Central and East European Moot Court Competition 2014

Organised by:

Sponsored by:

C L I F F O R D

C H A N C E

25th– 28th April 2014

In co-operation with:
Faculty of Law and Administration
University of Warsaw

SUPPLEMENTARY BACKGROUND READING

TABLE OF CONTENTS: SUPPLEMENTARY BACKGROUND READING

A.	*BACKGROUND ACADEMIC READING*	*Page No*
1	S. Weatherill, 'Cases & Materials on EU Law' (8th ed), OUP, 2007, (Extracts): The Direct Effect of Directives	1-20
2	S. Weatherill, 'Cases & Materials on EU Law' (8th ed), OUP, 2007, (Extracts): Proportionality	21-26
4	J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009, Chapter 5: Principles of direct applicability and direct effects	27-45
5	J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009, Chapter 6: General Principles of law	46-67

Cases and Materials on EU Law (8th Edition)

Stephen Weatherill

OUP 2007

(Extracts) The Direct Effect of Directives

SECTION 1: ESTABLISHING THE PRINCIPLE

The most difficult area relating to 'direct effect' arises in the application of the notion to EC *Directives.* Although the rest of this Chapter concentrates on this area, it is important not to develop an inflated notion of the importance of the problem of the direct effect of Directives. Directives are after all only one source of Community law. However, the issue deserves examination in some depth, not least because Directives play a major role in elaborating the detailed scope of Community policy-making in respect of which the Treaty provides a mere framework. Moreover, Directives are a rather peculiar type of act - Community law but implemented at national level through national legal procedures. An examination of this area, then, should reveal much about the general problem of the interrelation of national law with the Community legal order.

The starting point is Article 249 EC, formerly Article 189, set out at p.30. This suggests that a Directive, in contrast to a Regulation, would not be directly effective. Regulations are directly applicable, and if they meet the *Van Gend en Loos* (Case 26/62) test for direct effect they are directly effective too. They are law in the Member States (direct applicability) and they may confer legally enforceable rights on individuals (direct effect). Directives, in marked contrast, are clearly dependent on implementation by each State, according to Article 249. When made by the Community, they are not designed to be law in that form at national level. Nor are they designed directly to affect the individual. (The same is true of the European framework law, envisaged by Article 1-33 of the Treaty establishing a Constitution as the functional successor to the Directive, p.34 above.) Yet in *Van Duyn* (Case 41/74), at p.114 above, the Court held that a Directive might be relied on by an individual before a national court. In the next case, *Pubblico Ministero* v *Ratti* (Case 148/78), the European Court explains how, when and why Directives can produce direct effects (or, at least, effects analogous thereto) at national level.

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

Directive 73/173 required Member States to introduce into their domestic legal orders rules governing the packaging and labelling of solvents. This had to be done by December 1974. Italy had failed to implement the Directive and maintained in force a different national regime. Ratti produced his solvents in accordance with the Directive, not the Italian law. In 1978 he found himself the subject of criminal proceedings in Milan for non-compliance with Italian law. Could he rely on the Directive which Italy had left unimplemented?

[18] This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

[19] In this regard the settled case law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

[20] It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

[21] Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

[22] Consequently *a* Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

[23] It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.

[24] Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of

a directive a Member State may not apply its internal law - even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

NOTE: Directive 77/728 applied a similar regime to varnishes. But here Ratti had jumped the gun. The deadline for implementation was November 1979. Yet in 1978 his varnishes were already being made according to the Directive, not Italian law. In the criminal prosecution for breach of Italian law he sought to rely on this Directive too. He argued that he had a legitimate expectation that compliance with the Directive prior to its deadline for implementation would be permissible:

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

[43] It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive - and in particular Article 9 thereof - will be able to have the effects described in the answer to the first question.

[44] Until that date is reached the Member States remain free in that field.

[45] If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

[46] In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation.

[47] Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

NOTE: A small indentation into the Court's insistence that the expiry of the period prescribed for a Directive's implementation is the vital trigger for its relevance in law before national courts was made in Case C-129/96 *Inter-Environnement Wallonie ASBL* v *Region Wallone* [1997] ECR I-7411. In advance of the deadline, Member States are obliged 'to refrain ... from adopting measures liable seriously to compromise the result prescribed' by the Directive. A violation was established in Case C-14/02 *ATRAL* [2003] ECR 1-4431. In normal circumstances, however, it is the expiry of the prescribed deadline which converts an unimplemented (and sufficiently unconditional) Directive into a provision on which an individual may rely before a national court.

• QUESTION

Why did the European Court decide to uphold Ratti's ability to rely on the unimplemented 1973 solvents Directive in the face of the apparently conflicting wording of the Treaty (Article 189, now 249)? One may return to Judge Mancini for one explanation:

F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595

(Footnotes omitted.)

3. Costa v *Enel* may be therefore regarded as a sequel of *Van Gend en Loos.* It is not the only sequel, however. Eleven years after Von *Gend en Loos,* the Court took in *Van Duyn* v *Home Office* a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos.* In order to appreciate fully the scope of this development it should be borne in mind that while the principal subjects governed by Regulations are agriculture, transport, customs and the social security of migrant workers, Community authorities resort to Directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. Plain cooking and haute cuisine, in other words. The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of Directives.

Making Directives immediately enforceable poses, however, a formidable problem. Unlike Regulations and the Treaty provisions dealt with by *Van Gend en Loos,* Directives resemble international treaties, in so far as they are binding *only* on the States and *only* as to the result to be achieved. It is understandable therefore that, whereas the *Van Gend en Loos* doctrine established itself within a relatively short time, its extension to Directives met with bitter opposition in many quarters. For example, the French Conse/7 *d'Etat* and the German *Bundesfinanzhof* bluntly refused to abide by it and Professor

Rasmussen, in a most un-Danish fit of temper, went so far as to condemn it as a case of 'revolting judicial behaviour'.

Understandable criticism is not necessarily justifiable. It is mistaken to believe that in attributing direct effect to Directives not yet complied with by the Member States, the Court was only guided by political considerations, such as the intention of by-passing the States in a strategic area of law-making. Non-compliance with Directives is the most typical and most frequent form of Member State infraction; moreover, the Community authorities often turn a blind eye to it and, even when the Commission institutes proceedings against the defaulting State under Article 169 of the Treaty, the Court cannot impose any penalty on that State. [See now Article 228 EC, a Maastricht innovation, p.110 above.] This gives the Directives a dangerously elastic quality: Italy, Greece or Belgium may agree to accept the enactment of a Directive with which it is uncomfortable knowing that the price to pay for possible failure to transpose it is non-existent or minimal.

Given these circumstances, it is sometimes submitted that the *Van Duyn* doctrine was essentially concerned with assuring respect for the rule of law. The Court's main purpose, in other words, was 'to ensure that neither level of government can rely upon its malfeasance - the Member State's failure to comply, the Community's failure or even inability to enforce compliance', with a view to frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights, indeed, 'if a Court is forced to condone wholesale violation of a norm, that norm can no longer be termed law'; nobody will deny that 'Directives are intended to have the force of law under the Treaty'.

Doubtless, in arriving at its judgment in *Van Duyn*, the Court may also have considered that by reducing the advantages Member States derived from non-compliance, its judgment would have strengthened the 'federal' reach of the Community power to legislate and it may even have welcomed such a consequence. But does that warrant the revolt staged by the *Conseil d'Etat* or the *Bundesfinanzhof?* The present author doubts it; and so did the German Constitutional Court, which sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn.* The wound, one might say, is healed and the scars it has left are scarcely visible.

• QUESTION

Do you agree with Mancini that the Court's work in this area is 'essentially concerned with assuring respect for the rule of law'? See also N. Green, 'Directives, Equity and the Protection of Individual Rights' (1984) 9 EL Rev 295.

NOTE: Difficult constitutional questions arise at Community level and at national level in relation to the direct effect of Directives. You will quickly notice that many of the issues hav$_c$ arisen in the context of cases about sex discrimination. This has happened because equality between the sexes constitutes an area of Community competence which is given shape by ; string of important Directives, often inadequately implemented at national level.

SECTION 2: CURTAILING THE PRINCIPLE

The next case allowed the Court to refine its approach to the direct effect of Directives.

***Marshall* v *Southampton Area Health Authority* (Case 152/84)**

[1986] ECR723, [1986] 1 CMLR 688, Court of Justice of the European Communities

Ms Marshall was dismissed by her employers, the Health Authority, when she reached the age of 62. A man would not have been dismissed at that age. This ***was*** discrimination on grounds of sex. But was there a remedy in law? Apparently not under the UK's Sex Discrimination Act 1975, because of a provision excluding discrimination arising out of treatment in relation to retirement. Directive 76/207 requiring equal treatment between the sexes, *did* appear to envisage a legal remedy for such discrimination, but that Directive had not been implemented in the UK even though the deadline was past. So could Ms Marshall base a claim on the unimplemented Community Directive before an English court? The European Court was asked this question in a preliminary reference by the Court of Appeal

The European Court first held that Ms Marshall's situation was an instance of discrimination on grounds of sex contrary to the Directive. It continued:

[39] Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5(1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.

[40] The appellant and the Commission consider that that question must be answered in the affirmative. They contend

in particular, with regard to Articles 2(1) and 5(1) of Directive No 76/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.

[41] In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von* Co/son *and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.

[42] The Commission is of the opinion that the provisions of Article 5(1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. They may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.

[43] The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and hot against a Member State qua employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

[44] With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the government's central administration and its employees are not regarded as civil servants.

[45] Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.

[46] It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 Becter v *Finanzamt Munster-lnnenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

[47] That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

[48] With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that 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. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

[49] In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[50] It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), is a public authority.

[51] The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.

[52] Finally, with regard to the question whether the provision contained in Article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

[53] It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.

[54] With regard, in the first place, to the reservation contained in Article 1 (2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *rations materiae*, it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive No 76/207 provided for in Article 2 thereof are not relevant to this case.

[55] It follows that Article 5 of the Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

[56] Consequently, the answer to the second question must be that Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

NOTES

1. Ms Marshall was able to rely on the Directive because she was employed by the State. Her subsequent quest for compensation took her back to the European Court, where it was made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy (Case C-271/91 [19931 ECR 1-4367). However, had she been employed by a private firm she would have been unable to rely on the direct effect of the Directive. So, as far as direct effect is concerned, there are requirements which always apply - those explained above in *Van Gend en Loos* (Case 26/62) (p. 114). But for Directives there are extra requirements: first, that the implementation date has passed; and, second, that the State is the party against which enforcement is claimed. Directives may be vertically directly effective, but not horizontally directly effective.

2. In rejecting the horizontal direct effect of Directives, the Court in fact made a choice between competing rationales for the direct effect of Directives. In its early decisions the Court laid emphasis on the need to extend direct effect in this area in order to secure the 'useful effect' of measures left unimplemented by defaulting States. Consider para 12 of *Van Duyn* (Case 41/74) (p.114 above); and, for example, in *Nederlandse Ondernemingen* (Case 51/76) [1977] ECR 113, the Court observed (at para 23) that:

where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

This dictum came in the context of a case against the State, but this logic would lead a bold court to hold an unimplemented Directive enforceable against a private party too, in order to improve its useful effect. However, in *Ratti* (Case 148/78) (p.133 above) and in *Marshall* (Case 152/84) (p.136 above), the Court appears to switch its stance away from the idea of 'useful effect' to a type of 'estoppel' as the legal rationale for holding Directives capable of

direct effect. See para 49 of the judgment in *Marshall* (Case 152/84).

3. The Court's curtailment of the impact of Directives before national courts may also be seen as a manifestation of judicial minimalism, mentioned at p.28 above. The realist would examine the awareness of the Court that in this area it risks assaulting national sensitivities if it insists on deepening the impact of Community law in the national legal order. The next case was mentioned in passing by Judge Mancini (p.135 above), but the decision deserves further attention.

Minister* of the *Interior* v *Cohn Bendit

[1980] 1 CMLR543, Conseil d'Etat

The matter concerned the exclusion from France of Cohn Bendit, a noted political radical (who subsequently became a Member of the European Parliament!). He relied on Community rules governing free movement to challenge the exclusion. The Conseil d'Etat, the highest court in France dealing with administrative law, addressed itself to the utility of a Directive in Cohn Bendit's action before the French courts.

According to Article 56 of the Treaty instituting the European Economic Community of 25 March 1957, no requirement of which empowers an organ of the European Communities to issue, in matters of *ordre public*, regulations which are directly applicable in the member-States, the co-ordination of statute and of subordinate legislation *(dispositions legislatives et reglementaires)* 'providing for special treatment for foreign nationals on grounds of public policy *(ordre public)*, public security or public health' shall be the subject of Council directives, enacted on a proposal from the Commission and after consultation with the European Assembly. It follows clearly from Article 189 of the Treaty of 25 March 1957 that while these directives bind the member-States 'as to the result to be achieved' and while, to attain the aims set out in them, the national authorities are required to adapt the statute law and subordinate legislation and administrative practice of the member-States to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-States, directives may not be invoked by the nationals of such States in support of an action brought against an individual administrative act. It follows that M. Cohn-Bendit could not effectively maintain, in requesting the Tribunal Administratif of Paris to annul the decision of the Minister of the Interior of 2 February 1976, that that decision infringed the provisions of the directive enacted on 25 February 1964 by the Council of the European Communities with a view to coordinating, in the circumstances laid down in Article 56 of the EEC Treaty, special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Therefore, in the absence of any dispute on the legality of the administrative measures taken by the French Government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made subject to the interpretation of the directive of 25 February 1964. Consequently, without it being necessary to examine the grounds of the appeal, the Minister of the Interior substantiates his argument that the Tribunal Administratif of Paris was wrong when in its judgment under appeal of 21 December 1977 it referred to the Court of Justice of the European Communities questions relating to the interpretation of that directive and stayed proceedings until the decision of the European Court. In the circumstances the case should be referred back to the Tribunal Administratif of Paris to decide as may be the action of M. Cohn-Bendit.

NOTE: See, similarly, the *Bundesftnanzhof* (German federal tax court) in *VAT Directives* [1982] 1 CMLR 527.

As D. Anderson observed in the wake of the Court's rejection in *Marshall* (Case 152/ 84) of the enforceability of unimplemented Directives against private parties, '[t]he present concern of the Court is to consolidate the advances of the 1970s rather than face the legal complexities and political risks of attempting to extend the doctrine [of direct effect] further' *(Boston College International & Comparative Law Review* (1988) XI 91, 100). This implies that the Court might have been expected to return to the matter. This proved correct. In 1993 and 1994 three Advocates-General pressed the Court to reconsider its rejection of the horizontal direct effect of Directives: Van Gerven in *'Marshall 2'* (Case C-271/91) [1993] ECR 1-4367; Jacobs in *Vaneetveld* v *SA Le Foyer* (Case C-316/93) [1994] ECR 1-763 and Lenz in *Paola Faccini Dori* v *Recreb Sri* (Case C-91/92) [1994] ECR 1-3325. Advocate-General Lenz insisted that the Citizen of the Union was entitled to expect equality before the law throughout the territory of the Union and observed that, in the absence of horizontal direct effect, such equality was compromised by State failure to implement Directives. Advocate-General Jacobs thought that the effectiveness principle militated against drawing distinctions based on the status of a defendant. All three believed that the pursuit of coherence in the Community legal order dictated acceptance of the horizontal direct effect of Directives. Only in the third of these cases, *Faccini Dori* v *Recreb*, was the European Court unable to avoid addressing the issue directly.

Paolo *Faccini Dori* v *Recreb Sri* (Case C-91/92)

[1994] ECR I-3325, Court of Justice of the European Communities

Ms Dori had concluded a contract at Milan Railway Station to buy an English language correspondence course. By virtue of Directive 85/577, which harmonizes laws governing the protection of consumers in respect of contracts negotiated away from business premises, the so-called 'Doorstep Selling Directive', she ought to have been entitled to a 'cooling-off period of at least seven days within which she could exercise a right to withdraw from the contract. However, she found herself unable to exercise that right under Italian law because Italy had not implemented the Directive. She therefore sought to rely on the Directive to defeat the claim brought against her by the private party with which she had contracted. The ruling in *Marshall* (Case 152/84) appeared to preclude reliance on the Directive and the Court, despite the promptings of Advocate-General Lenz, *refused* to overrule *Marshal]*. It maintained that Directives are incapable of horizontal direct effect.

[23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights, on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker* v *Finarizamt Munster-lnnenstadt* [1982] ECR 53).

[24] The effect of extending that case law to the sphere of relations between individuals 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.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

NOTE: Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 - now 249 - EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p.156 below on 'indirect' effect and p.164 on a claim against the defaulting State), it nevertheless refused to allow a Directive to exert direct effect in relations between private individuals. In rulings subsequent to *Dori,* the Court has repeated its rejection of the horizontal direct effect of Directives: e.g., Case *C-192/94 El Corte Ingles v Cristma Blasquez Rivera* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 139 above) may have prompted the European Court's caution in *Marshall,* so too national judicial anxieties, expressed with particular force by the the *Bundesverfassungsgericht,* about Treaty amendment in the guise of judicial interpretation may have prompted the European Court in *Dori* to emblazon its fidelity to the text of the EC Treaty by declining to extend Community legislative competence to include the enactment of obligations for individuals with immediate effect. Chapter 21 will examine this material in depth.

SECTION 3: THE SCOPE OF THE PRINCIPLE: THE STATE

Whatever one's view of the Court's motivations in ruling against the horizontal direct effect of Directives in *Marshall* (Case 152/84), confirmed in *Don* (Case C-91/92) and subsequently, the decision left many questions unanswered. First, what is the 'State'? The more widely this is interpreted, the more impact the unimplemented Directive will have.

Foster v British Gas (Case C-188/89)

[1990] ECR 1-3133, Court of Justice of the European Communities

The applicant wished to rely on the Equal Treatment Directive 76/207 against her employer before English courts. She and other applicants had been compulsorily retired at an age earlier than male employees. This raised the familiar issue of the enforceability of Directives before national courts where national law is inadequate. The Court examined the nature of the defendant (the British Gas Corporation: BGC).

[3] By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly

of the supply of gas.

[4] The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

[5] The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.

[6] The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.

It then proceeded to explain the legal approach to defining the 'State' for these purposes:

[13] Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

[14] The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.

[15] It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

The Court then disposed of the question referred:

[16] As the Court has consistently held (see the judgment of 19 January 1982 in Case 8/81, *Becker* v *Hauptzollamt Munster-lnnenstadt,* [1982] ECR 53 at paragraphs 23 to 25), where 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. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[18] On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

[19] The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments of 19 January 1982 in Case 8/81, *Becker,* cited above, and of 22 February 1990 in Case C-22188, *ECSC* v *Acciaierie e Ferriere Busseni (in liquidation)),* local or regional authorities (judgment of 22 June 1989 in Case 103/88, *Fratelli Costanzo* v *Comune di Milano),* constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986 in Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651), and public authorities providing public health services (judgment of 26 February 1986 in Case 152/84, *Marshall,* cited above).

[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between

individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

[21] With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment of 26 February 1986 in Case 152/84 *(Marshall,* cited above, at paragraph 52), the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.

[22] The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

NOTE: The case has been widely commented upon; see, e.g., N. Grief, (1991) 16 EL Rev 136; E. Szyszczak, (1990) 27 CML Rev 859. For a full examination of the policy issues, see D. Curtin, The Province of Government', (1990) 15 EL Rev 195. For another case discussing the reach of unimplemented Directives in this vein see Case C-157/02, *Rieser International Transport* (judgment of 5 February 2004).

• QUESTION

The case arose before British Gas was 'privatized' under the Gas Act 1986 (sold to the private sector). What difference would this sale make to the application of the Court's test?

NOTE: The notion of the 'State' embraces local authorities.

***Fratelli Costanzo* v *Milano* (Case 103/88)**

[1989] ECR 1839, Court of Justice of the European Communities

The case arose out of the alleged failure of the municipal authorities in Milan to respect *inter alia* a Community Directive in awarding contracts for the construction of a football stadium for the 1990 World Cup. Could a disappointed contractor rely on the unimplemented Directive before Italian courts against the municipal authorities? The matter reached the European Court by way of a preliminary reference.

[28] In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

[29] In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Munster-lnnenstadt* [1982] ECR 53, at p.71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Area Health Authority* [1986] ECR 723, at p.748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

[30] It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

[31] It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

[32] With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

SECTION 4: 'INCIDENTAL EFFECT'

It has been shown that Directives are incapable of application against private individuals before national courts. It is only when the State has fulfilled its Treaty obligation of implementation pursuant to Articles 10 and 249 EC that the Directive, duly transformed, becomes 'live' for the purposes of imposing obligations on private parties.

