr Dubois' insurance policy and on the ground that the Belgian legislation in force at the time of the accident permitted the exclusion of the spouse of the insured person.

3. Mrs Vaneetveld has brought proceedings before the Tribunal de Commerce of Huy against SA Le Foyer, which by a counterclaim seeks recovery from her of the sums it had already paid. SA Le Foyer has also brought proceedings in the same court against the FMSS for recovery of sums paid.

4. The Tribunal de Commerce, taking the view that the two cases, which it has joined, may be governed by the Community legislation on the matter, has referred to this Court the following questions:

'1. Are the provisions of Article 5 of the Second Council Directive (84/5/EEC of 30 December 1983) on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles of direct effect in the Belgian domestic legal system?

* Original language: English.

2. If so, do those provisions create rights for individuals which the national courts must protect?

3. In particular, were those rights created with effect from the date when the directive entered into force or with effect from 31 December 1987, the date by which Member States were to amend their national provisions, or with effect from 31 December 1988 in accordance with Article 5 (2) of that directive?'

5. The order for reference is unusual in giving no information about the facts of the case; after certain formal recitals, it simply sets out the questions cited above. The French Government submits that the order for reference is for that reason inadmissible. It cites the order of the Court in the *Monin* case. [1] There, the Court recalled that the need to arrive at an interpretation of Community law which is useful for the national court requires that court to define the factual and legislative context of the questions referred or at least to explain the factual hypotheses on which they are based (paragraph 6).

6. It is certainly in general helpful if an order for reference sets out, however succinctly, the relevant facts, so that the question or questions referred can be understood in their context. Where that is not done, the Court may, it is true, be able to examine the questions in their context on the basis of the national court's case-file and in the light of the parties' observations; and this it not infrequently does. But Member States and Community institutions, which have to submit any written observations concurrently with the parties, are put at a disadvantage, since they may be unable to discover, and so unable to address, the true issues raised by the case. The Court, in turn, may be deprived of the benefit of their observations.

7. While pointing out the advantages of explaining the context in the order for reference itself, I should perhaps emphasize at the same time the advantages of doing so succinctly. An order for reference should be confined to what is essential to enable a useful answer to be given to the questions referred. I mention this because, while in some cases an order for reference contains no more than the questions, there are other

1 — Case C-386/92 *Monin Automobiles* [1993] ECR I-2049.

cases where the national court provides far more information than is needed. Sometimes what is sent to the Court is a lengthy judgment, not all of it relevant; such a judgment may obscure, rather than clarify the issues. Sometimes an order for reference is accompanied by schedules or annexes, and it is not clear which of these, if any, are relevant. Such practices can cause difficulties because it is uncertain which documents should be sent to the Member States and to the institutions for them to be able to submit their observations. Moreover, all orders for reference have to be translated immediately they are received at the Court into all the other official Community languages, currently nine in all. Delays and much unnecessary work can be occasioned in this way.

8. Although these difficulties are exceptional, it may be worthwhile to recall that what is most helpful is for the national court to set out succinctly the context in which the questions have arisen, in particular any relevant facts which have been established and any relevant provisions of national law.

9. Even in the absence of such information, it may still be possible for the Court to provide answers useful to the national court, and the practice of the Court has been to do so, rather than to refuse to answer the questions. From the outset the Court has taken the view that the Article 177 procedure is intended to provide for a form of judicial cooperation in which formalism should be avoided. [2] Certain recent cases, notably *Meilicke*, [3] *Telemarsicabruzzo*, [4] *Banchero* [5] and *Monin*, [6] in which the Court did not answer the questions referred, do not in my view constitute a departure from that fundamental approach. In the *Monin* case, referred to by the French Government, the Court considered that further information was necessary in order to provide answers which would be useful to the national court. (The same occurred in *Banchero*, where the national court has since made a second reference. [7]) The usefulness of the answer seems to me to be an important criterion, and in the present case, as will be seen, a useful answer can be given. Moreover, in the *Monin* case the questions referred were extremely general and wide-ranging, so that it was particularly difficult to identify their possible relevance to the national proceedings. In addition, the Court pointed out in *Monin*, as it did in *Telemarsicabruzzo* and *Banchero*, that the need for the national court to define the factual and legal context of the questions was particularly important in certain fields,

2 — Case 16/65 *Schwarze* v *Einfuhr-und Vorratsstelle Getreide* [1965] ECR 877 at 886.

3 — Case C-83/91 *Meilicke* [1992] ECR I-4871.

