A perhaps more equitable result would have been to permit the defence, subject to terms that required the transfer back of the endowment policy, thus improving the bank's chances of eventual recovery against the former husband. The lack of flexibility as regards remedies for undue influence has been problematic in the past (see, *e.g.*, *T.S.B.* v. *Camfield* [1995] 1 W.L.R. 430). Perhaps only legislation can provide a cure.

MIKA OLDHAM

COMMUNITY DIRECTIVES: EXPLAINING *CIA SECURITY*?

CASE C–443/98 *Unilever Italia* v. *Central Food* (judgment of 26 September 2000) concerned a dispute between two private undertakings over a contract for the supply of olive oil. Central Food refused to accept delivery because the oil did not comply with labelling requirements imposed by recent Italian legislation. Unilever claimed that the Italian rules were themselves governed by the provisions of Directive 83/189 [1983] O.J. L109/8. Under Article 8 of the Directive, member States must notify draft technical regulations to the Commission. In Case C–194/94 *CIA Security* [1996] ECR I–2201, the ECJ held that breach of this obligation rendered the relevant technical regulations inapplicable, and thus unenforceable before the national courts, even in a dispute between two private parties based on domestic rules prohibiting unfair trading. Italy had notified its draft labelling rules to the Commission as required by Article 8, but nevertheless continued to enact those proposals into law contrary to the standstill obligations contained in Article 9. Unilever argued that the principle in *CIA Security* should extend also to Article 9, obliging Central Food to accept delivery in accordance with its contractual duties.

On an Article 234 reference, the ECJ held that breach by a member State of either the duty to notify or the standstill provisions constituted a "substantial procedural defect" which rendered the relevant technical regulations inapplicable. Departing from the advice of Advocate General Jacobs, the Court further asserted that this legal sanction could be invoked in civil proceedings between private parties concerning their contractual rights, especially since application of the Italian labelling rules would hinder the marketing of olive oil by Unilever and thus frustrate the free movement aims of the Directive. How was this conclusion to be reconciled with the rule that directives cannot of themselves impose obligations upon, and cannot be relied on

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against, private individuals (Case C–91/92 *Faccini Dori* [1994] ECR I–3325)? The ECJ reasoned thus. Unlike the measures at issue in cases such as *Dori*, Directive 83/189 does not in any way define the substantive scope of the legal rules on the basis of which the national court must decide the case before it, and creates neither rights nor obligations for individuals. A breach of Article 8 or 9 simply renders the offending technical regulations inapplicable in so far as they hinder the marketing of a non-compliant product, and regardless of the vertical or horizontal nature of the specific dispute before the national court.

CIA Security and *Unilever* carve out a bold exception to the *Dori* rule. In the event of conflict between an "ordinary" directive and national law, the doctrine of supremacy ensures that the Community norm prevails—but only if triggered by the principle of direct effect and therefore provided that the provision in question will not impose novel obligations upon private individuals. In the event of conflict between Directive 83/189 and national rules, the imperative of supremacy again ensures that the offending domestic provisions are disapplied—but this time, the requisite trigger lies in the member State's substantial procedural defect, and free from any prohibition against affecting the legal position of private parties. By this means, *Unilever* explains why the citizen can appear to rely on a breach of Directive 83/189 against not only the defaulting member State but also another private individual: there is no question of recognising an unauthorised pattern of horizontal enforcement when the traditional framework of direct effect has just been excluded from consideration, and replaced by an alternative conceptual perspective for understanding the process by which directives produce independent legal results within the domestic legal orders.

This explanation is open to criticism.

First, was the ECJ right in its initial supposition that Directive 83/189 is essentially different from other directives? True: the Directive does not provide a traditional template for the transposition into the national legal orders of a static regulatory code aimed at governing relations between individuals, being more concerned with the dynamic legislative and administrative conduct of the member State *vis-à-vis* other Community institutions. To that extent true also: the black letter of the Directive does not define the substantive legal rules for determining the dispute at hand and does not in that sense seek to create rights or obligations for individuals. Yet the very consequence of rendering offending national regulations inapplicable is precisely to transform the Directive into a measure which determines the substantive legal rules applicable to

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the case and whose effect is precisely to create rights and obligations for the relevant protagonists, *e.g.*, to the extent that Unilever could enforce entitlements and Central Foods would be bound by duties not recognised as such under existing Italian law. By reasoning forwards from the skeletal text of the Directive rather than backwards from the ultimate outcome of its own judgment, the Court escapes having to acknowledge the otherwise clear equivalence which exists between Directive 83/189 and the "ordinary" measures contemplated by *Dori*, and thus avoids having to address the otherwise compelling case for saying that Directive 83/189 should be governed by the same principles of and limits to direct effect as propounded in that judgment.