But this is not to say that an unimplemented Directive will never exert an effect before a national court that is prejudicial to a private party. Without abandoning its stance against horizontal direct effect, the Court has nevertheless chosen to recognise circumstances in which the State's default may incidentally affect the position of a private individual.

Case C-201/94 *R* v *The Medicines Control Agency, ex. parte Smith & Nephew Pharmaceuticals Ltd* and *Primecrown Ltd* v *The Medicine Control Agency* [1996] ECR 1-5819 concerned Article 3 of Directive 65/65. This provided that no proprietary medicinal product could be placed on the market in a Member State unless a prior authorisation had been issued by the competent authority of that Member State - the Medicines Control Agency (MCA) in the UK. The UK's Medicines Control Agency (MCA) had issued to Primecrown a licence to import a proprietary medicinal product of Belgian origin bearing the same name, and manufactured under an agreement with the same (American) licensor, as a product for which Smith & Nephew already held a marketing authorisation in the United Kingdom. But the MCA decided it was in error and it withdrew the authorisation. Both Primecrown and Smith & Nephew initiated proceedings before the English courts and, in a preliminary reference, the European Court was asked to provide an interpretation of the Directive's rules governing authorisation. But it was also asked whether Smith & Nephew, as the holder of the original authorisation issued under the normal procedure referred to in Directive 65/65, could rely on the Directive in proceedings before a national court in which it contested the validity of a marketing authorisation granted by a competent public authority to one of its competitors. The Court decided that it could. The consequence is that Primecrown's position could be detrimentally affected by a competitor's reliance on a Directive in proceedings against the public authorities. True, Smith & Nephew did not rely on the Directive in an action against Primecrown. This is *not* horizontal direct effect of the type painstakingly excluded by the Court in Don (Case C-91/92, p.141 above). But it is a case in which the application of a Directive by a national court *incidentally* affected the legal position of a private party.

The Court has developed this case law further. Without any direct challenge to its dogged resistance to the horizontal direct effect of Directives, it has nevertheless extended the *incidental* effect of Directives on private parties in national proceedings.

Council Directive 83/189/EEC provided for Member States to give advance notice to the Commission and other Member States of plans to introduce new product specifications. The amendments were consolidated in Directive 98/34 [1998] OJ L204/37, itself amended by Directive 98/48 [1998] OJ L217/18. The purpose of this notification system is to avoid the introduction of new measures having equivalent effect to quantitative restrictions on trade (and to supply the Commission with a possible basis for developing its harmonisation programme). It is an 'early warning system' (see Chapter 9 more generally on 'market management').

In the next case the Court decided that non-notification of a draft technical regulation (as defined by the Directive) affected the enforceability of that measure before the courts of the defaulting Member State.

***CIA Security International SA* v *Signalson SA and Securitel Sprl* (Case C-194/94)**

[1996] ECR 1-2201, Court of Justice of the European Communities

Signalson and Securitel sought a court order from a Belgian court requiring that their competitor CIA Security cease marketing a burglar alarm. The alarm was not compatible with Belgian technical standards. But the Belgian technical standards had not been notified to the Commission, as was required by Directive 83/189. Did this State default have any effect in the national proceedings involving two private parties? The Directive did not address the matter. This did not deter the Court.

[42] It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 *Becker* [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357).

[43] The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

[44] That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before

national courts.

[45] It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

[46] The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

[47] The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

[48] For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

[49] That interpretation of the directive is in accordance with the judgment given in Case 380/87 *Enichern Base and Others* v *Cornune di Cinisello Balsamo* [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

[50] In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

NOTE: The *effectiveness* rationale contained in para 48 is remarkably far-reaching. It was also encountered in *Ratti* (Case 148/78 para 21, p.134 above)). But the reasoning in *Ratti* was treated more circumspectly by the Court subsequently in *Marshall* (Case 152/84, p. 136), and the approach taken in *CIA Security* has also been curtailed in the light of the salutary experience provided by litigation.

***Johannes Martinus Lemmens* (Case C-226/97)**

[1998] ECR 1-3711, Court of Justice of the European Communities

Lemmens was charged with driving while under the influence of alcohol. He argued that the breathalyser was made according to a technical standard that had not been notified to the Commission and that accordingly, following *CIA Security*, it was incompatible with Community law to rely on such evidence before national (criminal) courts. Para 12 of the judgment records Mr Lemmens' disingenuous but ingenious idea:

It is apparent from the order for reference that, in the course of the criminal proceedings instituted against him, Mr Lemmens said 1 understand from the press that there are difficulties regarding the breath-analysis apparatus. I maintain that this apparatus has not been notified to Brussels and wonder what the consequences of this could be for my case'.

The Court concluded that the Dutch Regulation governing breathalyser kits constituted a technical regulation which should, prior to its adoption, have been notified to the Commission in accordance with Article 8 of the Directive. But with what consequence?

[32] . . . it should be noted that, in paragraph 40 of its judgment in *CIA Security International*, cited above, the Court emphasised that the Directive is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest.

[33] In paragraphs 48 and 54 of that judgment, the Court pointed out that the obligation to notify is essential for achieving such Community control and went on to State that the effectiveness of such control will be that much greater if the Directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable, and thus unenforceable against individuals.

[34] In criminal proceedings such as those in the main action, the regulations applied to the accused are those which, on the one hand, prohibit and penalise driving while under the influence of alcohol and, on the other, require a driver to exhale his breath into an apparatus designed to measure the alcohol content, the result of that test constituting evidence in criminal proceedings. Such regulations differ from those which, not having been notified to the Commission in accordance with the Directive, are unenforceable against individuals.

[35] While failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified.

[36] The use of the product by the public authorities, in a case such as this, is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.

[37] The answer to the first question must therefore be that the Directive is to be interpreted as meaning that breach of the obligation imposed by Article 8 thereof to notify a technical regulation on breath-analysis apparatus does not have the effect of making it impossible for evidence obtained by means of such apparatus, authorised in accordance with regulations which have not been notified, to be relied upon against an individual charged with driving while under the influence of alcohol.

Paragraph 35 of *Lemmens* provides a re-focusing of the test applied in *CIA Security*. Paragraph 36 constitutes a narrower reading of the *effectiveness* rationale. In the next case the Court explicitly adopts the reasoning advanced in *Lemmens* but accepts the application of the notification Directive in litigation between two contracting parties in which, at first glance, the State had no involvement.

***Unilever Italia SpA* v *Central Food SpA* (Case C-443/98)**

[2000] ECR I-7535, Court of Justice of the European Communities

Unilever had supplied Central Food with a quantity of virgin olive oil. Central Food rejected the goods on the basis that they were not labelled in accordance with a relevant Italian law. This law had been notified to the Commission but Italy had not observed the Directive's 'standstill' obligation, which required it to wait a defined period before bringing the law into force. The Court treated breach of the 'standstill' obligation as indistinguishable for these purposes from outright failure to notify (which was the nature of the default in both *CIA Security* and *Lemmens).* Unilever submitted that the law should not be applied and sued Central Food under the contract for the price of the goods.

[46] … in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

[47] That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

[48] Next, it must be borne in mind that, in *CIA Security*, the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.

[49] Thus, it follows from the case law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the

obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the *CIA Security* case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.

[50] Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.

[51] In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

[52] In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

NOTE: This is *not* horizontal direct effect. The Directive did not impose an obligation on Central Food. The contract with Unilever imposed the obligation. This seems to be the Court's point in para 51. But the invocation of the Directive completely changed the legal position that had appeared to prevail between the two parties under the contract. It transplanted the commercial risk.

Advocate-General Jacobs had argued vigorously in his Opinion in *Unilever that* legal certainty would be damaged by a finding that the notification Directive be relevant to the status of the contractual claim between private parties.

ADVOCATE-GENERAL JACOBS:

[99] . . . The fact that a Member State did not comply with the procedural requirements of the directive as such should not, in my view, entail detrimental effects for individuals.

[100] That is, first, because such effects would be difficult to justify in the light of the principle of legal certainty. For the day-to-day conduct of trade, technical regulations which apply to the sale of goods must be clearly and readily identifiable as enforceable or as unenforceable. Although the present dispute concerns a relatively small quantity of bottled olive oil of a value which may not affect the finances of either Unilever or Central Food to any drastic extent, it is easy to imagine an exactly comparable case involving highly perishable goods and sums of money which represent the difference between prosperity and ruin for one or other of the parties concerned. In order to avoid difficulties in his contractual relations, an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA Security*, to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive. The last element in particular might prove to be extremely difficult because of the lack of publicity of the procedure under the directive. There is no obligation on the Commission to publish the fact that a Member State has notified or failed to notify a given draft technical regulation. In respect of the standstill periods under Article 9 of the directive, there is no way for individuals to know that other Member States have triggered the six-month standstill period by delivering detailed opinions to the Commission. Similarly, the Commission is also not required to publish the fact that it has informed a Member State of intended or pending Community legislation.

[101] The second problem is possible injustice. If failure to notify were to render a technical regulation unenforceable in private proceedings an individual would lose a case in which such a regulation was in issue, not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour. The economic survival of a firm might be threatened merely for the sake of the effectiveness of a mechanism designed to control Member States' regulatory activities. That would be so independently of whether the technical regulation in question constituted an obstacle to trade, a measure with neutral effects on trade, or even a rule furthering trade. The only redress for a trader in such a situation would be to bring ex post a hazardous and costly action for damages against a Member State. Nor is there any reason for the other party to the proceedings to profit, entirely fortuitously, from a Member State's failure to comply with the directive.

[102] It follows, in my view, that the correct solution in proceedings between individuals is a substantive solution. The applicability of a technical regulation in proceedings between individuals should depend only on its compatibility with Article 30 [now 28: Chapter 11 of this book] of the Treaty. If in the present case Italian Law No 313 complies with Article

30, I can see no reason why Central Food, which understandably relied on the rules laid down in the Italian statute book, should lose the case before the national court. If, however, Italian Law No 313 infringes Article 30 then the national court should be obliged to set the Law aside on that ground.

[103] I accordingly conclude that as against an individual another individual should not be able to rely on a Member State's failure to comply with the requirements of Directive 83/189 in order to set aside a technical regulation.

NOTE: Plainly these anxieties did not move the Court in *Unilever*. It did not follow the Advocate-General and it did not limit the matter to resolution under Article 28 (ex 30) EC, concerning the free movement of goods. It accepted the incidental effect of the notification Directive on the contractual claim. This thrusts EC law of market integration deep into national contract law in so far as private compliance with technical standards is at stake. In the next case the Court nonetheless adopts an additional line of reasoning which may be capable of providing a basis for softening some of the harsh commercial uncertainty likely to flow from the principle that technical standards may be treated as unenforceable by national courts if the requirements of the notification Directive are not observed bv the State.

***Sapod Audic* v *Eco-Emballages SA* (Case C-159/00)**

[2002] ECR 1-5031, Court of Justice of the European Communities

[49] … it should be observed, first, that according to settled case law Directive 83/189 must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals (see, in particular, *CIA Security International*, paragraphs 48 and 54, and *Lemmens*, paragraph 33).

[50] Second, it should be borne in mind that according to the case law of the Court the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 83/189 may be-invoked in legal proceedings between individuals concerning, *inter alia*, contractual rights and duties (see *Unilever*, paragraph 49).

[51] Accordingly, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to apply a mark or label and, hence, as constituting a technical regulation within the meaning of Directive 83/189, it would be incumbent on that court to refuse to apply that provision in the main proceedings.

[52] It should, however, be observed that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the second paragraph of Article 4 of Decree No 92-377 as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found. However, those rules and principles may not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia*, Case 33/76 *Rewe* v *Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, paragraph 5, and Joined Cases C-52/99 and C-53/99 *Camorotto and Vignone* [2001] ECR 1-1395, paragraph 21).

NOTE: The principles of equivalence and effectiveness, mentioned in para 52, were examined above in Chapter 4, p.122 above. With reference to relevant national rules on remedies with which you are familiar, consider what they may mean in the context sketched by the Court in para 52 of *Sapod Audic*.

In conclusion, none of these decisions on 'incidental' effect overturns the Court's long-standing exclusion of the horizontal direct effect of Directives. After all in none of these cases did a Directive impose an obligation directly on a private party. However these decisions do demonstrate that the legal position of private parties may be prejudicially affected by the lurking presence of an unimplemented Directive of which they may be perfectly unaware.

• QUESTION

The Court's case law places a sharp distinction between the horizontal direct effect of Directives (which is not allowed) and the 'incidental' effect of Directives of private parties (which is allowed). Is this distinction fair?

SECTION 5: THE PRINCIPLE OF INDIRECT EFFECT, OR THE OBLIGATION OF 'CONFORM-

INTERPRETATION'

The previous section questioned the extent to which the rejected notion that Directives may exert horizontal direct effect can be rationally sealed off from the phenomenon of incidental effect. But however one chooses to categorize the horizontal direct effect/incidental effect case law, and however one defines the 'State' for the purposes of fixing the outer limits of 'vertical' direct effect (Case 152/84 *Marshall*, p.136 above), an unavoidable anomaly taints the law governing the scope of the direct effect of Directives. Consider the sex discrimination Directives. If a State has failed to implement a Directive properly, then, provided that the standard *Van Gend en Loos* (Case 26/62) 'test' for direct effect is met by the provision in question, a State employee can rely on the direct effect of the Directive (vertical direct effect). A private employee cannot (horizontal direct effect). So, in the UK, where Directive 76/207 on Equal Treatment of the Sexes was not properly implemented in time, Ms Marshall (above), a State employee, succeeded in relying on Community law, whereas Ms Duke *(Duke vGEC Reliance* [1988] 2WLR359, [1988] 1 All ER 626), who was making the same complaint, failed, for she happened to be a private sector employee.

The UK had made this point in *Marshall* (Case 152/84) as a reason for *withholding* direct effect, but its objections were swept aside by the Court in para 51 of the judgment (p.138 above). Yet the anomaly is real, even if the Court's refusal to permit a recalcitrant State to benefit from pointing it out is understandable. Submissions in Don (Case C-91/92, p.141 above) urged the Court to eliminate the anomaly by *extending* direct effect, but these were not successful.

The European Court's contribution to the resolution of this anomaly first began to take shape in *Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83) and *Harz* v*Deutsche Tradax* (Case 79/83). Mention is made of Case 14/83 in para 41 of the judgment in *Marshall* at p.137 above, but the Court's approach in the case deserves careful separate attention.

***Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83)**

[1984] ECR 1891, [1986] 2 CMLR 430, Court of Justice of the European Communities

The case was a preliminary reference from Germany, and concerned that fertile source of litigation, the Equal Treatment Directive 76/207. The issue was described by the Court as follows:

[2] Those questions were raised in the course of proceedings between two qualified social workers, Sabine von Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.

[3] The Arbeitsgehcht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for 'Vertrauens-schaden', namely the loss incurred by candidates who are victims of discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611 a(2) of the Burgerliches Gesetzbuch.

[4] Under that provision, in the event of discrimination regarding access to employment, the employer is liable for 'damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach [of the principle of equal treatment]'. That provision purports to implement Council Directive No 76/207.

[5] Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff von Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.

Von Colson's objection centred on Article 6 of the Directive:

[18] Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed

up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.

Was this adhered to in the German legal order? The Court's approach was markedly different from standard 'direct effect' analysis:

[22] It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

[23] Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

[24] In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

[25] The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Burgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.

[26] However, the Member States' obligation arising from *a* directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

[27] On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

[28] It should, however, be pointed out to the national court that although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

NOTE: J. Steiner, (1985) 101 LQR 491, observed that the decision marks 'a subtle but significant change of direction' in the European Court's approach to the enforceability of EEC Directives before national courts'. P. Morris, (1989) JBL 233, at p.241, suggested that 'if national judiciaries respond positively to this exhortation [in *Von Colson]* something approaching horizontal direct effect may be achieved by a circuitous route'. B. Fitzpatrick, (1989) 9 OJLS 336, at p.346, refers to *Von Colson* having established a principle of 'indirect effect' and suggests that 'it may effectively bridge the gap between vertical and horizontal direct effect'.

• QUESTION

To what extent do you think the *Von Colson* approach offers a route for resolving the anomalies of the horizontal/vertical direct effect distinction which emerges from the Court's ruling in *Marshall* (Case 152/84)?

NOTE: In the *Von Colson* (Case 14/83) judgment itself, one can pick out important contradictions in respect of the national court's task of 'conform-interpretation' (para 28). Compare the second sentence of para 26 with the more qualified statement in the concluding sentence of the Court's ruling in answer to the questions referred to above. The next two cases are both worthy of examination from the perspective of clarifying the ambit of *Von Colson* (Case 14/83).

Offic/er *van* Just/tie v *Kolpinghuis Nijmegen* (Case 80/86)

[1987] ECR 3969, Court of Justice of the European Communities

A criminal prosecution was brought against a cafe owner for stocking mineral water which was in fact simply fizzy tap water. The Dutch authorities sought to supplement the basis of the prosecution by relying on definitions of mineral water detrimental to the defendant which were contained in a Directive which had not been implemented in The Netherlands. A preliminary reference was made to the European Court.

The Court ruled that 'a national authority may not rely, as against an individual, upon a provision of a Directive whose necessary implementation in national law has not yet taken place'. It then turned to the third question referred to it:

[11] The third question is designed to ascertain how far the national court may or must take account of a directive as an aid to the interpretation of a rule of national law.

[12] As the Court stated in its judgment of 10 April 1984 in Case 14/83 *Von* Co/son and *Kamann* v Land *Nordrhein-Westfalen* [1984] ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

[13] However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled in its judgment of 11 June 1987 in Case 14/86 Pretore *di* So/6 v X [1987] ECR 2545 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

[14] The answer to the third question should therefore be that in applying its national legislation a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty, but a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

NOTE: The Court is anxious to emphasise the importance of preserving legal certainty and protecting reasonable expectations. See also Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705.

***Marleasing SA* v *La Comercial International de Alimentation SA* (Case C-106/89)**

[1990] ECR 1-4135, Court of Justice of the European Communities

The case arose out of a conflict between the Spanish Civil Code and Community Company Law Directive (68/151) which was unimplemented in Spain. The litigation was between private parties, which, following *Marshall* (Case 152/84), ruled out the direct effect of the Directive. The European Court explained the national court's duty of interpretation in the following terms:

[8]… [T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and

thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The obligation imposed on national courts in *Marleasing* (Case C-108/89) has a firmer feel than that in *Von Colson* (Case 14/83, p.152 above). See J. Stuyck and P. Wytinck, (1991) 28 CMLRev205.

The Court also confirmed the obligation of sympathetic interpretation that is cast on national courts by virtue of what was Article 5 and is now Article 10 EC post-Amsterdam in its ruling in *Paola Faccini Dori* (Case C-91/92). Even though Ms Dori was not able to rely directly on the unimplemented Directive in proceedings involving another private party (p.141 above), she was entitled to expect that the national court would not simply ignore the Directive in applying national law.

***Paola Faccini Dori* v *Recreb Sri* (Case C-91/92)**

[1994] ECR I-3325, Court of Justice of the European Communities

[26] It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8, and Case C-334/92 *Wagner Miret* v *Fonda de Garantia Salahal* [1993] ECR 1-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The logic of this reasoning leads to the conclusion that the Community law obligations pertaining to the absorption of a Directive into the national legal order are enduring, and do not come to an end on the Directive's transposition 'on paper' into national law. This is made clear in the next case.

***Marks and Spencer pic* v *Commissioners of Customs and Excise* (C-62/00)**

[2002] ECR 1-6325, Court of Justice of the European Communities

[24] … it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, *inter alia*, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 41). It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 *Marleasing* [1990] ECR 1-4135, paragraphs, and Case C-334/92 *Wagner Miret* [1993] ECR 1-6911, paragraph 20).

[25] Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 Prate/// *Costanzo* [1989] ECR 1839, paragraph 29; and Case C-319/97 *Kortas* [1999] ECR 1-3143, paragraph 21).

[26] Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full (see to that effect, in particular, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31, and Case C-214/98 *Commission* v Greece [2000] ECR 1-9601, paragraph 49).

[27] Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

[28] As the Advocate General noted in point 40 of his Opinion, it would be inconsistent with the Community legal

order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national authorities apply the national measures implementing the directive in a manner incompatible with it.

NOTE: The scope of the obligation to interpret national law in conformity with a Directive was taken a step further in the next case. However, the Court did not help to stabilize and clarify the State of the law by introducing textual anomalies into its ruling.