4 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo & Others* [1993] ECR I-393.

5 — Case C-157/92 *Banchero* [1993] ECR I-1085.

6 — Above, note 1.

7 — Registered as Case C-387/93.

such as that of competition, which are characterized by complex factual and legal situations. That again is not the case here. As for *Meilicke*, that was a case where it appeared from the order for reference that the questions themselves might be purely hypothetical. There is no suggestion of that in the present case.

10. Moreover, in the present case, the facts as they emerge from the case-file and from the written observations are clear, the issue is a straightforward one, and there can be no doubt that the answer to the questions referred will be helpful to the national court. In this case, therefore, it would not be appropriate either to decline to answer the questions referred, as in *Meilicke* and *Telemarsicabruzzo*, or to reject the reference as inadmissible, as in *Banchero* and *Monin*. It does not follow, as will become apparent, that all the questions referred in the present case should necessarily be answered.

11. Accordingly I turn to consider the questions referred.

12. Article 3 (1) of the first directive on the matter, Council Directive 72/166/EEC of 24 April 1972, [8] requires each Member State to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. Article 1 (1) of the second directive, Council Directive 84/5/EEC of 30 December 1983 [9] provides that that insurance 'shall cover compulsorily both damage to property and personal injuries'.

13. The Second Council Directive sought to ensure that the members of the family of the insured person, driver or any other person liable should be afforded protection comparable to that of other third parties, in any event in respect of their personal injuries: see the ninth recital of the preamble. Article 3 accordingly provides as follows:

'The members of the family of the insured person, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 1 (1) shall not

8 — OJ 1972 L 103, p. 1.
9 — OJ 1984 L 8, p. 17.

be excluded from insurance in respect of their personal injuries by virtue of that relationship.'

Article 5 reads as follows:

'1. Member States shall amend their national provisions to comply with this Directive not later than 31 December 1987. They shall forthwith inform the Commission thereof.

2. The provisions thus amended shall be applied not later than 31 December 1988.

... .'

14. Belgian legislation implemented the Second Council Directive only by the Law of 21 November 1989. [10] That Law repealed the previous legislation, the Law of 1 July 1956, [11] which permitted the spouse and certain relatives of the driver and the insured person to be excluded from the scope of the insurance.

15. It is clear from the Court's case-law that the provisions of a directive which have not been implemented by a Member State can take effect only at the end of the period laid down by the directive for implementation. [12] In the present case, although Member States were required to amend their legislation to comply with the directive by 31 December 1987, the directive fixed the date from which that legislation as so amended should be applied at not later than 31 December 1988. It follows that the provisions of the directive could have no effect in relation to an accident which took place on 2 May 1988.

16. It is not therefore strictly necessary for the Court to answer the question whether the provisions of the directive could produce what is commonly called 'horizontal' direct effect, i. e. whether they could impose obligations on private bodies or individuals so

10 — Loi belge du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité civile en matière de véhicules automoteurs, *Moniteur belge*, 8 December 1989.

11 — Loi belge du 1 juillet 1956 relative à l'assurance obligatoire de la responsabilité civile en matière de véhicules automoteurs, *Moniteur belge*, 15 July 1956.

12 — See Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629.

that, for example, in the absence of implementation by the end of the prescribed period, an insurance company might be held liable in the national courts. That question is raised, although not explicitly, by the order for reference, but the answer will in my view not assist the national court. Since in the circumstances of this case the directive cannot have direct effect at all, it plainly cannot have any horizontal direct effect. So, although the issue is raised by the national court's questions, I do not think it would be appropriate for the Court to deal with it. Again, the concern of the Article 177 system is to provide answers which will be useful to the national court. Just as this may sometimes require answering a question which has not been directly raised by the national court, [13] so it may sometimes justify not answering a question which has been raised. That may be so especially where, as in the present case, the question raises issues of great importance for the Community legal order. It might seem disproportionate for the Court to address those issues in a case where the question does not need to be decided.

17. It has however been the frequent practice of the Court not to enquire into the relevance of the questions referred, but to answer them even if it is not clear how the answer will affect the resolution of the main proceedings. [14] In case it should be thought that that course should be followed here, I will consider how the question should be approached if an answer were considered necessary.

18. Both the Commission and SA Le Foyer, in their respective written observations, take the view that, if it were necessary to consider the question of horizontal direct effect, it would be a sufficient answer to refer to the past case-law of the Court holding that directives can have direct effect only against the State or an emanation of the State ('vertical' direct effect). [15] I do not agree. It is well-known that that case-law has given rise to anomalies, and in another case pending before the Court, namely *Faccini Dori*, [16] the Court has been expressly invited to re-examine the matter. I will examine the issue relatively briefly, bearing in mind that it has been much discussed by commentators and has been fully debated in *Faccini Dori*.