Secondly, even accepting that the ECJ has chosen to describe the legal effects of Directive 83/189 through the medium of "substantial procedural defects" rather than the more familiar principles of direct effect, questions still remain about whether this provides convincing grounds upon which to distinguish *CIA/Unilever* from the treatment of cases such as *Dori*. For example, the Court makes no attempt to explain why a substantial procedural defect (non-notification or enactment of technical regulations in breach of Directive 83/189) should be treated any differently from a substantial substantive defect (failure to implement or to implement correctly the provisions of any binding Community directive). It is far from self-evident that there is any necessary distinction between these two situations in terms of, *e.g.*, the culpability of the member State, the potential threat to the attainment of Treaty policy objectives, or the scale of third party interest invested in the factual scenario which falls under the shadow of the relevant legislative framework.

As it stands, the outcome in both *CIA* and *Unilever* was that a private individual suffered the consequences of the member State's failure to comply with the terms of a Community directive. To describe this outcome in the novel terms of a "substantial procedural defect" and consequent "sanction of inapplicability" is to dress the operation of judicial policy in the garb of logical exigency. The Court has opted to exempt Directive 83/189 from the normal principles which apply to its designated category of legislative instrument, and adopted an analysis which expands the possibilities for domestic enforcement beyond those one would expect in cases where the member State has failed to comply with its obligations under Article 249 EC. Indeed, the Court's reasoning in *Unilever* operates, in effect, to alter the underlying legislative nature of Directive 83/189: it becomes less like a directive within the terms of Article 249 EC, and more akin to a regulation in its

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ability to produce binding legal effects between private parties independently of implementation by the member State. This might seem a little ironic, given that one of the grounds relied on by the ECJ to resist the possibility of full horizontal direct effect for directives is its reluctance to fashion some hybrid species of legislative act which finds no firm legal parentage in the Treaty. Moreover, the odd result of the Court's approach in *Unilever* is that a measure (such as Directive 83/189) which is intended to govern inter-institutional relations between member State and Commission can legitimately produce binding effects for the legal position of third parties, whilst a measure (such as the Doorstep Selling Directive) which is specifically intended to govern relations between private individuals is prohibited from having any such consequences—surely the opposite of what a coherent legal system should seek to achieve.

Finally, the ECJ's explanation for the relationship between *CIA/Unilever* and *Dori* does nothing to resolve continuing discomfort over the status of other judgments which demonstrate the potential for un- or incorrectly implemented directives to impose novel obligations on or affect the interests of private parties, and thus raise similar concerns about the full integrity of the *Dori* rule (*e.g.* Case C–77/97 *Smithkline Beecham* [1999] ECR I–431; Case C–441/93 *Pafitis* [1996] ECR I–1347; *cf.* M. Dougan, (2000) 59 C.L.J. 586; also M. Lenz, D.S. Tynes, L. Young, (2000) 25 E.L.Rev. 509). Indeed, by offering an analysis so closely tied to the specific provisions of Directive 83/189, the ECJ in *Unilever* is perhaps hinting that the search for any single theory which seeks to present these judgments as a coherent juridicial phenomenon will prove ultimately to be a vain task.

MICHAEL DOUGAN

GERMAN CONSTITUTIONAL COURT BOWS TO EUROPE

THE relationship between national legal orders and Community law is one of the most difficult problems of European legal integration. In an order of 7 June 2000 (2 BvL 1/97, text at <*http://www.bverfg.de*>, English translation in (2000) 21 H.R.L.J. 251), the German Federal Constitutional Court (FCC) had to address one aspect of this problem, namely the question to what extent national courts are competent to review Community legislation by reference to the standards of national constitutions. While the order first and

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