***Centrosteel Sri* v *Adipol GmbH* (Case C-456/98)**

[2000] ECR I-6007, Court of Justice of the European Communities

[15] It is true that, according to settled case law of the Court, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals (Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Facdni Don* v *Recreb* [1994] ECR I-3325, paragraph 20).

[16] However, it is also apparent from the case law of the Court (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8; Case C-334/92 *Wagner Miret* v Fondo de *Garantia Salarial* [1993] ECR 1-6911, paragraph 20; *Facdni* Dor/, paragraph 26; and Joined Cases C-240/98 to C-244/98 Oceano *Grupo Editorial* v *Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30) that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

[17] Where it is seised of a dispute falling within the scope of the Directive and arising from facts postdating the expiry of the period for transposing the Directive, the national court, in applying provisions of domestic law or settled domestic case law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive...

The reference in para 17 to the application of 'settled domestic case law' in conformity with the aims of the Directive is striking. However, this phrase is missing from the formal ruling.

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 precludes national legislation which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register. The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

NOTE: In its subsequent ruling in *AXA Royal Beige* (Case C-386/00 [2002] ECR1-2209) the Court referred explicitly to its own ruling in *Centrosteel* (Case C-456/98), but cited only paragraphs 15 and 16, not 17!

This peculiarity was not addressed directly by the Court in the next case, but the Court did take the opportunity to refer to *Centrosteel* and to revisit its view of the nature of the obligation imposed on national judges.

***Bernhard Pfeiffer* v *Deutsches Rotes Kreuz* (Joined Cases C-397/01 to C-403/01)**

Judgment of 5 October 2004, Court of Justice of the European Communities

The litigation, originating before German labour courts, concerned matters falling within the scope of Directive 89/391 on health and safety at work and Directive 93/ 104 on the organization of working time. After confirming its long-standing refusal to accept that Directives are capable of application in litigation before national courts exclusively involving private parties - that is, no horizontal direct effect -the Court insisted:

[111] It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

[112] That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret[1*993] ECR 1-6911, paragraph 20).

[113] Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von* Co/son *and Kamann,* paragraph 26; /War/easing, paragraph 8, and *Faccini* Dor/, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Oceano Grupo Editorial and Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-OOOO, paragraph 21).

[114] The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR 1-4791, paragraph 34).

[115] Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari* [Case C-131/97], paragraphs 49 and 50).

[116] In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

[117] In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrostee/[2000] ECR I-6007, paragraphs 16 and 17).

[118] In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, /War/easing, paragraphs 7 and 13).

[119] Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

The assertion in para 114 that the principle of conform-interpretation is 'inherent in the system of the Treaty' is strikingly bold. However, this cements a direct connection between this principle and the Court's finding in *Francovich* (Cases C-6/90 & C-9/90) that a State may be liable for damage caused to individuals as a result of breach of EC law. That judgment too locates the principle as 'inherent in the system of the Treaty' (para 35 of the judgment in *Francovich,* p.162 below).

If the obligation cast on national courts is inherent in the system of the Treaty it is not to be confined to the impact of Directives. A Regulation is directly applicable but may in some circumstances leave room for necessary national implementation (for example in fixing penalties in the event of infringement). In Case C-60/02 *Rolex* judgment of 7 January 2004 the Court transposed the principle of 'conform-interpretation' from the sphere of Directives to the context of a Regulation of this type. It stated that 'National courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question', referring to Case C-106/89 *Marleasing* [1990] ECR 1-4135 (para 59 of the ruling in *Rolex).* However, the Court accepted the relevance of principles of legal certainty and of non-retroactivity in criminal matters, which preclude an EC act from determining or aggravating the liability in criminal law of persons who act in contravention of its provisions, referring to Case C-168/95 *Arcaro* [1996] ECR 1-4705, mentioned at p. 155 above.

Cases and Materials on EU Law (8th Edition)
Stephen Weatherill
OUP 2007

Pps 59-66 (Extracts): Proportionality

The principle of proportionality is not spelled out in those terms in the EC Treaty. But Article 5(3) captures the concept.

ARTICLE 5(3) EC

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

This statement is amplified by the Protocol attached to the EC Treaty on the application of the principles of subsidiarity and proportionality, which, admittedly, is more concerned to elucidate the former principle than the latter.

NOTE: Article 5(3) is a relative newcomer to the EC Treaty. It was inserted by the Maastricht Treaty and therefore entered into force only in 1993 (p.9 above). The Court had long before already developed proportionality as a basis for checking the exercise of power in the Community. So Article 5(3) clearly establishes the shape of the principle, but it is the Court's case law that amplifies what is at stake in applying the principle of proportionality.

The following case arose before English courts. It reached the European Court *via* the Article 234 preliminary reference procedure which allows national courts to cooperate with the Community Court and is discussed in Chapter 7. It allows the European Court to answer questions about Community law referred to it by a national court. The European Court took the opportunity in this case to insist that Community legislation must conform to the principle of proportionality.

***R* v *Intervention Board*, exports *Man (Sugar) Ltd* (Case 181/84)**

[1985] ECR 2889, Court of Justice of the European Communities

The case involved the sugar market, which is regulated by Community legislation administered at national level. Man, a British sugar trader, submitted to the Intervention Board, the regulatory agency, tenders for the export of sugar to States outside the Community. It lodged securities with a bank. Under relevant Community legislation, Man ought to have applied for export licences by noon on 2 August 1983. It was nearly four hours late, because of its own internal staff difficulties. The Board, acting pursuant to Community Regulation 1880/83, declared the security forfeit. This amounted to £1,670,370 lost by Man. Man claimed that this penalty was disproportionate; a small error resulted in a severe sanction. It accordingly instituted judicial review proceedings before the English courts in respect of the Board's action and argued that the authorising Community legislation was invalid because of its disproportionate effect. The matter was referred to the European Court under the preliminary reference procedure. Man's submission was explained by the Court as follows:

[16] ... Man Sugar maintains that, even if it is accepted that the obligation to apply for an export licence is justifiable, the forfeiture of the entire security for failure to comply with that obligation infringes the principle of proportionality, in particular for the following reasons: the contested regulation unlawfully imposes the same penalty for failure to comply with a secondary obligation - namely, the obligation to apply for an export licence - as for failure to comply with the primary obligation to export the sugar. The obligation to apply for an export licence could be enforced by other, less drastic means than the forfeiture of the entire security and therefore the burden imposed is not necessary for the achievement of the aims of the legislation. The severity of the penalty bears no relation to the nature of the default, which may, as in the present case, be only minimal and purely technical.

The Court held:

[20] It should be noted that, as the Court held in its judgments of 20 February 1979 (Case 122/78, *Buitoni* v *FORMA*, [1979] ECR 677) and of 23 February 1983 (Case 66/82, Fromonco *SA* v *FORMA*, [1983] ECR 395), in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as

severely as failure to comply with the primary obligation.

[21] It is clear from the wording of the abovementioned Council and Commission regulations concerning standing invitations to tender for exports of white sugar, from an analysis of the preambles thereto and from the statements made by the Commission in the proceedings before the Court that the system of securities is intended above all to ensure that the undertaking, voluntarily entered into by the trader, to export the quantities of sugar in respect of which tenders have been accepted is fulfilled. The trader's obligation to export is therefore undoubtedly a primary obligation, compliance with which is ensured by the initial lodging of a security of 9 ECU per 100 kilograms of sugar.

[22] The Commission considers, however, that the obligation to apply for an export licence within a short period, and to comply with that time-limit strictly, is also a primary obligation and as such is comparable to the obligation to export; indeed, it is that obligation alone which guarantees the proper management of the sugar market. In consequence, according to the Commission, failure to comply with that obligation, and in particular failure to comply with the time-limit, even where that failure is minimal and unintentional, justifies the forfeiture of the entire security, just as much as the total failure to comply with the primary obligation to export justifies such a penalty.

[23] In that respect the Commission contended, both during the written procedure and in the oral argument presented before the Court, that export licences fulfil four separate and important functions:

(i) They make it possible to control the release onto the market of sugar.

(ii) They serve to prevent speculation.

(iii) They provide information for the relevant Commission departments.

(iv) They establish the system of monetary compensatory amounts chosen by the exporter.

[24] As regards the use of export licences to control the release onto the world market of exported sugar, it must be noted that the traders concerned have a period of five months within which to export the sugar and no Community provision requires them to export it at regular, staggered intervals. They may therefore release all their sugar onto the market over a very short period. In those circumstances export licences cannot be said to have the controlling effect postulated by the Commission. That effect is guaranteed, though only in part, simply by staggering the invitations to tender.

[25] The Commission considers, secondly, that the forfeiture of the entire security for failure to comply with the time-limit for applying for an export licence makes it possible to prevent traders from engaging in speculation with regard to fluctuations in the price of sugar and in exchange rates and accordingly delaying the submission of their applications for export licences.

[26] Even if it is assumed that there is a real risk of such speculation, it must be noted that Article 12(c) of Regulation No 1880/83 requires the successful tenderer to pay the additional security provided for in Article 13(3) of the same regulation. The Commission itself recognised at the hearing that that additional security removes any risk of speculation by traders. It is true that at the hearing the Commission expressed doubts about the applicability of Article 13(3) before export licences have been issued. However, even if those doubts are well founded, the fact remains that a simple amendment of the rules regarding the payment of an additional security, requiring for example that, in an appropriate case, the additional security should be paid during the tendering procedure, in other words, even before the export licence has been issued, would make it possible to attain the objective sought by means which would be much less drastic for the traders concerned. The argument that the fight against speculation justifies the contested provision of Regulation No 1880/83 cannot therefore be accepted.

[27] With regard to the last two functions attributed by the Commission to export licences, it is true that those licences make it possible for the Commission to monitor accurately exports of Community sugar to non-member countries, although they do not provide it with important new information not contained in the tenders and do not, in themselves, guarantee that the export will actually take place. It is also true that the export licence makes it possible for the exporter to state whether he wishes the monetary compensatory amounts to be fixed in advance.

[28] However, although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the Community legislation in question.

[29] It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question.

[30] Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.

[31] The reply to the question submitted must therefore be that Article 6(3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

NOTE: A key element in the practical expression of the principle of proportionality is the need to show a link between the nature and scope of the measures taken and the object in view. The next extract is taken from a case in which a firm sought to show that a measure affected it disproportionately and that it was accordingly invalid. The issue arose in the coal and steel sector, and therefore the provisions in question were found in the ECSC Treaty, which has now expired. However, the Court explained the nature of the principle of proportionality in terms of general application.

***Valsabbia* v *Commission* (Case 154/78)**

[1980] ECR 907, Court of Justice of the European Communities

[117] It is now necessary to examine whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants which would constitute an infringement of the principle of proportionality. In reply to the applicants' allegations on this matter, the Commission states that the validity of a general decision cannot depend on the existence or absence of other formally independent decisions.

[118] That argument is not relevant in this case and the Court must inquire whether the defects established imposed disproportionate burdens upon the applicants, having regard to the objectives laid down by Decision No 962/77. But the Court has already recognised in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, that 'In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators'.

[119] It appears that, on the whole, the system established by Decision No 962/77 worked despite the omissions disclosed and in the end attained the objectives pursued by that decision. Although it is true that the burden of the sacrifices required of the applicants may have been aggravated by the omissions in the system, that does not alter the fact that that decision did not constitute a disproportionate and intolerable measure with regard to the aim pursued.

[120] In those circumstances, and taking into consideration the fact that the objective laid down by Decision No 962/77 is in accordance with the Commission's duty to act in the common interest, and that a necessary consequence of the very nature of Article 61 of the ECSC Treaty is that certain undertakings must, by virtue of European solidarity, accept greater sacrifices than others, the Commission cannot be accused of having imposed disproportionate burdens upon the applicants.

NOTE: The nature of the Court's scrutiny is influenced by the type of act subject to challenge. (See, for example, Hermann, G., 'Proportionality and Subsidiarity' Ch. 3 in Barnard, C. and Scott, J., *The Law of the Single European Market* (Oxford: Hart Publishing, 2002).) It was mentioned above (p.43) that the UK's submission that Directive 93/104 on Working Time violated the principle of proportionality was rejected. The Court explained its role in the following terms.

***United Kingdom* v *Council* (Case C-84/94)**

[1996] ECR I-5755, Court of Justice of the European Communities

[57] As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42).

[58] As to judicial review of those conditions, however, the Council must be aiiowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has

been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.

There were no such flaws and consequently the plea failed. Notice that in Case 181/84 (p.59 above) Man Sugar was not complaining about a broad legislative choice. The matter was more specific to its circumstances. In Case C-84/94 the Court's concession that the legislature be allowed a 'wide discretion' in areas of policy choice means that the principle of proportionality, though flexible and therefore a tempting addition to any challenge to the validity of a Community act, is only infrequently held to have been violated where broad legislative choices are impugned. This is well illustrated by revisiting a ruling already considered above.

R v Secretary of State for *Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01)

[2002] ECR 1-11543, Court of Justice of the European Communities

The validity of Directive 2001/37, which amended and extended common rules governing tar yields and warnings on tobacco product packaging, was challenged in this case. As explained above (p.51), the Court was not persuaded that an incorrect legal base had been chosen. The applicant fared no better by alleging the measure violated the principle of proportionality.

[122] As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia*, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Qlmuhlen* [1993] ECR I-6473, paragraph 15, and Case C-210/00 *Kaserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

[123] With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR 1-2211, paragraph 61).

[124] With regard to the Directive, the first, second and third recitals in the preamble thereto make it clear that its objective is, by approximating the rules applicable in this area, to eliminate the barriers raised by differences which, notwithstanding the harmonization measures already adopted, still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products and impede the functioning of the internal market. In addition, it is apparent from the fourth recital that, in the attaining of that objective, the Directive takes as a basis a high level of health protection, in accordance with Article 95(3) of the Treaty.

[125] During the procedure various arguments have been put forward in order to challenge the compatibility of the Directive with the principle of proportionality, particularly so far as Articles 3, 5 and 7 are concerned.

[126] It must first be stated that the prohibition laid down in Article 3 of the Directive on releasing for free circulation or marketing within the Community cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide, together with the obligation imposed on the Member States to authorise the import, sale and consumption of cigarettes which do comply with those levels, in accordance with Article 13(1) of the Directive, is a measure appropriate for the purpose of attaining the objective pursued by the Directive and one which, having regard to the duty of the Community legislature to ensure a high level of health protection, does not go beyond what is necessary to attain that objective.

[127] Secondly, as pointed out in paragraph 85 above, the purpose of the prohibition, also laid down in Article 3 of the Directive, on manufacturing cigarettes which do not comply with the maximum levels fixed by that provision is to avoid the undermining of the internal market provisions in the tobacco products sector which might be caused by illicit reimports into the Community or by deflections of trade within the Community affecting products which do not comply with the requirements of Article 3(1).

[128] The proportionality of that ban on manufacture has been called into question on the ground that it is not a

measure for the purpose of attaining its objective and that it goes beyond what is necessary to attain it since, in particular, an alternative measure, such as reinforcing inspections of imports from non-member countries, would have been sufficient.

[129] It must here be stated that, while the prohibition at issue does not of itself make it possible to prevent the development of the illegal trade in cigarettes in the Community, having particular regard to the fact that cigarettes which do not comply with the requirements of Article 3(1) of the Directive may also be placed illegally on the Community market after being manufactured in non-member countries, the Community legislature did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market.

[130] Nor has it been established that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provision. It must be observed that the prohibition on manufacture at issue is especially appropriate for preventing at source deflections in trade affecting cigarettes manufactured in the Community for export to non-member countries, deflections which amount to a form of fraud which, ex *hypothesi*, it is not possible to combat as efficiently by means of an alternative measure such as reinforcing controls on the Community's frontiers.

[131] As regards Article 5 of the Directive, the obligation to show information on cigarette packets as to the tar, nicotine and carbon monoxide levels and to print on the unit packets of tobacco products warnings concerning the risks to health posed by those products are appropriate measures for attaining a high level of health protection when the barriers raised by national laws on labelling are removed. Those obligations in fact constitute a recognised means of encouraging consumers to reduce their consumption of tobacco products or of guiding them towards such of those products as pose less risk to health.

[132] Accordingly, by requiring in Article 5 of the Directive an increase in the percentage of the surface area on certain sides of the unit packet of tobacco products to be given over to those indications and warnings, in a proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks, the Community legislature has not overstepped the bounds of the discretion which it enjoys in this area.

[133] Article 7 of the Directive calls for the following observations.

[134] The purpose of that provision is explained in the 27th recital in the preamble to the Directive, which makes it clear that the reason for the ban on the use on tobacco product packaging of certain texts, such as 'low-tar', light', 'ultra-light', 'mild', names, pictures and figurative or other signs is the fear that consumers may be misled into the belief that such products are less harmful, giving rise to changes in consumption. That recital states in this connection that the level of inhaled substances is determined not only by the quantities of certain substances contained in the product before consumption, but also by smoking behaviour and addiction, which fact is not reflected in the use of such terms and so may undermine the labelling requirements set out in the Directive.

[135] Read in the light of the 27th recital in the preamble, Article 7 of the Directive has the purpose therefore of ensuring that consumers are given objective information concerning the toxicity of tobacco products.

[136] Such a requirement to supply information is appropriate for attaining a high level of health protection on the harmonization of the provisions applicable to the description of tobacco products.

[137] It was possible for the Community legislature to take the view, without overstepping the bounds of its discretion, that stating those tar, nicotine and carbon monoxide levels in accordance with Article 5(1) of the Directive ensured that consumers would be given objective information concerning the toxicity of tobacco products connected to those substances, whereas the use of descriptors such as those referred to in Article 7 of the Directive did not ensure that consumers would be given objective information.

[138] As the Advocate-General has pointed out in paragraphs 241 to 248 of his Opinion, those descriptors are liable to mislead consumers. In the first place, they might, like the word 'mild', for example, indicate a sensation of taste, without any connection with the product's level of noxious substances. In the second place, terms such as 'low-tar', 'light', 'ultra-light', do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco

products, is liable to encourage smoking.

[139] Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products.

[140] It is not clear that merely regulating the use of the descriptions referred to in Article 7, as proposed by the claimants in the main proceedings and by the German, Greek and Luxembourg Governments, or saying on the tobacco products' packaging, as proposed by Japan Tobacco, that the amounts of noxious substances inhaled depend also on the user's smoking behaviour would have ensured that consumers received objective information, having regard to the fact that those descriptions are in any event likely, by their very nature, to encourage smoking.

[141] It follows from the preceding considerations concerning Question 1(c) that the Directive is not invalid by reason of infringement of the principle of proportionality.

R v Secretary *of State for Health, ex parte Swedish Match AB* (Case C-210/03)

Judgment of 14 December 2004, Court of Justice of the European Communities

This is the decision, encountered above *(p.52),* in which the Court found that Directive 2001/37's ban on the marketing of tobacco for oral use was validly based on Article 95 EC. Faced with the submission that the measure was nonetheless invalid for violation of the proportionality principle, the Court made an explicit connection with the direction in Article 95(3) that the Community legislature shall take as a base a high level of health protection in setting harmonized standards.

[56] To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

[57] As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.

[58] It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

NOTE: The principle of proportionality applies not only to Community legislation, but also arises in the application of substantive Treaty provisions.

5.1 Introduction

It has already been seen that EC law, if not EU law, is supreme to national law and that domestic courts are under an obligation to give full effect to EC law (see Chapter 4). With this in mind, the question then arises to what extent individuals can rely on EC law before the national courts, particularly where a Member State has failed to implement a particular measure, or where the implementation is in some way defective and does not provide the full extent of the rights an individual should enjoy by virtue of the relevant EC measure. To deal with this question, and very much in accordance with the principle of supremacy, the European Court of Justice (ECJ) has developed three interrelated doctrines: direct effect, indirect effect, and state liability. Taken together, these seek to ensure that individuals are given the greatest possible level of protection before their national courts. This chapter considers the scope of the doctrines of direct and indirect effect, as well as identifying difficulties in the jurisprudence. One particular area in which problems arise is that of ensuring the enforceability of directives. This chapter will look at this issue and the various approaches that the ECJ has developed with regard to it. Chapter 9 will examine the jurisprudence in the field of state liability.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in Chapter 4, the European Community Treaties were incorporated into UK law by the European Communities Act 1972. With the passing of this Act all Community law became, in the language of international law, directly applicable, that is, applicable as part of the British internal legal system. Henceforth, 'Any rights or obligations created by the Treaty are to be given legal effect in England without more ado' (per Lord Denning MR in *HP Bulmer Ltd v JBollinger SA* [1974] Ch 401). As directly applicable law, EC law thus became capable of forming the basis of rights and obligations enforceable by individuals before their national courts.