19. It was in the *Marshall* case in 1986 (which may now be referred to as *Marshall*

13 — See for example Case 157/84 *Frascogna* v *Caisse des Dépôts et Consignations* [1985] ECR 1739.

14 — See e. g. Joined Cases 98, 162 & 258/85 *Bertini* v *Regione Lazio* [1986] ECR 1885, paragraph 8; Joined Cases 2 to 4/82 *Delhaize Frères* v *Belgian State* [1983] ECR 2973, paragraph 9.

15 — See in particular Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority ('Marshall I')* [1986] ECR 723.

16 — Case C-91/92.

I) that the Court finally took a position on the horizontal direct effect of directives, holding that 'a directive may not of itself impose obligations on an individual and ... a provision of a directive may not be relied upon as such against such a person'. [17] There however the Court indicated that Miss Marshall could rely on the directive in question against the defendant, the Southampton and South-West Hampshire Area Health Authority (Teaching), which could be regarded as an organ of the State, and that it was immaterial whether that body was acting as employer or as public authority. Curiously, therefore, the Court decided the issue in a case in which it was not necessary to do so: the Court could simply have found that the defendant was an organ of the State, leaving open the question whether directives could ever be invoked against private bodies.

20. In deciding the issue, the Court relied — and relied exclusively — on the wording of Article 189 of the Treaty. As is well known, and for good reasons, such reliance on the wording of the Treaty has not generally been decisive in the Court's interpretation of it. Moreover the argument based on the wording, although it carries some weight, is not wholly convincing. Article 189 says that a directive 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed ...'. Quite apart from the fact that Article 189 does not expressly exclude the possibility of derived obligations arising for persons other than Member States, it may be noted that, on the basis of such an argument from the text, it would have been wholly impossible to maintain that Article 119 of the Treaty, for example, imposed obligations on private employers as the Court had held as long ago as 1976. [18] Moreover, if a directive can impose obligations only on Member States, it is by no means easy to justify imposing obligations on a body such as the Southampton and South-West Hampshire Area Health Authority (Teaching). The well-known attempt at a rationale for assigning direct effect to a directive as against a Member State, namely that a Member State ought not to be allowed to rely upon its own failure to implement a directive, is singularly inapposite in relation to such a body, which has no responsibility for that failure.

21. In any event, once the Court had accepted that directives did have such a reach, it became difficult to justify distinctions between, for example, employers in the public sector and employers in the private

17 — *Marshall I*, cited above in note 15, paragraph 48.

18 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraphs 39 and 40.

sector. Moreover, once direct effect, although limited, had been recognized, some of the general arguments of principle against assigning horizontal direct effect to directives — for example, the argument that, under Article 189 of the Treaty, directives leave to the national authorities the choice of form and methods — could no longer be sustained.

22. It becomes difficult, also, in my view, to sustain a distinction in this respect between directives — which are, after all, the main, and often the only, form of Community legislation provided for under many areas of the Treaty — and other binding provisions of Community law, namely treaties, regulations and decisions, all of which, it is accepted, may impose obligations on individuals.

23. Similarly, if horizontal direct effect were to be denied to directives as having an insufficient democratic basis — the role of the European Parliament in the enactment of directives having been very limited at the outset and having increased only gradually — then again it is difficult to see why that argument should apply only to directives and not to other Community provisions, such as regulations, in which the role of the Parliament has been identical. Moreover it cannot be objected against horizontal direct effect that the measures have not been implemented by a democratically elected national parliament, since the directives in question *ex hypothesi* leave no discretion to the national legislature.

24. Nor in my view can an argument be based on the absence of a requirement in the Treaty that directives should be published. [19] That lacuna, remedied by the Treaty on European Union, [20] can be explained by the limited role envisaged for directives in the original Treaty, and is of little significance given the invariable practice of publishing in the Official Journal all legislative directives of the type addressed to all Member States. No doubt, if a particular directive had not been published, the absence of publication might have prevented it, like any other measure, from producing legal effects. [21]

25. The above considerations do not in my view obviate the important differences which still remain between directives and regulations. In *Marshall I* the Court rightly, in my view, refrained from relying on the argument (mentioned in the Opinion of Advocate General Slynn) that to make directives directly enforceable against individuals

19 — See e. g. Pescatore, 'L'effet des directives communautaires, une tentative de démythification', Dalloz 1980, chronique XXV.

20 — See Article 191 (1) and (2) of the EC Treaty as amended by the Treaty on European Union.

21 — See Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 15.

would obliterate the distinction between directives and regulations. To recognize that even the provisions of a directive may be directly enforceable, in the exceptional case where they have not been correctly transposed, in no way affects the obligation of Member States to take all measures necessary to implement them; while regulations, being directly applicable, do not normally require implementation. Moreover, a directive, as we have seen, will produce legal effects only after the period which it lays down for its implementation has expired. Regulations and directives will remain different instruments, appropriate in different situations and achieving their aims by different means, even if it is recognized that in certain circumstances a directive which has not been correctly implemented may impose obligations on certain private entities.

26. More than 30 years ago in *Van Gend en Loos* [22] the Court recognized the specific character of Community law as a system of law which could not be reduced to an arrangement between States, as was often the case in traditional international law. After the developments in the Community legal system which have taken place since then, it may be necessary to recognize that in certain circumstances directives which have not been properly implemented may confer rights on individuals even as against private bodies. Perhaps a particular contrast could be drawn in this respect between the Community legal order and the international legal order.

27. It is a notorious weakness of international law that a treaty may not be enforceable in the courts of a State party to it, even if the treaty provisions themselves are apt to be applied by the courts. This regrettable result is especially likely to occur in so-called 'dualist' States which do not recognize any constitutional principle giving internal legal effect to treaties binding on them under international law. Thus it may often arise, in an international transaction between private parties, that a party to the transaction, intending that the transaction should be governed by a particular treaty, takes care to ascertain that the treaty has been ratified by the State of the other party, but finds when a dispute occurs that the treaty does not form part of that State's domestic law and will not be applied by that State's courts.

28. It is unacceptable that the weakness of international law should be reproduced in the Community legal order. As is often the

22 — Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.

case with a treaty, a directive is binding upon the State as to the result to be achieved, but leaves to the national authorities the choice of form and methods. But the role of directives in the EC Treaty has developed, as a result of the legislative practice of the Council, in a way which makes the language of Article 189 of the Treaty no longer appropriate. Notwithstanding the wording of the third paragraph of that article, it is no longer accurate to say that directives are binding only 'as to the result to be achieved'. The 'choice of form and methods' left to the Member States is often illusory because the discretion of the Member States in implementing directives is severely limited by the detailed, exhaustive nature of much of the legislation now emanating from the Council in the form of directives. Many of the provisions contained in directives are in consequence ideally suited to have direct effect.

29. There are sound reasons of principle for assigning direct effect to directives without any distinction based on the status of the defendant. It would be consistent with the need to ensure the effectiveness of Community law and its uniform application in all the Member States. 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. [23] 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 direct effect to directives. [24] 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. Distortions will obviously result, both between and within Member States, if directives are enforceable, for example, against employers or suppliers of goods or services in the public sector but not in the private sector. It is no answer to suggest that such distortions will be removed if the directive is properly implemented; [25] the situation which has to be envisaged is one in which the directive has not been properly implemented.

30. The possibility for the individual, under *Francovich*, [26] to claim damages against the

23 — See e. g. Case C-213/89 *Factortame* [1990] ECR I-2433 and Case C-271/91 *Marshall II*, judgment of 2 August 1993.

24 — See e. g. Manin, 'L'invocabilité des directives: quelques interrogations', *Revue Trimestrielle de Droit Européen*, 1990, p. 669; Emmert, 'Horizontale Drittwirkung von Richtlinien? Lieber ein Ende mit Schrecken als ein Schrecken ohne Ende!', in *Europäisches Wirtschafts- und Steuerrecht*, 1992, p. 56; Boch and Lane, 'European Community Law in national courts: a continuing contradiction', *Leiden Journal of International Law*, 1992, p. 171; Van Gerven, 'The horizontal effect of directive provisions revisited — the reality of catchwords', Institute of European Public Law, University of Hull, 1993; Emmert and Pereira de Azevedo, 'L'effet horizontal des directives. La jurisprudence de la CJCE: un bateau ivre?', *Revue Trimestrielle de Droit Européen*, 1993, p. 503; Mangas Martín, in Rodríguez Iglesias and Liñán Nogueras (eds.), *El derecho comunitario europeo y su aplicación judicial*, 1993, at 77-79.

25 — See *Marshall I*, paragraph 31.