Provisions of international law which are found to be capable of application by national courts *at the suit of individuals* are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law. For this reason it was suggested by Winter that the term 'directly effective' be used to convey this secondary meaning. Although this term has generally found favour amongst British academic writers, the ECJ as well as the British courts tend to use the two concepts of direct applicability and direct effects interchangeably. However, for purposes of clarity it is proposed to use the term 'directly effective' or 'capable of direct effects' in this secondary meaning, to denote those provisions of EC law which give rise to rights or obligations which individuals may enforce before their national courts.

Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by states alone; others are too vague to form the basis of rights or obligations for individuals; others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular provision is directly effective is a matter of construction, depending on its language and purpose as well as the terms on which the treaty has been incorporated into domestic law. Although most states apply similar criteria of clarity and completeness, specific rules and attitudes inevitably differ, and since the application of the criteria often conceals an underlying policy decision, the results are by no means uniform from state to state.

5.2.2 Relevance of direct effect in EC law

The question of the direct effects of Community law is of paramount concern to EC lawyers. If a provision of EC law is directly effective, domestic courts must not only apply it but, following the principle of primacy of EC

law (discussed in Chapter 4), must do so in priority over any conflicting provisions of national law. Since the scope of the EC Treaty is wide, the more generous the approach to the question of direct effects, the greater the potential for conflict.

Which provisions of EC law will then be capable of direct effect? The EC Treaty merely provides in Article 249 (ex 189; post Lisbon, Article 288 TFEU) that regulations (but only regulations) are 'directly applicable'. Since, as has been suggested, direct applicability is a necessary precondition for direct effects, this would seem to imply that only regulations are capable of direct effects.

This has not proved to be the case. In a series of landmark decisions, the ECJ, principally in its jurisdiction under Article 234 EC (ex 177; post Lisbon, Article 267 TFEU) to give preliminary rulings on matters of interpretation of EC law on reference from national courts, has extended the principle of direct effects to treaty articles, directives, decisions, and even to provisions of international agreements to which the EC is a party.

5.2.3 Treaty articles

s.2.3. 1 *The Starting Point: Van Gend en Loos*

The question of the direct effect of a treaty article was first raised in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62). The Dutch administrative tribunal, in a reference under Article 234, asked the ECJ 'Whether Article 12 of the EEC Treaty [now 25 EC] has an internal effect... in other words, whether the nationals of Member States may, on the basis of the Article in question, enforce rights which the judge should protect?'

Article 25 (ex 12) EG (Article 30 TFEU) prohibits states from 'introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect'.

It was argued on behalf of the defendant customs authorities that the obligation in Article 25 was addressed to states and was intended to govern rights and obligations between states. Such obligations were not normally enforceable at the suit of individuals. Moreover the treaty had expressly provided enforcement procedures under what are now Articles 226-7 EC (ex 169-70; post Lisbon, Articles 258-9 TFEU) (see Chapter 11) at the suit of the Commission or Member States, respectively. Advocate-General Roemer suggested that Article 25 was too complex to be enforced by national courts; if such courts were to enforce Article 25 directly there would be no uniformity of application.

Despite these persuasive arguments the ECJ held that Article 25 was directly effective. The Court stated that 'this Treaty is more than an agreement creating only mutual obligations between the contracting parties. . . Community law . . . not only imposes obligations on individuals but also confers on them legal rights'. These rights would arise:

not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly denned manner, by the Treaty on individuals as well as on Member States and the Community institutions.

... The text of Article 12 [now 25] sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member States and their citizens.

And further:

The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169-70 [now 226-7] to the diligence of the Commission and the Member States.

Apart from its desire to enable individuals to invoke the protection of EC law the Court clearly saw the principle of direct effects as a valuable means of ensuring that EC law was enforced uniformly in all Member States, even when states had not themselves complied with their obligations.

s.2.3.2 *Subsequent developments*

It was originally thought that, as the Court suggested in *Van Gend,* only prohibitions such as (the then) Article

25 ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Liitticke GmbHvHauotzollamt Saarlouk* in relation to the obligation that 'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules'.

The ECJ found that the then Article 95(1) was directly effective; what was Article 95(3), which was subject to compliance within a specified time limit, would, the Court implied, become directly effective once that time limit had expired.

The Court has subsequently found a large number of treaty provisions to be directly effective. All the basic principles relating to free movement of goods and persons, competition law, and discrimination on the grounds of sex and nationality may now be invoked by individuals before their national courts.

5.2.3.3 *Criteria for direct effect*

In deciding whether a particular provision is directly effective certain criteria are applied: the provision must be sufficiently clear and precise; it must be unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions. The criteria are, however, applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects. Even where they are conditional and subject to further implementation they have been held to be directly effective once the date for implementation is past. The Court reasons that while there may be discretion as to the means of implementation, there is no discretion as to ends.

5.2.3.4 *Vertical and horizontal effect of treaty provisions*

In *Van Gend* the principle of direct effects operated to confer rights on Van Gend exercisable against the Dutch customs authorities. Thus the obligation fell on an organ of the state, to whom Article 25 was addressed. (This is known as a 'vertical' direct effect, reflecting the relationship between individual and state.) But treaty obligations, even when addressed to states, may fall on individuals too. May they be invoked by individuals against individuals? (This is known as a 'horizontal effect', reflecting the relationship between individual and individual.)

Van Gend implies so, and this was confirmed in *Defrenne* v *Sabena (No 2)* (case 43/75). Ms Defrenne was an air hostess employed by Sabena, a Belgian airline company. She brought an action against Sabena based on what was then Article 119 of the EEC Treaty (now 141 EC; post Lisbon Article 157 TFEU). It provided that 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

Ms Defrenne claimed, inter alia, that in paying their male stewards more than their air hostesses, when they performed identical tasks, Sabena was in breach of the then Article 119. The gist of the questions referred to the ECJ was whether, and in what context, that provision was directly effective. Sabena argued that the treaty articles so far found directly effective, such as Article 25, concerned the relationship between the State and its subjects, whereas former Article 119 was primarily concerned with relationships between individuals. It was thus not suited to produce direct effects. The Court, following Advocate-General Trabucci, disagreed, holding that 'the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.

This same principle was applied in *Walrave v Association Union Cycliste Internationale* (case 36/74) to Article 12 (ex 6, originally 7) EC which provides that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

The claimants, Walrave and Koch, sought to invoke Article 12 (post Lisbon, Article 18 TFEU) in order to challenge the rules of the defendant association which they claimed were discriminatory.

The ECJ held that the prohibition of any discrimination on grounds of nationality 'does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective

manner gainful employment and the provision of services'.

To limit the prohibition in question to acts of a public authority would risk creating inequality in their application. Even now, the precise scope of the horizontal nature of the provisions relating to free movement of individuals (Articles 39, 43, and 49; post Lisbon Articles 45, 49 and 56 TFEU respectively) is not clear. Whilst the judgment in *Walrave* can be read as a form of effectiveness, which could then extend the scope of the provisions to all non-state actors, it can equally be read as relating to collective agreements, or to situations where there is a violation of the principle of non-discrimination. Subsequent cases have not cleared up this ambiguity (see Chapter 21). It is generally accepted that the provisions on the free movement of goods (Articles 28-9 EC; post Lisbon Articles 34-5 TFEU) do not have horizontal direct effect, although the ECJ's jurisprudence has operated to compensate for this limitation (see Chapter 20). Nonetheless, many treaty provisions have now been successfully invoked vertically and horizontally. The fact of their being addressed to, and imposing obligations on, states has been no bar to their horizontal effect.

5.2.4 Regulations

A regulation is described in Article 249 EC as of 'general application ... binding in its entirety and directly applicable in all Member States'. It is clearly intended to take immediate effect without the need for further implementation.

Regulations are thus by their very nature apt to produce direct effects. However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation before it can take full legal effect. But since a regulation is of 'general application', where the criteria for direct effects are satisfied, it may be invoked vertically or horizontally.

In *Antonio Munoz Cia SA v Frumar Ltd* (case C-253/00), the ECJ confirmed that regulations by their very nature operate to confer rights on individuals which must be protected by the national courts. In this case, Regulation 2200/96 ([1996] OJ L 297/1) laid down the standards by which grapes are classified. Munoz brought civil proceedings against Frumar who had sold grapes under particular labels which did not comply with the corresponding standard. The relevant provision in the regulation did not confer rights specifically on Munoz, but applied to all operators in the market. A failure by one operator to comply with the provision could have adverse effects, since the purpose of the regulation was to keep products of unsatisfactory quality off the market, and to ensure the full effectiveness of the regulation, it must be possible for a trader to bring civil proceedings against a competitor to enforce the regulation. This decision is noteworthy for several reasons. As with the early case law on the treaty articles, it reasons from the need to ensure the effectiveness of Community law. It also confirms that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a regulation. Insofar as the ECJ's jurisprudence requires individuals seeking to rely on a directive to have received rights under that directive (see 5.2.5.3 below), there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives.

5.2.5 Directives

5.2.5.1 *The problem of the direct effect of directives*

A directive is (Article 249 EC) 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

Because directives are not described as 'directly applicable' it was originally thought that they could not produce direct effects. Moreover the obligation in a directive is addressed to states, and gives the state some discretion as to the form and method of implementation; its effect thus appeared to be conditional on the implementation by the state.

5.2.5.2 *The principle of direct effect of directives*

This was not the conclusion reached by the ECJ, which found, in *Grad v Finanzamt Traunstein* (case 9/70) that a directive could be directly effective. The claimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities that the claimant claimed was in breach of an EC directive and decision. The

directive required states to amend their VAT systems to comply with a common EC system and to apply this new VAT system to, inter alia, freight transport from the date of the directive's entry into force. The German government argued that only regulations were directly applicable. Directives and decisions took effect internally only via national implementing measures. As evidence they pointed out that only regulations were required to be published in the *Official Journal.* The ECJ disagreed. The fact that only regulations were described as directly applicable did not mean that other binding acts were incapable of such effects:

It would be incompatible with the binding effect attributed to Decisions by Article 189 [now 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. . . the effectiveness of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.

Although expressed in terms of a decision, it was implied in the judgment that the same principle applied in the case of directives. The direct effect of directives was established beyond doubt in a claim based on a free-standing directive in *Van Duyn v Home Office* (case 4 1/74). Here the claimant sought to invoke Article 3 of Directive 64/221 to challenge the Home Office's refusal to allow her to enter to take up work with the Church of Scientology. Under EC law Member States are allowed to deny EC nationals rights of entry and residence only on the grounds of public policy, public security and public health (see Chapter 25). Article 3 of Directive 64/22 1 provided that measures taken on the grounds of public policy must be based exclusively on the personal conduct of the person concerned. Despite the lack of clarity as to the scope of the concept of 'personal conduct' the ECJ held that Mrs Van Duyn was entitled to invoke the directive directly before her national court. It suggested that even if the provision in question was not clear the matter could be referred to the ECJ for interpretation under Article 234 EC.

So both directives and decisions may be directly effective. Whether they will in fact be so will depend on whether they satisfy the criteria for direct effects—they must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation. These conditions were satisfied in *Grad.* Although the directive was not unconditional in that it required action to be taken by the state, and gave a time limit for implementation, once the time limit expired the obligation became absolute. At this stage there was no discretion left. *Van Duyn* demonstrates that it is not necessary for a provision to be particularly precise for it to be deemed 'sufficiently' clear. Significantly, the ECJ held in *Riksskatterverket v Soghra Gharehveran* (case C-441/99) that a provision in a directive could be directly effective where it contained a discretionary element if the Member State had already exercised that discretion. The reason for this was that it could then no longer be argued that the Member State still had to take measures to implement the provision.

The reasoning in *Grad* was followed in *Van Duyn* and has been repeated on many occasions to justify the direct effect of directives once the time limit for implemen tation has expired. A more recent formulation of the test for direct effects, and one that is generally used, is that the provision in question should be 'sufficiently clear and precise and unconditional'.

A directive cannot, however, be directly effective before the time limit for implementation has expired. It was tried unsuccessfully in the case of *Pubblico Ministero v Ratti* (case 148/78). Mr Ratti, a solvent manufacturer, sought to invoke two EC har-monisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he claimed, were not illegal according to the directive. The ECJ held that since the time limit for the implementation of one of the directives had not expired it was not directly effective. He could, however, rely on the other directive for which the implementation date had passed.

Even when a state has implemented a directive it may still be directly effective. The ECJ held this to be the case in *Verbond van Nederlandse Ondernemingen (VNO) v Inspecteur der Invoerrechten en Accijnzen* (case 51/76), thereby allowing the Federation of Dutch Manufacturers to invoke the Second VAT Directive despite implementation of the provision by the Dutch authorities. The grounds for the decision were that the useful effect of the directive would be weakened if individuals could not invoke it before national courts. By allowing individuals to invoke the directive the Union can ensure that national authorities have kept within the limits of their discretion. Indeed, it seems possible to rely on even a properly implemented directive if it is not properly applied in practice *(Marks and Spencer* (case G-62/00)).

Arguably, the principle in *VNO* could apply to enable an individual to invoke a 'parent' directive even before the

expiry of the time limit, where domestic measures have been introduced for the purpose of complying with the directive (see *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86)). This view gains some support from the case of *Inter-Environment WallonieASBL vRegion Wallonie* (case C-129/96). Here the ECJ held that even within the implementation period Member States are not entitled to take any measures which could seriously compromise the result required by the directive. This applies irrespective of whether the domestic measure which conflicts with a directive was adopted to implement that directive (case C-14/02 *ATRAL).* In *Mangold* (case C-l 44/04, see further below), the ECJ strengthened this view. According to its ruling, the obligation on a national court to set aside domestic law in conflict with a directive before its period for implementation has expired appears to be even stronger where the directive in question merely aims to provide a framework for ensuring compliance with a general principle of Community law, such as non-discrimination on the grounds of age (see Chapter 6). Note also the approach in regards to the obligation for consistent interpretation (see, eg, *Adeneler v ELOG* (case C-2 12/04) below).

5.2.5.3 *Must rights be conferred by the directive?*

The ECJ's test for direct effects (the provision must be sufficiently clear, precise, and unconditional) has never expressly included a requirement that the directive should be intended to give rise to rights for the individual seeking to invoke its provisions. However, the justification for giving direct effect to EC law has always been the need to ensure effective protection for individuals' Community rights. Furthermore, the ECJ has, in a number of recent cases, suggested that an individual's right to invoke a directive may be confined to situations in which he can show a particular interest in that directive. In *Becker v Finanzamt MunsterInnenstadt* (case 8/81), in confirming and clarifying the principle of direct effect as applied to directives, the Court held that 'provisions of Directives can be invoked by individuals *insofar as they define rights which individuals are able to assert against the state'* (emphasis added).

Drawing on this statement in *Verholen* (cases C-87 to C-89/90), the Court suggested that only a person with a direct interest in the application of the directive could invoke its provisions: this was held in *Verholen* to include a third party who was directly affected by the directive. In *Verholen,* the husband of a woman suffering sex discrimination as regards the granting of a social security benefit, contrary to Directive 79/7, was able to bring a claim based on the directive in respect of disadvantage to himself consequential on the discriminatory treatment of his wife.

In most recent cases in which an individual seeks to invoke a directive directly, the existence of a direct interest is clear. The question of his or her standing has not therefore been in issue. Normally the rights he or she seeks to invoke, be it for example a right to equal treatment or to employment protection, are contained in the directive. Its provisions are clearly, if not explicitly, designed to benefit persons such as the individual. There are circumstances, however, where this is not so.

5.2.5.4 *Member States' initial response*

Initially national courts were reluctant to concede that directives could be directly effective. The Conseil d'Etat, the supreme French administrative court, in *Minister of the Interior v Cohn-Bendit* ([1980] 1 CMLR 543), refused to follow *Van Duyn vHome Office* and allow the claimant to invoke Directive 64/221. The English Court of Appeal in *O'Brien v Sim-Chem Ltd* ([1980] ICR 429) found the Equal Pay Directive (75/117) not to be directly effective on the grounds that it had purportedly been implemented in the Equal Pay Act 1970 (as amended 1975). *VNO* was apparently not cited before the court. The German Federal Tax Court, the Bundesfinanzhof, in *Re VAT Directives* ([1982] 1 CMLR 527) took the same view on the direct effects of the Sixth VAT Directive, despite the fact that the time limit for implementation had expired and existing German law appeared to run counter to the directive. The courts' reasoning in all these cases ran on similar lines. Article 249 expressly distinguishes regulations and directives; only regulations are described as 'directly applicable'; directives are intended to take effect within the national order via national implementing measures.

On a strict interpretation of Article 249 EC this is no doubt correct. On the other hand the reasoning advanced by the ECJ is compelling. The obligation in a directive is 'binding "on Member States" as to the result to be achieved'; the useful effects of directives would be weakened if states were free to ignore their obligations and enforcement of EC law were left to direct action by the Commission or Member States under Articles 226 or 227. Moreover states are obliged under Article 10 (post Lisbon, Article 4 of the Treaty on European Union (TEU)) to 'take all appropriate measures... to ensure fulfilment of the obligations arising out of this Treaty or

resulting from action taken by the institutions of the Community'. If they have failed in these obligations why should they not be answerable to individual litigants?

5.2.5.5 *Vertical and horizontal direct effects: A necessary distinction*

The reasoning of the ECJ is persuasive where an individual seeks to invoke a directive against the state on which the obligation to achieve the desired results has been imposed. In cases such as *VNO, Van Duyn,* and *Ratti,* the claimant sought to invoke a directive against a public body, an arm of the state. This is known as *vertical* direct effect, reflecting the relationship between the individual and the state. Yet as with treaty articles, there are a number of directives, impinging on labour, company or consumer law for example, which a claimant may wish to invoke against a private person. Is the Court's reasoning in favour of direct effects adequate as a basis for the enforcement of directives against individuals? This is known as *horizontal* direct effect, reflecting the relationship between individuals.

The arguments for and against horizontal effects are finely balanced. Against horizontal effects is the fact of uncertainty. Prior to the entry into force of the TEU, directives were not required to be published. More compelling, the obligation in a directive is addressed to the state. In *Becker v Finanzamt MunsterInnenstadt* (case 8/8 1) the Court, following dicta in *Pubblico Ministero v Ratti* (case 148/78), had justified the direct application of the Sixth VAT Directive against the German tax authorities on the grounds that the obligation to implement the directive had been placed on the state. It followed that:

a Member State which has not adopted, within the specified time limit, the implementing measure$ prescribed in the Directive, cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the Directive. This reasoning is clearly inapplicable in the case of an action against a private person. In favour of horizontal effects is the fact that directives have always in fact been published; that treaty provisions addressed to, and imposing obligations on,Member States have been held to be horizontally effective; that it would be anomalous, and offend against the principles of equality, if an individual's rights to invoke a directive were to depend on the status, public or private, of the party against whom he wished to invoke it; and that the useful effect of Community law would be weakened if individuals were not free to invoke the protection of Community law against *all* parties.

Although a number of references were made in which the issue of the horizontal effects of directives was raised, the ECJ for many years avoided the question, either by declaring that the claimant's action lay outside the scope of the directive, as in *Burton v British Railways Board* (case 19/8 1) (Equal Treatment Directive 76/207) or by falling back on a directly effective treaty provision, as in *Worringham v Lloyds Bank Ltd* (case 69/80) in which the then Article 119 (now 141) was applied instead of Directive 75/117, the Equal Pay Directive.

The nettle was finally grasped in *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* (case 152/84). Here Mrs Marshall was seeking to challenge the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, in breach of the Equal Treatment Directive 7 6/207. The difference in age was permissible under the Sex Discrimination Act 1975, which expressly excludes 'provisions relating to death or retirement' from its ambit. The Court of Appeal referred two questions to the ECJ:

(a) Was a different retirement age for men and women in breach of Directive 7 6/207?

(b) If so, was Directive 76/207 to be relied on by Mrs Marshall in the circumstances of the case?

The relevant circumstances were that the area health authority, though a 'public' body, was acting in its capacity as employer.

The question of vertical and horizontal effects was fully argued. The Court, following a strong submission from Advocate-General Slynn, held that the compulsory different retirement age was in breach of Directive 7 6/207 and could be invoked against a public body such as the health authority. Moreover 'where a person involved in legal proceedings is able to rely on a Directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority'.

On the other hand, following the reasoning of *Becker,* since a directive is, according to Article 249, binding only on '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.

If this distinction was arbitrary and unfair:

Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

So, with *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* the issue of the horizontal effect of directives was, it seemed, finally laid to rest (albeit in an *obiter* statement, since the health authority was arguably a public body at the time). By denying their horizontal effect on the basis of Article 249 the Court strengthened the case for their vertical effect. The decision undoubtedly served to gain acceptance for the principle of vertical direct effects by national courts (see, eg, *R v London Boroughs Transport Committee, ex parte Freight Transport Association Ltd* [1990] 3 CMLR 495). But problems remain, both with respect to vertical and horizontal direct effects.

5.2.5.6 ***Vertical direct effects: Reliance against public body***

First, the concept of a 'public' body, or an 'agency of the State', against whom a directive may be invoked, is unclear. In *Fratelli Costanzo SPA v Comune di Milano* (case 103/88), in a claim against the Comune di Milano based on the Comune's alleged breach of Public Procurement Directive 71/305, the Court held that since the reason for which an individual may rely on the provisions of a directive in proceedings before the national courts is that the obligation is binding on all the authorities of the Member States, where the conditions for direct effect were met, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply these provisions'. The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in *Johnston v RUC* (case 222/84). But what of the status of publicly owned or publicly run enterprises such as the former British Rail or British Coal? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatised utility companies, or banks, which are in the main owned by the taxpayer?

These issues arose for consideration in *Foster v British Gas pic* (case C-l 88/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 7 6/207, the English Court of Appeal had held that British Gas, a statutory corporation carrying out statutory duties under the Gas Act 1972 at the relevant time, was not a public body against which the directive could be enforced. On appeal the House of Lords sought clarification on this issue from the ECJ. That court refused to accept British Gas's argument that there was a distinction between a nationalised undertaking and a state agency and ruled (at para 18) that a directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State or had special powers beyond those which result from the normal relations between individuals'.

Applying this principle to the specific facts of *Foster v British Gas pic* it ruled (at para 20) that a directive might be invoked against:

a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State arid has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

On this interpretation a nationalised undertaking such as the then British Gas would be a 'public' body against which a directive might be enforced, as the House of Lords subsequently decided in *Foster* v *British Gaspic* ([1991] 2 AC 306).

It may be noted that the principle expressed in para 18 is wider than that of para 20, the criteria of 'control' and 'powers' being expressed as alternative, not cumulative; as such it is wide enough to embrace any nationalised undertaking, and even bodies such as universities with a more tenuous public element, but which are subject to *some* state authority or control. However, in *Rolls-Royce pic v Doughty* ([1992] ICR 538), the English Court of Appeal, applying the 'formal ruling' of para 20 of *Foster*, found that Rolls-Royce, a nationalised undertaking at the relevant time, although 'under the control of the State', had not been 'made responsible pursuant to a measure adopted by the State for providing a public service'. The public services which it provided, for example, in the defence of the realm, were provided to the *state* and not to the *public* for the purposes of benefit to the state: nor did the company possess or exercise any special powers of the type enjoyed by

British Gas. Mustill LJ suggested that the test provided in para 18 was 'not an authoritative exposition of the way in which cases like *Foster* should be approached': it simply represented a 'summary of the (Court's) jurisprudence to date'.

There is little evidence to support such a conclusion. The Court has never distinguished between its 'formal' rulings (ie, on the specific issue raised) and its more general statements of principle. Indeed such general statements often provide a basis for future rulings in different factual situations. A restrictive approach to the Court's rulings, as taken in *Rolls-Royce pic v Doughty,* is inconsistent with the purpose of the ECJ, namely to ensure the effective implementation of Community law and the protection of individuals' rights under that law by giving the concept of a public body the widest possible scope. This was acknowledged by the Court of Appeal in *National Union of Teachers v Governing Body ofSt Mary's Church ofEngland (Aided) Junior School* ([1997] 3 CMLR 630) when it suggested that the concept of an emanation of the state should be a 'broad one'. The definition provided in para 20 of *Foster* should not be regarded as a statutory definition: it was, in the words of para 20, simply *'included among* those bodies against which the provisions of a Directive can be applied'.

The English courts' approach to whether a particular body is an 'emanation of the state' for the purpose of enforcement of EC directives is unpredictable. It is not altogether surprising that they fail to take a generous view when the result would be to impose liability on bodies which are in no way responsible for the non-implementation of directives, a factor which was undoubtedly influential in *Rolls-Royce pic v Doughty.* But even if national courts were to adopt a generous approach, no matter how generously the concept of a 'public' body is defined, as long as the public/private distinction exists there can be no uniformity in the application of directives as between one state and another. Neither will it remove the anomaly as between individuals. Where a state has failed to fulfil its obligations in regard to directives, whether by non-implementation or inadequate implementation, an individual would, it appeared, following *Marshall,* be powerless to invoke a directive in the context of a 'private' claim.

s.2.5.7 *Horizontal direct effects*

In 1993, in the case of *Dori v Recreb Sri* (case C-9 1/92), the Court was invited to change its mind on the issue of horizontal direct effects in a claim based on EC Directive 85/577 on Door-step Selling, which had not at the time been implemented by the Italian authorities, against a private party. Advocate-General Lenz urged the Court to reconsider its position in *Marshall* and extend the principle of direct effects to allow for the enforcement of directives against *all* parties, public and private, in the interest of the uniform and effective application of Community law. This departure from its previous case law was, he suggested, justified in the light of the completion of the internal market and the entry into force of the Treaty on European Union, in order to meet the legitimate expectations of citizens of the Union seeking to rely on Community law. In the interests of legal certainty such a ruling should however not be retrospective in its effect (on the effect of Article 234 rulings—see Chapter 10).

The Court, no doubt mindful of national courts' past resistance to the principle of direct effects, and the reasons for that resistance, declined to follow the Advocate-General's advice and affirmed its position in *Marshall:* Article 249 distinguished between regulations and directives; the case law establishing vertical direct effects was based on the need to prevent states from taking advantage of their own wrong; to extend this case law and allow directives to be enforced against individuals 'would be to recognise a power to enact obligations for individuals with immediate effect, whereas (the Community) has competence to do so only where it is empowered to adopt Regulations'. This decision was confirmed in subsequent cases, such as *El Corte Ingles SA vRivero* (case C-192/94) *Arcaro* (case C-l68/95), and more recently in *Carp v Ecorad* (case C-80/06).

However, in denying horizontal effects to directives in *Dori,* the Court was at pains to point out that alternative remedies might be available based on principles introduced by the Court prior to *Dori,* namely the principle of indirect effects and the principle of State liability introduced in *Francovich v Italy* (cases C-6 and 9/90— see Chapter 9). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA v Rivero. Pfeiffer* (joined cases C-397/01 to 403/0 1) confirmed that directives could not have horizontal direct effect, but it emphasised, in the strongest possible terms, that a court was obliged to interpret domestic law in so far as possible in accordance with a directive (see 5.3, below). In the circumstances of that case, the practical outcome would have been akin to admitting horizontal direct effect, albeit by following the 'indirect effect' route. It must be borne in mind that one of the principal justifications for rejecting 'horizontal direct effect' has been that directives cannot, of themselves, impose obligations on individuals. In two-party situations, this

reasoning is straightforward. It is less so in a three-party situation where an individual is seeking to enforce a right under a directive against the Member State where this would have an impact on a third party. This issue arose in *Wells v SoSfor Transport, Local Government and the Regions* (case C-201/02), where Mrs Wells challenged the government's failure to carry out an environmental impact assessment (as required under Directive 85/337/EEC, [1985] OJ LI 7 5/40) when authorising the recommencement of quarrying works. The UK government argued that to accept that the relevant provisions of the directive had direct effect would result in 'inverse direct effect' in that UK government would be obliged to deprive another individual (the quarry owners) of their rights. The ECJ dismissed this, holding that permitting an individual to hold the Member State to its obligations was not linked to the performance of any obligation which would fall on the third party (at para 58), although there would be consequences for the third party as a result. It would be for the national courts to consider whether to require compliance with the directive in the particular case, or whether to compensate the individual for any harm suffered. A similar approach can be seen m *Arcor* (case C- 152-4/07). The case concerned a decision by the German telecommunications authority, approving a connection charge for calls from Deutsche Telekom's national network to a connection partner to cover the costs of maintaining the local telecommunications infrastructure. Third-party telecommunications operators sought to challenge that decision and it was this challenge that formed the basis of the reference. The ECJ held that the decision was incompatible with the directives regulating the area. The ECJ then referred to its decision in *Wells,* although the referring court had not raised the question in these terms, and re-emphasised that 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a directive against the Member State concerned' (para 36). In coming to its conclusion in *Wells,* the ECJ relied, in part, on case law developed in the context of Directive 83/1 89/EEC on the enforceability of technical standards which have not been notified in accordance with the requirements of that directive. It had been suggested that these cases create something akin to 'incidental' horizontal effect, and it is therefore necessary to examine these in more detail.

5.2.5.8 *'Incidental' horizontal effect*

There have been cases in which individuals have sought to exploit the principle of direct effects not for the purposes of claiming Community rights denied them under national law, but simply in order to establish the illegality of a national law and thereby prevent its application to them. This may occur in a two-party situation, in which an individual is seeking to invoke a directive, whether as a sword or a shield, against the state. It presents particular problems in a three-cornered situation, in which a successful challenge based on an EC directive by an individual to a domestic law or practice, although directed at action by the state, may adversely affect third parties. In this case the effect of the directive would be felt horizontally. To give the directive direct effects in these cases would seem to go against the Court's stance on horizontal direct effects in the line of cases beginning with *Dori v Recreb Sri,* and the reasoning in these cases. Two cases, with contrasting outcomes, *CIA Security International SA v Signalson SA* (case C-194/94) and *Lemmens* (case C-226/97), illustrate the difficulty. Both cases involve Directive 83/189 (Directive 83/189 has been replaced and extended, by Directive 98/34 ([1998] OJ L204/37, amended by Directive 98/44, OJ L217/18), see 16.3.6). The directive, which is designed to facilitate the operation of the single market, lays down procedures for the provision of information by Member States to the Commission in the field of technical standards and regulations. Article 8 prescribes detailed procedures requiring Member States to notify, and obtain clearance from, the Commission for any proposed regulatory measures in the areas covered by the directive. In *CIA Security International SA v Signalson SA,* the defendants, CIA Security, sought to rely on Article 8 of Directive 83/189 as a defence to an action, brought by Signalson, a competitor, for unfair trading practices in the marketing of security systems. The defendants claimed that the Belgian regulations governing security, which the defendants had allegedly breached, had not been notified as required by the directive: they were therefore inapplicable. Contrary to its finding in the earlier case of *Enichem Base v Comune di Cinsello Balsamo* (case C-380/87), involving very similar facts and the same directive, the ECJ accepted this argument, distinguishing *Enichem* on the slenderest of grounds. Thus the effects of the directive fell horizontally on the claimant, whose actions, based on national law, failed.

Article 8 of Directive 83/189 was again invoked as a defence in *Lemmens* (case C-226/97). Lemmens was charged in Belgium with driving above the alcohol limit. Evidence as to his alcohol level at the relevant time had been provided by a breath analysis machine. Invoking *CIA Security International SA v Signalson SA,* he argued that the Belgian regulations with which breath analysis machines in Belgium were required to conform had not been notified to the Commission, as required by Article 8 of Directive 83/189. He argued that the consequent

inapplicability Of the Belgian regulations regarding breath analysis machines impinged on the evidence obtained by using those machines; it could not be used in a case against him. The ECJ refused to accept this argument. It looked to the purpose of the directive, which was designed to protect the interest of free movement of goods. The Court concluded:

Although breach of an obligation (contained in the Directive) rendered (domestic) regulations inapplicable inasmuch as they hindered the marketing of a product which did not conform with its provisions, it did not have the effect of rendering unlawful any use of the product which conformed with the unnotified regulations. Thus the breach (of Article 8) did not make it impossible for evidence obtained by means of such regulations, authorized in accordance with the regulations, to be relied on against an individual.

This distinction, between a breach affecting the marketing of a product, as in *CIA Security International SA v Signalson SA*, and one affecting its use, as in *Lemmens*, is fine, and hardly satisfactory. The decision in *CIA Security International SA* v *Signalson SA* had been criticised because the burden imposed by the breach (by the state) of Article 8, the non-application of the state's unfair practice laws, would have fallen on an individual, in this case the claimant. This was seen as a horizontal application in all but name. In two other cases decided, like *CIA Security International SA v Signalson SA*, in 1996, *Ruiz Bemaldez* (case C-129/94) and *Panagis Parfitis* (case C-441/93), individuals were permitted to invoke directives to challenge national law, despite their adverse impact on third parties.

Lemmens, on the other hand, did not involve a third-party situation. The invocation by the defendant of Article 8 of Directive 83/189 did, however, smack of abuse. The refinement introduced in *Lemmens* may thus be seen as an attempt by the ECJ to impose some limits on the principle of direct effects as affected by *CIA Security* and as applied to directives.

The *CIA Security* principle was, however, confirmed and extended to a contractual relationship between two companies in *Unilever Italia SpA v Central Food SpA* (case C443/98). Italy planned to introduce legislation on the geographical origins of various kinds of olive oil and notified this in accordance with Article 8 of the directive after the Commission requested that this be done. The Commission subsequently decided to adopt a Community-wide measure and invoked the 'standstill' procedure in Article 9 of the directive, which requires a Member State to delay adoption of a technical regulation for- 12 months if the Commission intends to legislate in the relevant field. Italy nevertheless adopted its measure before the 12-month period had expired. The dispute leading to the Article 234 reference arose when Unilever supplied Central Foods with olive oil which had not been labelled in accordance with Italian law. Unilever argued that Italian legislation should not be applied because it had been adopted in breach of Article 9 of the directive. Advocate-General Jacobs argued that the C/A principle could not affect contractual relations between individuals, primarily because to hold otherwise would infringe the principle of legal certainty. The Court disagreed and held that the national court should refuse to apply the Italian legislation. It noted that there was no reason to treat the dispute relating to unfair competition in *CIA Security* differently from the contractual dispute in *Unilever.* The Court acknowledged the established position that directives cannot have horizontal direct effect, but went on to say that this did not apply in relation to Articles 8-9 of Directive 83/189. The Court did not feel that the case law on horizontal direct effect and the case law under Directive 83/189 were in conflict, because the latter directive does not seek to create rights or obligations for individuals.

The initial reaction to *CIA Security* was that the Court appeared to accept that directives could have horizontal direct effect. But after *Unilever*, it is clear that this has not been its intention. However, this area remains one of some uncertainty. The position now seems to be that private parties to a contract for the sale or supply of goods need to investigate whether any relevant technical regulations have been notified in accordance with the directive. There may then be a question of whether the limitation introduced by *Lemmens* comes into play. The end result appears to be the imposition on private parties of rights and obligations of which they could not have been aware—this was the main reason *against* the acceptance of horizontal direct effect in the case of directives. Although the Court in *Unilever* was at pains to restrict this line of cases to Directive 83/189 (and its replacement, Directive 98/34), this is not convincing. Nevertheless, the ECJ has maintained its approach under this Directive (see, eg, *Lidl Italia Sri v Comune di Stradella* (case C-303/04)), and it would appear to be best to regard the case law under Directive 9 8/34 (and its predecessor) as being confined to the context of that and similar directives (see also, eg, *R v Medicines Control Agency exparte Smith & Nephew Ltd* (case C-201/94) in the context of the authorisation of medicinal products under Directive 65/65/EEC (superseded by 1993 measures),

permitting the holder of a marketing authorisation to rely on Article 5 of that directive in challenging the grant of an authorisation to a competitor). It should also be noted that the ECJ has not adopted this approach in analogous situations involving decisions *(Carp v Ecorad* (case C-80/06)). Such a view should, of course, not be understood as reducing the significance of these cases in the context of an important field of EC law, and *Wells* (case C-20 1/02) and *Arcor* (case C-1 52-4/07) have taken this approach into the field of direct effect generally.

5.2.5.9 *No direct effect to impose criminal liability*

One important limitation to the direct effect principle was confirmed in *Berlusconi and others* (joined cases C-387/02, C-39 1/02, and C-403/02). Here, Italian company legislation had been amended after proceedings against Mr Berlusconi and others had been commenced to make the submission of incorrect accounting information a summary offence, rather than an indictable offence. The Italian criminal code provides that a more lenient penalty introduced after proceedings have been commenced but prior to judgment should be imposed, and in the instant cases, proceedings would therefore have to be terminated as the limitation period for summary offences had expired. The ECJ was asked (in Article 234 proceedings) if Article 6 of the First Company Law Directive (68/15 1/EEC) could be relied upon directly against the defendants. Having observed that the directive required an appropriate penalty and that it was for the national court to consider whether the revised provisions of Italian law were appropriate, the Court confirmed that it is not permissible to rely on the direct effect of a directive to determine the criminal liability of an individual (paras 73-8). In so holding, the ECJ followed the principles developed in the context of indirect effect (5.3.2, below) and reflects general principles of law (see Chapter 6).

s.2.5.10 *Direct effect of directives: Conclusions*

The jurisprudence of the ECJ in this area has matured sufficiently to permit the conclusion that, as a general rule, directives cannot take direct effect in the context of a two-party situation where both parties are individuals. Directives can only be relied upon against a Member State (in a broad sense) by an individual (on limitations on the obligations an individual can enforce, note *Verholen* (case C-87/90)). A directive cannot impose an obligation on an individual of itself; it needs to be implemented to have this consequence. Nevertheless, it is apparent that the clear-cut distinction between vertical and horizontal direct effect in two-party situations becomes blurred when transposed into a tripartite context. The enforcement by an individual of an obligation on the Member State may affect the rights of other individuals, which, according to *Wells* (case C-201/02), is a consequence of applying direct effect, but does not appear to change its vertical nature. The rather specific context of notification and authorisation directives, which may also have an effect on relationships not involving Member States, adds to the uncertainty. But whilst the case law may seem settled, the debate as to whether directives *should* have horizontal direct effect is one that is unlikely to go away soon.

5.2.6 Decisions

A decision is 'binding in its entirety upon those to whom it is addressed' (Article 249 EC). Decisions may be addressed to Member States, singly or collectively, or to individuals. Although, like directives, they are not described as 'directly applicable', they may, as was established in *Grad v Finanzamt Traustein* (case 9/70), be directly effective provided the criteria for direct effects are satisfied. The direct application of decisions does not pose the same theoretical problems as directives, since they will only be invoked against the addressee of the decision. If the obligation has been addressed to him and is 'binding in its entirety', there seems no reason why it should not be invoked against him, providing, of course, that it satisfies the test of being sufficiently clear precise and unconditional. In the recent case of *Fosele v Sud-Ouest-Sarl* (case C- 18/08), which concerned a decision which permitted the state to exempt certain vehicles from motor tax, the ECJ held that due to the element of choice left to the Member State, the individual could not rely on the decision to obtain such an exemption. An individual may seek to rely on a decision addressed to a Member State against that Member State (eg, recently, *Fosele v Sud-Ouest-Sarl* (case C- 18/08)). In *Ecorad* (case C80/60), Ecorad sought to rely on the contents of a decision, adopted according to the terms of a directive, addressed to a Member State in the context of a contractual dispute with Carp. Carp claimed it was not bound by the decision. The ECJ reviewed the cases on the horizontal application of directives and concluded that:

> the considerations underpinning the case-law referred to in the preceding paragraph with regard to directives apply *mutatis mutandis* to the question whether Decision 1999/93 may be relied upon as against an individual. [Para 21.]

5.2.7 Recommendations and opinions

Since recommendations and opinions have no binding force it would appear that they cannot be invoked by individuals, directly or indirectly, before national courts. However, in *Grimaldi v Fonds des Maladies Professionnelles* (case C-322/88), in the context of a claim by a migrant worker for benefit in respect of occupational diseases, in which he sought to invoke a Commission recommendation concerning the conditions for granting such benefit, the ECJ held that national courts were:

bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.

Such a view is open to question. It may be argued that recommendations, as non-binding measures, can at the most only be taken into account in order to resolve ambiguities in domestic law.

5.2.8 International agreements to which the EC is a party

There are three types of international agreements capable of being invoked in the context of EC law arising from the Community's powers under Articles 281, 300, 133, and 310 (ex 210, 228, 113 and 238 EC, post Lisbon, Articles 243, 260, 294, and 272 TFEU respectively—see Chapter 3). First, agreements concluded by the Community institutions falling within the treaty-making jurisdiction of the EC; secondly, 'hybrid' agreements, such as the WTO agreements, in which the subject matter lies partly within the jurisdiction of Member States and partly within that of the EC; and thirdly, agreements concluded prior to the EC Treaty, such as GATT, which the EC has assumed as being within its jurisdiction, by way of succession. There is no indication in the EC Treaty that such agreements may be directly effective.