26 — Joined Cases C-6/90 & C-9/90 *Francovich & Others* [1991] ECR I-5357.

Member State where a directive has not been correctly implemented is not, in my view, an adequate substitute for the direct enforcement of the directive. It would often require the plaintiff to bring two separate sets of legal proceedings, either simultaneously or successively, one against the private defendant and the other against the public authorities, which would hardly be compatible with the requirement of an effective remedy.

31. It cannot, I think, be objected that imposing obligations on individuals will prejudice legal certainty. On the contrary, perhaps the most significant feature of the existing case-law on this point is that it has generated uncertainty. [27] It has led, first, to a very broad interpretation of the notion of Member State so that directives can be enforced even against commercial enterprises in which there is a particular element of State participation or control, [28] notwithstanding that those enterprises have no responsibility for the default of the Member States, and notwithstanding that they might be in direct competition with private sector undertakings against which the same directives are not enforceable. And it has led to great uncertainty on the scope of national legislation, in view of the duty imposed on national courts to stretch to their limits the terms of national legislation so as to give effect to directives which have not been properly implemented. [29] Moreover, where national legislation is interpreted extensively so as to give effect to a directive, the result may well be to impose on individuals obligations which they would not have in the absence of the directive. Thus directives which have not been correctly implemented may already give rise to obligations for individuals. Against that background, it does not seem a valid criticism that enforcing directives directly against individuals would endanger legal certainty. On the contrary, it might well be conducive to greater legal certainty, and to a more coherent system, if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals.

32. Because the existing case-law already requires national courts in effect to enforce directives against individuals, by construing all provisions of national law, whether or not adopted for the purpose of implementing a directive and whether prior or subsequent to the directive, so as to give effect to the provisions of directives, it would not be a radical

27 — See the Opinion of Advocate General Van Gerven of 26 January 1993 in Case C-271/91 *Marshall II*, note 23 above, paragraph 12, and the authors cited at note 24 above.

28 — See Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313.

29 — See for an extreme example Case C-106/89 *Marleasing* [1990] ECR I-4135.

departure from the existing state of the law, in terms of its practical consequences, to assign horizontal direct effect to directives; such direct effect will arise only when it is impossible so to construe any provision of national law. The consequences of such a departure could in any event, if necessary, be cushioned by limiting the temporal effect of the Court's new ruling, for reasons similar to those adopted by the Court in *Defrenne II*, [30] so as to exclude or restrict its application to the past.

33. There are, of course, circumstances in which it will be clear that a directive which has not been implemented by a Member State will not impose obligations on individuals. Thus a directive cannot of itself give rise to any criminal liability. [31] Nor perhaps should a directive be construed as imposing obligations on individuals where that would confer rights on the defaulting State.

34. In general, however, it seems to me that directives whose very object is that rights should be conferred on individuals, and that obligations should be imposed on individuals, should be enforceable at the suit of the plaintiff unless the legitimate expectations of the defendant would thereby be defeated.

35. Even if that general proposition were not accepted, a case such as the present case would, if the period by which the implementing measures were to be applied had expired, provide strong arguments for securing the direct enforcement of directives. The subject of compulsory insurance for liability for motor accidents is one where there is an obvious public interest in individuals being able to rely on an effective system of insurance operating uniformly throughout the Community. Moreover, the undertakings offering motor insurance are, by virtue of legal requirements as to their financial standing, large corporations accustomed to operating in a highly regulated framework where freedom of contract has been drastically curtailed on account of the overriding public interest in ensuring that all drivers and all motor vehicles are adequately insured against liability towards third parties. Such companies can certainly be presumed to be familiar with the obligations which the Community directives manifestly intend should be imposed on them. Is it then tolerable for them to escape liability on the ground that a

30 — Above, note 18.

31 — See Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; see also my Opinion in Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraphs 24 and 25.

particular Member State was in default in transposing the directive in question? Just as the Court has recognized that a Member State cannot rely on its own default, so it seems clear that an insurance company, in such circumstances, should not be able to take advantage of the default of a Member State.

36. For the above reasons, if the question had called for an answer, I would have taken the view that the provisions in issue do create rights for individuals which the national courts must protect, even against bodies which are not emanations of the State. I repeat, however, that the question does not, in my view, need to be answered in this case.

Conclusion

37. Accordingly in my opinion it is sufficient to give the following answer to the questions referred by the national court:

Before the date of 31 December 1988 laid down by Article 5 (2) of the Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, the provisions of that directive did not create rights for individuals which the national courts must protect.