The ECJ's case law on the direct effect of these agreements has not been wholly consistent. It purports to apply similar principles to those which it applies in matters of 'internal' law. A provision of an association agreement will be directly effective when 'having regard to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. Applying these principles in some cases, such as *International Fruit Co NV v Produktschap voor Groenten en Fruit (No 3)* (cases 21 and 22/72), the Court, in response to an enquiry as to the direct effects of Article XI of GATT, held, following an examination of the agreement as a whole, that the Article was not directly effective.

In others, such as *Bresciani* (case 87/75) and *Kupferberg* (case 104/81), Article 2(1) of the Yaounde Convention and Article 21 of the EC-Portugal trade agreement were examined respectively on their individual merits and found to be directly effective. The reasons for these differences are at not at first sight obvious, particularly since the provisions in all three cases were almost identical in wording to EC Treaty articles already found directly effective. The suggested reason (see Hartley (1983) 8 EL Rev 383) for this inconsistency is the conflict between the ECJ's desire to provide an effective means of enforcement of international agreements against Member States and the lack of a solid legal basis on which to do so. The Court justifies divergences in interpretation by reference to the scope and purpose of the agreement in question, which are clearly different from, and less ambitious than, those of the EC Treaty *(Opinion 1/91* (on the draft EEA Treaty)). As a result, the criteria for direct effects tend to be applied more strictly in the context of international agreements entered into by the EC.

Since the *International Fruit Co* cases the Court has maintained consistently that GATT rules cannot be relied upon to challenge the lawfulness of a Community act except in the special case where the Community provisions have been adopted to implement obligations entered into within the framework of GATT. Because GATT rules are not unconditional, and are characterised by 'great flexibility', direct effects cannot be inferred from the 'spirit, general scheme and wording of the Treaty'. This principle was held in *Germany v Council* (case C280/93) to apply not only to claims by individuals but also to actions brought by Member States. As a result the opportunity to challenge Community law for infringement of GATT rules is seriously curtailed. Despite strong arguments in favour of the direct applicability of WTO provisions from Advocate-General Tesauro in *THermes International v FH Marketing Choice BV* (case C-53/96), the Court has not been willing to change its mind. It appears that there is near-unanimous political opposition to the direct application of WTO. (See recently *Merck Genericos-Produtos Farmaciuticos Lda v Merck & Co Inc, and Merck Sharp & Dohme Lda* (case C-43 1/05)).

However, where the agreement or legislation issued under the agreement confers clear rights on

individuals the ECJ has not hesitated to find direct effects (eg, *Sevince* (case C192/89); *Bahia Kziber* (case C- 18/90)).

Thus, paradoxically, an individual in a dualist state such as the UK will be in a stronger position than he would normally be vis-a-vis international law, which is not as a rule incorporated into domestic law.

5.2.9 Exclusions from the principle of direct effects

In extending the jurisdiction of the ECJ to matters within the third—justice and home affairs (JHA)—pillar of the TEU to encompass decisions and framework decisions in the field of political and judicial cooperation in criminal matters taken under Title VI TEU, the Treaty of Amsterdam (ToA) expressly denied direct effects to these provisions (Article 34(2) TEU). Similarly, although areas within the third pillar of the TEU, relating to visas, asylum, immigration, and judicial cooperation in civil matters, were incorporated into the EC Treaty (new Title IV), the ToA excluded the ECJ's jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) 'relating to the maintenance of law and order and the safeguarding of internal security' (Article 68(2) EC); thus access to the ECJ via a claim before their national court was denied to individuals in areas in which they may be significantly and adversely affected. It should be noted that if the Treaty of Lisbon comes into force, Article 34 TEU would be deleted, all the provisions relating to judicial cooperation in criminal matters and to police cooperation being relocated to the TFEU (the EC Treaty after Lisbon corrfes into effect) as part of the area of freedom security and justice provisions. With the unitary structure, it will no longer be possible to distinguish between the policy areas in the current manner and thus these areas would seem to have the potential to become directly effective, though it should be noted that the CFSP provisions will remain in the TEU and therefore structurally separate. Arguably, distinctions may continue to be made here.

Although not an express exclusion from the principle of direct effects, a situation in which an individual was not be able to rely on Community law arose in the case of *Rechberger and Greindle v Austria* (case C-140/97). The case, a claim based on *Francovich,* concerned Austria's alleged breaches of Directive 90/134 on package travel both before Austria's accession, under the EEA Agreement, and, following accession, under the EC Treaty. The ECJ held that where the obligation to implement the directive arose under the EEA Agreement, it had no jurisdiction to rule on whether a Member State was liable under that agreement prior to its accession to the European Union (see also *Ulla-Brith Andersson v Swedish State* (case C321/97)).

5.3 Principle of indirect effects

Although the ECJ has not shown willing to allow horizontal direct effect of directives, it has developed an alternative tool by which individuals may rely on directives against another individual. This tool is known as the principle of 'indirect effect', which is an interpretative tool to be applied by domestic courts interpreting national legislation which conflicts with a directive in the same area. It is sometimes also called the principle of consistent interpretation.

The principle of indirect effects was introduced in a pair of cases decided shortly before *Marshall,* namely: *von Colson v Land Nordrhein-Westfalen* (case 14/83) and *Harz v Deutsche Tradax GmbH* (case 79/83). Both cases were based on Article 6 of Equal Treatment Directive 76/207. Article 6 provides that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment... to pursue their claims by judicial process after possible recourse to other competent authorities.

The claimants had applied for jobs with their respective defendants. Both had been rejected. It was found by the German court that the rejection had been based on their sex, but it was justifiable. Under German law they were entitled to compensation only in the form of travelling expenses. This they claimed did not meet the requirements of Article 6. Ms von Colson was claiming against the prison service; Ms Harz against Deutsche Tradax GmbH, a private company. So the vertical/ horizontal, public/private anomaly was openly raised and argued in Article 234 proceedings before the ECJ.

The Court's solution was ingenious. Instead of focusing on the vertical or horizontal effects of the directive it turned to Article 10 of the EC Treaty. Article 10 requires states to 'take all appropriate measures' to ensure fulfilment of their Community obligations,

This obligation, the Court said, applies to *all* the authorities of Member States, including the courts. It thus falls on the courts of the Member States to interpret national law in such a way as to ensure that the objectives of the directive are achieved. It was for the German courts to interpret German law in such a way as to ensure an effective remedy as required by Article 6 of the directive. The result of this approach is that although Community law is not applied directly—it is not 'directly effective'—it may still be applied indirectly as domestic law by means of interpretation.

The success of the *von Colson* principle of indirect effect depended on the extent to which national courts perceived themselves as having a discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Although the courts in the UK showed some reluctance initially to apply this principle, relying on a strict interpretation of s 2(1) of European Communities Act 1972 as applying only to directly effective Community law (see the House of Lords in *Duke v GEC Reliance Ltd* ([1988] AC 618)), the position soon changed *(Litster v Forth Dry Dock & Engineering Co Ltd* ([1990] 1 AC 546). Occasional 'hiccups' still occurred, however, and may still do so today. In *Finnegan v Clowney Youth Training Programme Ltd* ([1990] 2 AC 407) the House of Lords had refused to interpret Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) in line with *Marshall,* even though the order had been made after the ECj 's decision in *Marshall.* This was because that provision was enacted in terms identical to the parallel provision considered in *Duke v GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act. In the light of *Marleasing* (case 106/89, see below), such a decision would be unsustainable now, and today, the UK courts are taking their obligation seriously (see, eg, *Braymist Ltd* v *Wise Finance Co Ltd* [2002] Ch 273; *Director-General ofFair Trading* v *First National Bank* [2002] 1 AC 481).

5.3.1 The scope of the doctrine: *Marleasing*

The ECJ considered the scope of the 'indirect effect' doctrine in some depth in *Marleasing SA v La Comercial Internacional de Alimentation SA* (case C-106/89). In this case, which was referred to the ECJ by the Court of First Instance, Oviedo, the claimant company was seeking a declaration that the contracts setting up the defendant companies were void on the grounds of 'lack of cause', the contracts being a sham transaction carried out in order to defraud their creditors. This was a valid basis for nullity under Spanish law. The defendants argued that this question was now governed by EC Directive 68/151. The purpose of Directive 68/151 was to protect the members of a company and third parties from, inter alia, the adverse effects of the doctrine of nullity. Article 11 of the directive provides an exhaustive list of situations in which nullity may be invoked. It does not include 'lack of cause'. The directive should have been in force in Spain from the date of accession in 1986, but it had not been implemented. The Spanish judge sought a ruling from the ECJ on whether, in these circumstances, Article 11 of the directive was directly effective.

The ECJ reiterated the view it expressed in, *Marshall* that a directive cannot of itself 'impose obligations on private parties'. It reaffirmed its position in *von Colson* that national courts must *as far as possible* interpret national law in the light ot the wording and purpose of the directive in order to achieve the result pursued by the directive (para 8). And it' added that this obligation applied *whether the national provisions in question were adopted before or after the directive.* It concluded by ruling specifically, and without qualification, that national courts were 'required' to interpret domestic law in such a way as to ensure that the objectives of the directive were achieved (para 13).

Given that in *Marleasing* no legislation had been passed, either before or after the issuing of the directive, to comply with the directive, and given the ECJ's suggestion that the Spanish court must nonetheless strive to interpret domestic law to comply with the directive, it seems that, according to the ECJ, it is not necessary to the application of the *von Colson* principle that the relevant national measure should have been introduced for the purpose of complying with the directive, nor even that a national measure should have been specifically introduced at all.

5.3.2 The limits of *Marleasing*

The strict line taken in *Marleasing was* modified in *Wagner MiretvFondo de Garantira Salaria* (case C-334/92), in a claim against a private party based on Directive 80/987. This directive is an employee protection measure designed, inter alia, to guarantee employees arrears of pay in the event of their employer's insolvency. Citing its ruling in *Marleasing* the Court suggested that, in interpreting national law to conform with the objectives of a

directive, national courts must *presume* that the state intended to comply with Community law. They must strive 'as far as possible' to interpret domestic law to achieve the result pursued by the directive. But if the provisions of domestic law cannot be interpreted in such a way (as was found to be the case in *Wagner Miret)* the state may be obliged to make good the claimant's loss on the principles of state liability laid down in *Francovich v Italy* (cases 6 and 9/90).

Wagner Miret thus represents a tacit acknowledgment on the part of the Court that national courts will not always feel able to 'construe' domestic law to comply with an EC directive, particularly when the provisions of domestic law are clearly at odds with an EC directive, and there is no evidence that the national legislature intended national law to comply with its provisions, or with a ruling on its provisions by the ECJ. This limitation proved useful for courts which were unwilling to follow *Marleasing.* Thus, in *R v British Coal Corporation, ex parte Vardy* ([1993] ICR 720), a case decided after, but without reference to, *Marleasing,* the English High Court adverted to the House of Lords judgment in *Litster* but found that it was 'not possible' to interpret a particular provision of the Trade Union and Labour Relations Act 1992 to produce the same meaning as was required by the relevant EC directive (see also *Re Hartlebury Printers Ltd* [1993] 1 All ER 470 at 478b, ChD).

Thus the indirect application of EC directives by national courts cannot be guaranteed. Some reluctance on the part of national courts to comply with the *von Colson* principle, particularly as applied in *Marleasing,* is hardly surprising. It may be argued that in extending the principle of indirect effect in this way the ECJ is attempting to give horizontal effect to directives by the back door, and impose obligations, addressed to Member States, on private parties, contrary to their understanding of domestic law. Where such is the case, as the House of Lords remarked in *Duke v GEC Reliance Ltd* (see also *Finnegan v Clowney Youth Training Programme Ltd),* this could be 'most unfair'. Indeed, the dividing line between giving 'horizontal direct effect' to a directive and merely relying on the interpretative obligation under the doctrine of 'indirect effect' can be a very fine and technical one in the circumstances of a particular case, as evidenced by *Mangold* (case C-144/04). This case involved an interpretation of the notion of 'working time' in the context of the Working Time Directive (93/104/EC [1993] OJ L307/1 8). German case law had developed a distinction between duty time, on-call time and stand-by time, with only the first being regarded as 'working time'. Emergency workers employed by the German Red Cross had challenged a provision in their collective labour agreement which, they argued, extended their working time beyond the prescribed 48-hour limit. The Court suggested that this agreement may be in breach of the directive, but that the claimants could not rely on the directive itself as against their employer. Having restated the basic principle that national law must be interpreted in accordance with the treaty, in particular where this has been enacted to implement a directive, the Court went on to say that this obligation was not restricted to the provisions themselves, but extended to 'national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive' (para 115).

A national court must do 'whatever lies within its jurisdiction' to ensure compliance with EC law. The ECJ did not go so far as to state expressly that existing case law might have to be reviewed to ensure such compliance, but the force of its reasoning appears to point in that direction. On the facts of the case, the outcome would be very close to allowing the individuals to invoke the direct effect of the directive against their employer.

The ECJ in *Adeneler* (case C-2 12/04) referred to another limitation on indirect effect, legal certainty and non-retroactivity. This line of reasoning finds its basis in the case of *Kolpinghuis Nijmegen* (case 80/8 6). Here, in the context of criminal proceedings against Kolpinghuis for breach of EC Directive 80/777 on water purity, which at the relevant time had not been implemented by the Dutch authorities, the Court held that national courts' obligation to interpret domestic law to comply with EC law was 'limited by the general principles of law which form part of Community law [see Chapter 6] and in particular the principles of legal certainty and non-retroactivity'.

Although expressed in the context of criminal liability, to which these principles were 'especially applicable', it was not suggested that the limitation should be confined to such situations. Where an interpretation of domestic law would run counter to the legitimate expectations of individuals *afortiori* where the state is seeking to invoke a directive against an individual to determine or aggravate his criminal liability, as was the case in *Arcaro* (case C-l68/95, see further below), the doctrine will not apply. Where domestic legislation has been introduced to comply with a Community directive, it is legitimate to expect that domestic law will be interpreted in conformity with Community law, provided that it is capable of such an interpretation (cf *Mangold,* case C-144/04, above). Where legislation has not been introduced with a view to compliance domestic law may still be interpreted in the

light of the aims of the directive as long as the domes'tic provision is reasonably capable of the meaning contended for. But in either case an interpretation which conflicts with the clear words and intentions of domestic law is unlikely to be acceptable to national courts. This has repeatedly been acknowledged by the Court *(Wagner Miret* (case C-334/92) and *Arcaro* (case C-1 68/95)).

Mangold could, however, be seen as a more unsympathetic approach to the limits of interpretation. A^-similarly unsympathetic approach to the difficulties of the national court can be seen in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbdnde* (case C-404/06), where it was argued that, as the national court had ruled that there was only one possible interpretation and it was prohibited under national law from making a ruling *contra legem,* the reference should be declared inadmissible as the referring court would not be able to take account of any differing interpretation from the ECJ. The ECJ rejected the argument, on the basis of the separation of functions between the ECJ and the national court (see Chapter 10). It continued:

The uncertainty as to whether the national court—following an answer given by the Court of Justice to a question referred for a preliminary ruling relating to interpretation of a directive—may, in compliance with the principles laid down by the Court... interpret national law in the light of that answer cannot affect the Court's obligation to rule on that question. [Para 22.]

In effect, the ECJ held here that the problems of dealing with the doctrine of indirect effect are for the national court. It should not be thought that *Quelle* signals an end to the *contra legem* principle. It was a ruling of one of the chambers. The Grand Chamber shortly before *Quelle* in *Impact v Minister for Agriculture and Food and others* (case C-268/06) reaffirmed the principle, holding that the national court's duty under indirect effect is 'limited by general principles of law, particularly those of legal certainty and non-retroactivity' and therefore indirect effect 'cannot serve as the basis for an interpretation of national law *contra legem'* (para 100). *Quelle* and *Mangold* seem then to be exceptions, but the uncertainty they introduced is not helpful.

Arcaro (case C-1 68/9 5) could also be seen as introducing further limitations on the scope of indirect effect. There, the ECJ held that the:

obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law *reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed* or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions.

The Court has subsequently affirmed that the obligation to interpret domestic law in accordance with EC law cannot result in criminal liability independent of a national law adopted to implement an EC measure, particularly in light of the principle of non-retroactivity of criminal penalties in Article 7 of the European Convention on Human Rights (case C-60/02 *Criminal Proceedings againstX ('Rolex')).* This reasoning has also been applied in the context of direct effect (see *Berlusconi and others* (joined cases C-387/02, C-39 1/02 and C-403/02)).

The phrase 'imposition on an individual of an obligation' in *Arcaro* could be interpreted to mean that indirect effect could never require national law to be interpreted so as to impose obligations on individuals not apparent on the face of the relevant national provisions. It is submitted, however, that the ECJ's view in *Arcaro* is limited to the context of criminal proceedings, and that the application of the doctrine of indirect effect can result in the imposition of civil liability not found in domestic law (see also Advocate-General Jacobs in *Centrosteel Sri v Adipol GmbH* (case C-456/98), paras 31-5).

This seems to be the result of *Oceano Grupo Editorial vRocio Murciano Quintero* (case C240/9 8). Here, Oceano had brought a claim in a Barcelona court for payment under a contract of sale for encyclopaedias. The contract contained a term which gave jurisdiction to the Barcelona court rather than a court located near the consumer's home. That court had doubts regarding the fairness of the jurisdiction clause. The Unfair Contract Terms Directive (93/13/EEC) requires that public bodies be able to take steps to prevent the continued use of unfair terms. It also contains a list of unfair terms, including a jurisdiction clause, but this only became effective in Spanish law *after* Oceano's claim arose. Spanish law did contain a general prohibition on unfair terms which could have encompassed the jurisdiction clause, but the scope of the relevant Spanish law was unclear. The question arose whether the Barcelona court should interpret Spanish legislation in accordance with the Unfair

Contract Terms Directive. The ECJ reaffirmed the established position that a 'national court is obliged, when it applies national law provisions predating or postdating [a directive], to interpret those provisions, so far as possible, in the light of the wording of the directive' (para 32).

The Court went on to say that in light of the emphasis on public enforcement in the Unfair Contract Terms Directive, the national court may be required to decline of its own motion the jurisdiction conferred on it by an unfair term. As a consequence, Oceano would be deprived of a right which it might otherwise have enjoyed under existing Spanish law. This latter consideration should not prevent the national court from interpreting domestic law in light of the directive. In terms of the scope of the doctrine of indirect effect, it would be nonsensical to distinguish between cases which involve the imposition of obligations and those which concern restrictions on rights. Often, in a relationship between individuals, one individual's right is an obligation placed on another individual. The reasoning in *Arcaro* is best confined to the narrow context of criminal penalties.

Some questions have arisen as to when the obligation to use a consistent interpretation arises and in particular should it be the date the directive is enacted, or the date by which it must be implemented. This question came before the ECJ in *Adeneler*. The ECJ distinguished a positive and a negative duty for the courts of Member States. The positive aspect is the obligation to interpret all national law in line with the directive; that arises from the date by which the directive must be transposed. The negative aspect is based on the ECJ's reasoning in *Inter-Environnement Wallonie* (see 5.2.5.2 above). According to this line of reasoning, the national courts must, once the directive is in force (but before it is due to be transposed), refrain from interpreting national law in a way liable seriously to compromise the attainment of the result prescribed by the directive.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it wilfhot be possible to apply it. In such a situation, as the Court suggested in *Wagner Miret,* it will be necessary to pursue the alternative remedy of a claim in damages against the state under the principles laid down in *Francovich v Italy* (cases C-6 and 9/90—see Chapter 9).

It may be significant that in *El Corte Ingles SA v Rivero* (case C-l92/94) the Court, in following the *Dori* ruling that a directive could not be invoked directly against private parties, did not suggest a remedy based on indirect effect, as it had in *Dori*, but focused only on-the possibility of a claim against the state under *Francovich.*

5.3.3 Indirect effect in other contexts

The discussion has, so far, concentrated on the application of this principle in the context of directives. However, *mMariaPupino* (case C-l05/03), the ECJ held that the obligation to interpret national law in accordance with European rules can extend to framework decisions adopted under Article 34(2) TEU, and that a national court is required to interpret domestic law, in so far as possible, in accordance with the wording and purpose of a corresponding framework decision. The decision is controversial, because it extends the notion of indirect effect into the domain of criminal law, an area in respect of which the Community has no competence to act and seems also to circumvent the limitation on the direct effect of JHA provisions noted at 5.2.9.

5.4 Conclusions

The principle of direct effects, together with its twin principle of supremacy of EC law, discussed in Chapter 4, has played a crucial part in securing the application and integration of Community law within national legal systems. By giving individuals and national courts a role in the enforcement of Community law it has ensured that EC law is applied, and Community rights enforced, even though Member States have failed, deliberately or inadvertently, to bring national law and practice into line with Community law. Thus, as the Court suggested in *Van Gend* (case 26/62), the principle of direct effects has provided a means of control over Member States additional to that entrusted to the Commission under Article 226 and Member States under Article 227 (see further Chapter 11). But there is no doubt that the ECJ has extended the concept of direct effects well beyond its apparent scope as envisaged by the EC Treaty. Furthermore, although the criteria applied by the ECJ for assessing the question of direct effects appear straightforward, in reality they have in the past been applied loosely, and any provision which is justiciable has, until recently, been found to be directly effective, no matter what difficulties may be faced by national courts in its application, or what impact it may have on the parties, public or private, against whom it is enforced. Thus the principle of direct effects created problems for national

courts, particularly in its application to directives.

In recent years there have been signs that the ECJ, having, with a few exceptions, won acceptance from Member States of the principle of direct effects, or at least—in the case of directives—of vertical effects, had become aware of the problems faced by national courts and was prepared to apply the principles of direct and indirect effect with greater caution. Its more cautious approach to the question of standing, demonstrated in *Lemmens* (case C-226/97), has been noted above. In *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (case C-236/92), the Court found that Article 4 of Directive 7 5/442 on the Disposal of Waste, which required states to 'take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment', was not unconditional or sufficiently precise to be relied on by individuals before their national courts. It 'merely indicated a programme to be followed and provided a framework for action' by the Member States. The Court suggested that in order to be directly effective the obligation imposed by the directive must be 'set out in unequivocal terms'. In *R v Secretary of State for Social Security, exparte Sutton* (case C-66/95) the Court refused to admit a claim for the award of interest on arrears of social security benefit on the basis of Article 6 of EC Directive 79/7 on Equal Treatment for Men and Women in Social Security, although in *Marshall (No 2)* (case C-27 1/91) it had upheld a claim for compensation for discriminatory treatment based on an identically worded Article 6 of Equal Treatment Directive 7 6/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Corte Ingles SA v Rivero* (case C-192/94) it found the then Article 1 29a (now 153) of the EC Treaty requiring the Community to take action to achieve a high level of consumer protection insufficiently clear and precise and unconditional to be relied on as between individuals. This may be contrasted with its earlier approach to the former Article 128 EC, which required the Community institutions to lay down general principles for the implementation of a vocational training policy, which was found, albeit together with the non-discrimination principle of (the then) Article 7 EEC, to be directly effective (see *Gravier v City of Liege* (case 293/83)). Thus, a directive may be denied direct effects on any of the following the grounds:

(a) the right or interest claimed in the directive is not sufficiently clear, precise and unconditional

(b) the individual seeking to invoke the directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90)

(c) the obligation allegedly breached was not intended for the benefit of the individual seeking to invoke its provisions *(Lemmens).*

In the area of indirect effects, in *Dori v Recreb Sri* (case C-9 1/92), the ECJ, following its lead in *Marshall* (case 152/84), declared unequivocally that directives could not be invoked horizontally. This view was endorsed in *El Corte Ingles SA v Rivero, Arcaro* (case C- 168/95) and, most recently, in *Pfeiffer* (joined cases C-397/01 to C-403/01). In *Wagner Miret* (case C3 34/92) the ECJ acknowledged that national courts might not feel able to give indirect effect to Community directives by means of 'interpretation' of domestic law. This was also approved in *Arcaro.* In almost all of these cases, decided after *Francovich,* the Court pointed out the possibility of an alternative remedy based on *Francovich,* discussed in Chapter 9.

6.1 Introduction

6.1.1 The relevance of general principles

After the concept of direct effects and the principle of supremacy of EC law the third major contribution of the European Court of Justice (ECJ) has been the introduction of general principles of law into the corpus of EU law. Although primarily relevant to the question of remedies and enforcement of EC law, a discussion of the role of general principles of law is appropriate at this stage in view of their fundamental importance in the jurisprudence of the ECJ.

General principles of law are relevant in the context of EU law in a number of ways. First, they may be invoked as an aid to interpretation: EU law, including domestic law implementing EC law obligations, must be interpreted in such a way as not to conflict with general principles of law. Secondly, general principles of law may be invoked by both states and individuals to challenge Community action, either to annul or invalidate acts of the institutions (under Articles 230, 234, 236, and 241 (ex 173, 177,179, and 184) EC post Lisbon 263, 267, 270 and 277 TFEU), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC post Lisbon 265 and 270 TFEU). Thirdly, as a logical consequence of its second role, but less generally acknowledged, general principles may also be invoked as a means of challenging action by a Member State, whether in the form of a legal or an administrative act, where the action is performed in the context of a right or obligation arising from Community law (see *Klensch* (cases 201 and 202/85); *Wachaufv Germany* (case 5/88); *Lageder v Amministrazione delle Finanze dello Stato* (case C31/91); but cf*R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C2/93)). The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. General principles of law may be invoked to support a claim for damages against the Community, under Article 288(2) (ex 2 15(2) post Lisbon Article 340 TFEU) (see Chapter 14).

These reasons are all practical reasons, based in the arena of legal action. There are other reasons, too, which relate to how the Union is seen; what sort of values it has. The jurisprudence in this area expands the rights of individuals beyond the economic rights found in the original treaty. In parallel with the concept of citizenship, the protection of such rights suggests the Union itself has greater links with the individuals and is, itself, obtaining greater legitimacy.

This area has become a steadily evolving aspect of Union law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Union law. It will be seen that general principles, in particular fundamental rights, are invoked with increasing frequency before the European courts. Some of these general principles are examined in more detail. However, this chapter does not provide a full survey of the substantive rights which are now recognised in Union law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

6.1.2 Fundamental principles

General principles of law are not to be confused with the fundamental principles of Community law, as expressed in the EC Treaty, for example, the principles of free movement of goods and persons, of non-discrimination on the grounds of sex (Article 141 (ex 119, as amended) EC) or nationality (Article 12 (ex 6) EC), although there may be some overlap or commonality between the two. General principles of law constitute the 'unwritten' law of the Union and they have been developed—or discovered—over time by the ECJ.

6.2 Rationale for the introduction of general principles of law

The original legal basis for the incorporation of general principles into Union law was slim, resting precariously on three articles. Article 230 gives the ECJ power to review the legality of Community acts on the basis of, inter alia, 'infringement of this Treaty', or 'any rule of law relating to its application'. Article 288(2), which

governs Community liability in tort, provides that liability is to be determined 'in accordance with the general principles common to the laws of the Member States'. And Article 220, governing the role of the ECJ, provides that the Court 'shall ensure that in the interpretation and application of this Treaty the law is observed'.

In the absence of any indication as to the scope or content of these general principles, it has been left to the ECJ to put flesh on the bones provided by the treaty. This function the Court has amply fulfilled, to the extent that general principles now form an important element of EU law.

One of the reasons for what has been described as the Court's 'naked law-making' in this area is best illustrated by the case of *Internationale Handelsgesellschaft mbH* (case 11/70). There the German courts were faced with a conflict between an EC regulation requiring the forfeiture of deposits by exporters if export was not completed within an agreed time, and a number of principles of the German constitution, in particular, the principle of proportionality. It is in the nature of constitutional law that it embodies a state's most sacred and fundamental principles. Although these principles were of particular importance, for obvious reasons in post-war Germany, other Member States also had written constitutions embodying similar principles and rights. Clearly it would not have done for EC law to conflict with such principles. Indeed, as the German constitutional court made clear ([1974] 2 CMLR 540), were such a conflict to exist, national constitutional law would take precedence over EC law. This would have jeopardised not only the principle of primacy of EC law but also the uniformity of application so necessary to the success of the new legal order. So while the ECJ asserted the principle of primacy of EC law in *Internationale Handelsgesellschaft*, it was quick to point out that respect for fundamental rights was in any case part of EC law.

Another reason now given to justify the need for general principles is that the Community's powers—and now those of the Union—have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Union competence means that the institutions' powers are now more likely to operate in policy areas in which human rights have an influence. Although those who wish to see sovereignty retained by the nation state may originally have been pleased to see the limitation of the institutions' powers, the development of human-rights jurisprudence in this context can be seen as a double-edged sword, giving the ECJ increased power to impugn both acts of the Union institutions and implementing measures taken by Member States on grounds of infringement of general principles.

6.3 Development of general principles

6.3.1 Fundamental human rights

The Court's first tentative recognition of fundamental human rights was prior to *Internationale Handelsgesellschaft*, in the case of *Stauder v City ofUlm* (case 29/69). Here the applicant was claiming entitlement to cheap butter provided under a Community scheme to persons in receipt of welfare benefits. He was required under German law to divulge his name and address on the coupon which he had to present to obtain the butter. He challenged this law as representing a violation of his fundamental human rights (namely, equality of treatment). The ECJ, on reference from the German court on the validity of the relevant Community decision, held that, on a proper interpretation, the Community measure did not require the recipient's name to appear on the coupon. This interpretation, the Court held, contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of law and protected by the Court.

The ECJ went further in *Internationale Handelsgesellschaft*. There it asserted that respect for fundamental rights forms an integral part of the general principles of law protected by the Court—such rights are inspired by the constitutional traditions common to the Member States. One point to note here is that the ECJ was not comparing EC law with *national* law but with the principles of *international* law which are embodied in varying degrees in the national constitutions of Member States. A failure to make the distinction between general principles of international law (even if embodied in national laws) which the Community legal order respects and national law proper could erode the doctrine of supremacy of Community law vis-a-vis national laws.

The *International Handelsgesellschaft* judgment can be taken as implying that only rights arising from traditions common to Member States can constitute part of EC law (a 'minimalist' approach). It may be argued that if the problem of conflict between Community law and national law is to be avoided in *all* Member States it is necessary for *any* human right upheld in the constitution of *any* Member State to be protected under EU law (a maximalist approach). In *Hoechst* v *Commission* (cases 46/87 and 227/88), in the context of a claim based on

the fundamental right to the inviolability of the home, the Court, following a comprehensive review by Advocate-General Mischo of the laws of all the Member States on this question, distinguished between this right as applied to the 'private dwelling of physical persons', which was common to all Member States (and which would by implication be protected as part of Community law), and the protection offered to commercial premises against intervention by public authorities, which was subject to 'significant differences' in different Member States. In the latter case the only common protection, provided under various forms, was protection against arbitrary or disproportionate intervention on the part of public authorities. Similarly, but dealing with administrative law, in *Australian Mining & Smelting Europe Ltd v Commission* (case 155/79), in considering the principle of professional privilege, the Court found that the scope of protection for confidentiality for written communications between lawyers and their clients varied from state to state; only privilege as between independent (as opposed to in-house) lawyers and their clients was generally accepted, and would be upheld as a general principle of Community law.

These cases suggest that where certain rights are protected to differing degrees and in different ways in Member States, the Court will look for some *common* underlying principle to uphold as part of Union law. Even if a particular right protected in a Member State is not universally protected, where there is an apparent conflict between that right and EU law, the Court will strive to interpret Union law so as to ensure that the substance of that right is not infringed. An exception to this approach can be seen in *Society for the Protection of the Unborn Child v Grogan* (case 159/90). This case concerned the officers of a students' union who provided information in Ireland about the availability of legal abortion in the UK. SPUC brought an action alleging that this was contrary to the Irish constitution. The officers' defence was based on the freedom to provide services within the Community and on the freedom of expression contained in the ECHR which also forms part of Community law as a general principle (see further below). The ECJ evaded this issue. Since the students' union did not have an economic link with the clinics whose services they advertised, the provision of information about the clinics was not an economic activity within the treaty. As the issues fell outside the scope of EC law, the officers could not rely on either the provisions on freedom to provide services in the treaty or on general principles of law. (See further Chapter 21.)

6.3.2 Role of international human-rights treaties

Following *Internationale Handelsgesellschaft* the scope for human-rights protection was further extended in the case of *Nold KG v Commission* (case 4/73). In this case J Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity. While the Court did not find for the company on the merits of the case, it asserted its commitment to fundamental rights in the strongest terms. As well as stating that fundamental rights form an integral part of the general principles of law, the observance of which it ensures, it went on to say: In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The reasons for this inclusion of principles of certain international treaties as part of EU law are clearly the same as those upholding fundamental constitutional rights; it is the one certain way to guarantee the avoidance of conflict.

In this context, the most important international treaty concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), to which all Member States are now signatories. The Court has on a number of occasions confirmed its adherence to the rights protected therein, an approach to which the other institutions gave their support 0oint Declaration, [1977] OJ C 103/1). In *R v Kirk* (case 63/83), in the context of criminal proceedings against Kirk, the captain of a Danish fishing vessel, for fishing in British waters (a matter subsequently covered by EC regulations), the principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the Court and applied in Captain Kirk's favour. The EC regulation, which would have legitimised the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively. (See also *Johnston v Chief Constable of the Royal Ulster Constabulary* (case 222/84) (ECHR, Article 6, right to

judicial process); *Hoechst* (cases 46/87, 227/88) contrast substantive ruling in *Roquette Freres* (case C-94/00); *National Panasonic v Commission* (case 136/79) (ECHR Article 8, right to respect for private and family life, home and correspondence—not infringed).) The impact of Article 8 ECHR can be seen clearly in the case law on free movement of people (see Chapter 25).

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of a matter of EU law. In *Kaur* v *Lord Advocate* ([1980] 3 CMLR 79), an attempt was made to invoke the Convention (Article 8 'respect for family life') by an Indian immigrant seeking to challenge a deportation order made under the Immigration Act 1971. She failed on the grounds that the Convention had not been incorporated into British law. Its alleged incorporation via the European Communities Act 1972 did not enable a party to invoke the Convention before a Scottish court in a matter wholly unrelated to EU law (see also *SPUC v Grogan* (case 159/90) and *Kremzow v Austria* (case C-299/95)). In *Mannesmannrohren-Werke AG* v *Commission* (Case T-l 12/98), the Court of First Instance (CFI) emphasised that although the ECHR has special significance in defining the scope of fundamental rights recognised by the Community, because it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself. The CFI therefore rejected arguments based directly on Article 6 ECHR in relation to an application to annul a Commission decision, but allowed the application on other grounds (see 6.6.7). The CFI's view with regard to invoking ECHR articles may be technically correct, but it sits somewhat uneasily with other judgments both by the CFI and the ECJ in which the courts appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see, eg, *Roquette Freres* (case C-94/00); *Orfanopoulos* (case C-482/0 1), citing *Boultifv Switzerland* concerning right to family life; *Connolly v Commission* (case C-274/99P): civil servants' freedom of expression under Article 10 ECHR).

Other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles are the European Social Charter (1971) and Convention 111 of the International Labour Organisation (1958) *(Defrenne v Sabena (No 3)* (case 149/77)). In *Ministere Public v Levy* (case C-158/91) the Court suggested that a Member State might even be obliged to apply a national law which conflicted with a ruling of its own on the interpretation of EC Directive 7 6/207 where this was necessary to ensure compliance with an international convention (in this case ILO Convention 89,1948) concluded prior to that state's entry into the EC. The list has grown over the years, with the ECJ adding recently, for example, Convention on the Protection and Promotion of the Diversity of Cultural Expressions *(UTECA v Administracion General del Estado* (case C-222/07)) and the UN Convention on the Rights of the Child *(Dynamic Medien* (case C-244/06)).

6.3.3 Relationship between different legal systems protecting human rights

6.3.3.1 *Relationship with national constitutions*

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EU law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The ECJ's tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wilnsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *InternationaleHandelsgesellschaft* ([1974] 2 CMLR 540) (see Chapter 4). This does not, however, mean that the ECJ can rest on its laurels in this regard. The Italian constitutional court in Fragd *(SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) reaffirmed its right to test Community rules against national constitutional rules and stated that Community rules that, in its view, were incompatible with the Italian constitution would not be applied. Similarly, the German constitutional courts have reasserted the right to challenge Community legislation that is inconsistent with the German constitution (see, eg, *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 BvQ3/89) [1990] 1 CMLR 570 (an earlier tobacco-advertising case) and the bananas cases—*Germany v Council (Re Banana Regime)* (case C-280/93), *Germany v Council (Bananas II)* (case C-l22/95) and T Porr *GmbH v Hauptzollamt Hamburg-Jonas* (cases C-364 and 365/95)—discussed further in Chapter 4). Although the supremacy of Community law vis-a-vis national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather than referring for a ruling on these matters from the ECJ. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have a similar effect.

6.3.3.2 *Accession to the ECHR*

Deferring to the ECJ does, however, concentrate a significant degree of power in that court, against whose rulings there is no appeal. One suggested safeguard for fundamental rights would be for the Community to accede to the ECHR. Questions of human rights and, in particular, interpretation of the ECHR, could then be taken to the European Court of Human Rights, a court which specialises in these issues. This would minimise the risk of the ECJ misinterpreting the ECHR and avoid the possibility of two conflicting lines of case law developing (eg, *Orkem* (case 3 74/87) and *FunkevFrance* (case SA 256A)). The ECJ, however, has ruled that accession to the ECHR would not be within the present powers of the Community: treaty amendment would be required before the Community could take this step *(Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights).*

This was one of the issues discussed by the Convention on the Future of Europe preparing for the 2004 IGC. The treaty establishing a Constitution would not only have incorporated the EU Charter of Fundamental Rights (a separate document, not to be confused with the ECHR) into the Constitution (see further below), but would also have included an article in Part I which provided that the Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. A further declaration provided for cooperation between the ECHR and the ECJ. As we know, the Constitution has been abandoned and replaced by the Lisbon Treaty. Although Lisbon does not incorporate the charter, it continues the intention to accede to the ECHR (Article 6(2) TEU), but the status of the Lisbon Treaty is, like the Constitution before it, in doubt (see Chapter 1). Even if it were in force, the details of timing and other practicalities of accession remain to be worked out. The Treaty on European Union (TEU) (as amended by Lisbon) also specifies that accession would not affect the Union's competence as defined in the treaties. Yet, this remains a significant step forward. It also follows the line established by recent treaty amendments, which have seen a progressive raising of the profile of human-rights protection within the Community and, indeed, the Union.

6.3.3.3 *Enforcing respect for the ECHR within the EU structure*

The TEU had included in the Union general provisions a reference to the ECHR to the effect that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . and as they result from the constitutional tradition common to the Member States, as general principles of Community law. [Article 6(2) (ex F(2) TEU).]

The Constitution provided, to a similar effect, that:

Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [Article 1-9(3).]

This wording has been reproduced by the Lisbon Treaty at Article 6(3) TEU.

Additionally, Article 6(1) (ex F(l)) TEU stated that the Union was founded on respect for 'liberty, democracy and respect for human rights'. However, by Article L TEU, as it then was (now amended and renumbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The Treaty of Amsterdam (ToA) amended Article 46 TEU to give the ECJ express competence in respect of Article 6(2) TEU with regard to action of the institutions 'insofar as the ECJ has jurisdiction either under the treaties establishing the Communities or under the TEU'. This would seem to be little more than a confirmation of the existing position, at least as far as the EC Treaty is concerned, though it might have some significance in respect of the ECJ's (limited) jurisdiction regarding justice and home affairs (JHA). Article 46 TEU will be repealed should the Lisbon Treaty come in to force.

The ToA inserted Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision used, it could have serious consequences for the Member State in question; such a Member State would lose its opportunity to influence the content of Union legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. Thus, one might suggest that the need to comply with fundamental principles is being taken seriously indeed. It is likely, though, that this provision will be used only rarely given the severity of the breach needed to trigger the procedure, which itself is long-winded, requiring unanimity

(excluding the offending Member State) in the first instance. Given the potential consequences for Member States, however, the complexity of the procedure is perhaps appropriate. The Lisbon Treaty contains a new provision, Article 269 TFEU, which gives the ECJ the jurisdiction to decide on the legality of such a decision on procedural grounds only.

6.3.3.4 *Relationship with international law*

The relationship between EU and international law has been the subject of consideration recently. The factual backdrop concerned Union measures implementing UN Resolutions on economic sanctions. Effectively, these measures allowed for the freezing of individuals' assets, without prior warning. The matter came before the CFI, as an action for annulment. It held that the courts are not empowered to review decisions of the UN, including the Security Council, even in the light of Community law or the fundamental rights recognised by Union law *(Ahmed AH Yusufand Others v Council of the European Union* (cases T-306 and 3 15/01), known as *Kadi).* The CFI based this decision on the fact that, according to its interpretation of the requirements of international law, the obligations of the Member States of the United Nations prevail over any other obligation. The Community, although not itself a member of the UN, must, in the CFI's opinion, be bound by the obligations flowing from the Charter of the United Nations. Nonetheless, the CFI reserved the rights of the Community courts to check the lawfulness of the Council Regulation (which implemented the UN Security Council Resolution and was under challenge in this case), and therefore implicitly the underlying resolution, by reference to the higher rules of international law *(jus cogens),* from which neither the Member States nor the bodies of the Union should, under international law, be able to derogate. This includes provisions intended to secure universal protection of fundamental human rights. On the facts, the CFI found the application unfounded.

The ECJ heard the appeal in *Kadi* (joined cases C-402 and 415/05 P) and approached the matter in a completely different way, overturning the CFI's internationalist approach. While the ECJ accepted that the EU (and its Member States) were subject to international obligations, such as those contained in the UN, this does not change the allocation of powers within the EU. Furthermore, the EU was characterised by the ECJ, drawing on its previous jurisprudence, as an autonomous legal order built on the rule of law and respect for fundamental human rights. Thus there is a distinction between international obligations and the effect of Community norms, and the fact that Community measures might arise from those international obligations does not affect the fact that Union law must comply with human rights, as recognised by the EU. On this basis, the ECJ reviewed whether the EU implementing measures (not the UN Resolutions) complied with a number of procedural rights and the right to respect for property, and in this, it is arguable that the ECJ was taking a stronger line that had the European Court of Human Rights. This is a significant judgment, which re-emphasises the centrality of the rule of law and the protection of human rights within the EU.

6.4 Relationship between the EC/EU and the ECHR in the protection of human rights: View from the ECHR

All Member States of the EU have signed the ECHR, and in most Member States, the Convention has been incorporated into domestic law. (It was incorporated in the UK by the Human Rights Act 1998, which came into force in October 2000.) When it is so incorporated, the Convention's provisions may be invoked before the domestic courts in order to challenge *national* rules or procedures which infringe the rights protected by the Convention. Even without the Convention being incorporated into domestic law, the Member States are bound by its terms and individuals, after they have exhausted national remedies, have a right of appeal under the Convention to the European Court of Human Rights.

The ECJ has done a great deal to ensure the protection of human rights within the context of the application of Community law, whether by Community institutions or by Member States. But, as the ECHR has not so far been incorporated into *Community* law, its scope has been limited and the relationship between the ECHR and the Union legal system is somewhat unclear. The difficulties are illustrated by the decision of the European Court of Human Rights in the *Matthews* case (European Court of Human Rights judgment, 18 February 1999).

Matthews concerned the rights of UK nationals resident in Gibraltar to vote in European Parliamentary elections. They were excluded from participating in the elections as a result of the 1979 agreement between the Member States which established direct elections in respect of the European Parliament. The applicants argued that this was contrary to Protocol 1, Article 3 of the ECHR, which provides that signatory States to the

Convention are under an obligation 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The British government argued that not only was Community law not within the jurisdiction of the ECHR (as the Community had not acceded to the Convention), but also that the UK government could not be held responsible for joint acts of the Member States. The European Court of Human Rights found, however, that there had been a violation of the Convention.

The Court held that States which are party to the ECHR retain residual obligations in respect of the rights protected by the Convention, even as regards areas of lawmaking which had been transferred to the Union. Such a transfer of power is permissible, provided Convention rights continue to be secured within the Community framework. In this context the Court of Human Rights noted the ECJ's jurisprudence in which the ECJ recognised and protected Convention rights. In this case, however, the existence of the direct elections was based on a *sui generis* international instrument entered into by the UK and the other Member States which could not be challenged before the ECJ, as it was not a normal Community act. Furthermore, the TEU, which extended the European Parliament's powers to include the right to co-decision thereby increasing the Parliament's claim to be considered a legislature and taking it within the terms of Protocol 1, Article 3 of the ECHR, was equally an act which could not be challenged before the ECJ. There could therefore be no protection of Convention rights in this regard by the ECJ. Arguing that the Convention is intended to guarantee rights that are not theoretical or illusory, the Court of Human Rights held that:

The United Kingdom, together with all other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty. [Para 33.]

It may be noted that it is implicit in the reasoning in this judgment that the EU is regarded by the Court of Human Rights as being the creature of the Member States, which remain fundamentally responsible for the Community's actions—and for those of the Union. This corresponds with the conception of the EU expressed by some of the Member States' constitutional courts (eg, see the German constitutional court's reasoning in *Brunner* [1994] 1 CMLR 57).

Arguably, this judgment opens the way for the Member States to be held jointly responsible for those Community (or Union) acts that currently fall outside the jurisdiction of the ECJ, sealing lacunae in the protection offered to individual human rights within the Community legal order. The difficulty is, of course, that in this case only the UK was the defendant. The British government is dependent on the cooperation of the other Member States to enable it to fulfil its own obligations under the ECHR. It is possible that a case could be brought under the ECHR against all Member States jointly. (See, eg, *Societe Guerin Automobiles* (Application No 51717/99), inadmissible on other grounds; *DSR Senator Lines*, (Application No 56672/00) (Grand Chamber), dismissed as the applicant could not claim on the facts to be a victim, though note third-party representations, including that of the ICJ.) Although this would not obviate the need for cooperation to remedy any violation found, it would avoid the situation where one Member State alone was carrying the responsibility for Union measures that were the choice of all (or most) Member States. The implication that the European Court of Human Rights will step in only where there is no effective means of securing human-rights protection within an existing international body (ie, that the ECJ has primary responsibility for these issues in the EU) is underlined by its approach in another case involving another European supranational organisation, Euratom *(Waite and Kennedy v Germany*, European Court of Human Rights judgment, 18 February 1999). There the Court emphasised the necessity for an independent review board which is capable of protecting fundamental rights to exist within the organisational structure. More recently, we can see this approach in *Bosphorus Airways v Ireland* (European Court of Human Rights judgment, 30 June 2005 (GC)), which concerned alleged human-rights violations resulting from Community secondary legislation which the ECJ had upheld. There the European Court of Human Rights held that it would not interfere provided the rights protection awarded by the ECJ was equal to that under the ECHR, noting that in this context, 'equal' means equivalent or comparable rather than identical (para 155). It should be noted that in a concurring judgment, one of the European Court of Human Rights judges did make the point that, although there have been reviews of ECJ jurisprudence, they have looked at the level of protection in a general or formal way, rather than looking at the substance of a right in an individual case (Concurring Opinion of Judge Ress, para 2), highlighting a potential weakness in the system of protection awarded to individuals. Of course, this may all change should the EU accede to the ECHR.

6.5 The EU Charter of Fundamental Rights

6.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the ECHR. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog (a former German federal president), to produce a draft Union charter as an alternative mechanism to ensure the protection of fundamental rights. This was completed in time for the 2000 European Council meeting at Nice, where the European institutions solemnly proclaimed the charter (published at [2000] OJ C364/1—hereinafter EUCFR). At the present time, the EUCFR does not have legal effect. As with the Constitution, the Lisbon Treaty proposes to give legal effect to the Charter. It does so by a different route, though. The Constitution would have incorporated the Charter as Part II and Article 1-9(1) specified that 'the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights'. Lisbon instead refers to the Charter rather than incorporating it. Thus, Article 6(1) TEU (as amended by Lisbon) states:

the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights. . . which shall have the same legal value as the Treaties.

Nonetheless the scope of the rights granted is as limited as it was under the Charter (see 6.5.2). Further provisions clarify that the reference to the Charter does not create any new rights or extend the Union's competence.

Despite some contention about the status and impact of the Charter, the ECJ has alreadymentioned the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see, eg, *R v SoS ex parte BAT* (Case C-491/01), where the Court observed that 'the right to property ... is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR") and *enshrined in Article 17 of the Charter of Fundamental Rights of the European Union'* (para 144, emphasis added). See also *Jego-Quere et Cie v Commission* (case T-177/01 para 42; see further Chapter 12 and *Mannesmannrohren-Werke AG* v *Commission* (case T-l 12/98) paras 15 and 76). These have begun to cover a wide range of rights: we have already noted the *Kadi* judgment. In *Dynamic Medien,* the ECJ referred to the rights of the child protected by the Charter and in *Varec v Belgian State* (case C-450/06), the ECJ refers to the right to private life. However, there has been no judgment to date in which the ECJ has *based* its judgment on the EUCFR.

6.5.2 Scope

By virtue of Article 51(1) EUCFR, its provisions are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. As far as the institutions and bodies of the Union are concerned, due regard is to be had to the principle of subsidiarity. It is not entirely clear what the significance of this reference is, other than perhaps to confirm that the Union must always act in accordance with the principle of subsidiarity. With regard to the Member States, Article 51(1) EUCFR confirms existing case law which has held that there is only an obligation on the Member States to respect fundamental rights under EU law when they are acting in the context of Community law (see *Karlsson and ors* (case C-292/97), para 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see above, on 'residual obligations').

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. Any such limitations must be proportionate and are only permitted if they are necessary and genuinely meet objectives recognised by the EU. In this, there are similarities to the approach taken with regard to the derogation provisions in the ECHR. Article 52(2) EUCFR further confirms that those rights which derive from the treaties are subject to the conditions and limitations that apply to the corresponding treaty provisions.

6.5.3 Substance

The EUCFR is divided into six substantive chapters. Chapter I, Dignity, includes:

(a) human dignity

(b) the right to life

(c) the right to the integrity of the person

(d) prohibitions on torture, inhuman or degrading treatment or punishment, slavery and forced labour.

Chapter II, Freedoms, provides for:

(a) right to liberty and security

(b) respect for private and family life

(c) protection of personal data

(d) right to marry and found a family

(e) freedom of: (i) thought, conscience and religion (ii) expression and information (iii) assembly and association (iv) the arts and sciences (v) a right to education; (vi) choice in an occupation and a right to engage in work; (vii) ability to conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or deportation.

Chapter III, Equality, guarantees:

(a) equality before the law, non-discrimination, cultural, religious and linguistic diversity

(b) equality between men and women

(c) the rights of the child and the elderly

(d) the integration of persons with disabilities.

The solidarity rights in Chapter IV are:

(a) the workers' right to information and consultation with the right of collective bargaining and action

(b) right of access to placement services

(c) protection in the event of unjustified dismissal

(d) fair and just working conditions

(e) prohibition of child labour and protection of young people at work

(f) family and professional life

(g) social security and social assistance

(h) health care

(i) access to services of general economic interest

(j) environmental protection

(k) consumer protection.

Chapter V provides for citizenship rights (see also Chapter 24), which are the right to:

(a) vote and stand as candidate at elections to the European Parliament and at municipal elections

(b) good administration

(c) access to documents

(d) access to the Ombudsman

(e) petition the European Parliament

(f) have freedom of movement and residence

(g) diplomatic and consular protection.

Finally, Chapter VI, Justice, guarantees a right to:

(a) effective remedy and to a fair trial

(b) presumption of innocence and right of defence

(c) principles of legality and proportionality of criminal offences and penalties;

(d) not to be tried or punished twice in criminal proceedings for the same criminal offence.

The preceding enumeration of all the rights contained in the EUCFR demonstrates that the Charter consists of a mixture of human rights found in the ECHR, rights derived from other international conventions and provisions of the EC Treaty. The Council of the European Union has published a booklet which explains the origin of each of the rights contained in the EUCFR (see 'Further Reading' at the end of this chapter).

6.5.4 Overlap between the Charter and the ECHR

Article 52(3) deals with the complex problem of overlap between the ECHR and the EUCFR. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (Article 53).

At present, the question of overlap is not a cause for concern, because the EUCFR has no legal status. However, if the Lisbon Treaty comes into force, it will be necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Presumably, Article 51 would mean that the EUCFR rights are not free-standing rights, but are only relevant in matters of European law. In that case, the position would probably not be any different from the current situation.

If, however, certain EUCFR rights (such as those based on the ECHR) are regarded as free-standing rights, then the ECJ may be in danger of 'competing' with the European Court of Human Rights. The ECJ would be obliged to interpret EUCFR rights in accordance with the ECHR, but a difficulty may arise if the ECJ interprets an ECHR-based right in one way and the Court of Human Rights subsequently takes a different view. Member States may then face a conflict between complying with their obligations under European law, in particular the doctrine of supremacy (see Chapter 4) and under the ECHR, respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ's case law. In *Roquette Freres* (case C-94/00), the question arose whether business premises could be protected under Article 8 ECHR against 'dawn raids' by the Commission under Regulation 17 (now replaced by Regulation 1/2003). In its earlier decision in *Hoechst* (case C-46/87), the ECJ had held that Article 8 required no such protection. However, subsequent ECHR case law has extended the scope of Article 8 to cover business premises. In *Roquette*, the ECJ held that the case law under the ECHR must be taken into account in applying the *Hoechst* decision. The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Union law. Interestingly, it has been noted the Court of Human Rights has likewise taken account of relevant case law of the ECJ. It seems that in their respective jurisdictions the two courts are endeavouring to minimise conflict. Whilst this is good practice, the risk of inconsistency remains.

6.5.5 Conclusion on EUCFR

Currently, the EUCFR has only declaratory status and it remains to be seen whether it will become legally binding. If this were to happen, some thought would need to be given to the relationship between the ECHR and the EUCFR and the role of the ECJ in interpreting the fundamental rights contained in the EUCFR. The potential accession of the EU to the ECHR, which would be possible if the Lisbon Treaty became effective in its current form, would acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Union law have been expanded through the case law of the ECJ to cover a wide variety of rights and principles developed from many sources. We will now look at some specific examples of those rights. The following is not, however, an exhaustive list, and there may be degrees of overlap between the categories mentioned.

6.6 Rules of administrative justice

6.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 6.8 below). The principle, applied in the context of administrative law, requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test thus puts the burden on an administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect it is a more rigorous test than one based on reasonableness.

The principle has been invoked on many occasions as a basis of challenge to EC secondary legislation, often successfully (eg, *Werner A Bock KG v Commission* (case 62/70); *Bela-Muhle JosefBergmann KG v Grows-Farm GmbH & Co KG* (case 114/76). It was applied *in Rv Intervention Boardfor Agricultural Produce, exparte ED & F Man (Sugar) Ltd* (case 181/84) in the context of a claim by ED & F Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, ED & F Man (Sugar) Ltd, was seeking repayment of a security of £1,670,370 forfeited when it failed to comply with an obligation to submit licence applications to the Board within a specified time limit. Due to an oversight they were a few hours late. The claimant's claim rested on the alleged illegality of the EC regulations governing the common organisation of the sugar market. The regulations appeared to require the full forfeiture of the deposit (lodged by the exporter at the time of the initial offer to export) in the event of a breach of both a *primary* obligation to export goods as agreed with the Commission and a *secondary* obligation to submit a licence application following the initial offer within a specified time limit. The ECJ held, on a reference from the Divisional Court on the validity of the regulations, that to require the same forfeiture for breach of the secondary obligation as for the primary obligation was disproportionate, and to the extent that the regulation required such forfeiture, it was invalid. As a result of this ruling, the claimant was held entitled in the Divisional Court to a declaration that the forfeiture of its security was unlawful: a significant victory for the claimant.

The proportionality principle has also been applied in the context of the EC Treaty, for example, in the application of the provisions relating to freedom of movement for goods and persons. Under these provisions States are allowed some scope for derogation from the principle of free movement, but derogations must be 'justified' on one of the grounds provided (Articles 30 (ex 36) and 39(3) (ex 48(3) post Lisbon Articles 36 and 45(3) TFEU). This has been interpreted by the ECJ as meaning that the measure must be *no more than is necessary* to achieve the desired objective (see Chapters 20 (goods), and 25 (persons)).

In *Watson* (case 118/75) the proportionality principle was invoked in the sphere of the free movement of persons to challenge the legality of certain action by the Italian authorities. One of the defendants, Ms Watson, was claiming rights of residence in Italy. The right of free movement of workers expressed in Article 39 EC is regarded as a fundamental Community right, subject only to 'limitations' which are 'justified' on the grounds of public policy, public security or public health (Article 39(3)). The Italian authorities sought to invoke this derogation to expel Ms Watson from Italy. The reason for the defendants' expulsion was that they had failed to comply with certain administrative procedures, required under Italian law, to record and monitor their movements in Italy. The ECJ, on reference from the Italian court, held that, while states were entitled to impose penalties for non-compliance with their administrative formalities, these must not be disproportionate; and they must never provide a ground for deportation. Here, it is worth noting, it is a Member State's action which was deemed to be illegal for breach of the proportionality principle. Likewise, in *Wijsenbeek* (case C-378/97) the ECJ held that, although Member States were still entitled to check the documentation of EC nationals moving from one Member State to another, any penalties imposed on those whose documentation was unsatisfactory must be proportionate: in this case, imprisonment for failure to carry a passport was disproportionate. (See further Chapter 25.)

Similarly, in the context of goods, in a case brought against Germany in respect of its beer purity laws (case 178/84), a German law imposing an absolute ban on additives was found in breach of EC law (Article 28 EC) and not 'justified' on public-health grounds under Article 30. Since the same (public health) objective could have been achieved by other less restrictive means, the ban was not 'necessary'; it was disproportionate.

More recently, however, there seems to have been a refinement of the principle of proportionality. In the case of *Sudzucker Mannheim/Ochsenfiirt AG v HauptzoUamt Mannheim* (case C-161/96) the ECJ confirmed the

distinction between primary and secondary (or administrative) obligations made in *R v Inteivention Board for Agricultural Produce* (case 181/84). The breach of a secondary obligation should not be punished as severely as a breach of a primary obligation. On the facts of the case, the ECJ held that a failure to comply with customs formalities by not producing an export licence was a breach of a primary and not a secondary obligation. The ECJ stated that the production of the export licence was necessary to ensure compliance with export requirements and thus the production of the export licence was part of the primary obligation. On this reasoning, it may be difficult to distinguish between primary and secondary obligations.

Further, the ECJ has held that, where an institution has significant discretion in the implementation of policies, such as in CAP, the ECJ may only interfere if the 'measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue' *(Germany v Council (Re Banana Regime)* (case C-280/93), para 90). The same is also true of actions of Member States where they have a broad discretion in the implementation of Community policy (see *R v Minister ofAgriculture, Fisheries and Food,* ex parte *National Federation of Fishermen's Organisations* (case C-44/94)). In these circumstances, the distinction between proportionality and *Wednesbury* reasonableness is not great.

6.6.2 Legal certainty

The principle of legal certainty was invoked by the ECJ in *Defrenne v Sabena (No 2)* (case 43/75). The principle, which is one of the widest generality, has been applied in more specific terms as:

(a) the principle of legitimate expectations

(b) the principle of non-retroactivity (c) the principle of *resjudicata.*

The principle of legitimate expectations, derived from German law, means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned. A legitimate expectation is one which might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. It does not extend to anticipated windfalls or speculative profits. In *Efisol SA v Commission* (case T-336/94) the CFI commented that an individual would have no legitimate expectations of a particular state of affairs existing where a 'prudent and discriminating' trader would have foreseen the development in question. Furthermore, in *Germany v Council* (case C-280/93), the ECJ held that no trader may have a legitimate expectation that an existing Community regime will be maintained. In that the principle requires the encouragement of a reasonable expectation, a reliance on that expectation, and some loss resulting from the breach of that expectation, it is similar to the principle of estoppel in English law.

The principle was applied in *August Tbpfer & Co GmbH v Commission* (case 112/77) (see Chapter 2). August Topfer & Co GmbH was an exporter which had applied for, and been granted, a number of export licences for sugar. Under Community law, as part of the common organisation of the sugar market, certain refunds were to be payable on export, the amount of the refunds being fixed in advance. If the value of the refund fell, due to currency fluctuations, the licence holder could apply to have his licence cancelled. This scheme was suddenly altered by an EC regulation, and the right to cancellation withdrawn, being substituted by provision for compensation. This operated to Topfer's disadvantage, and it sought to have the regulation annulled, for breach, inter alia, of the principle of legitimate expectations. Although it did not succeed on the merits, the principle of legitimate expectations was upheld by the Court. (See also *CNTA SA v Commission* (case 74/74), monetary compensation scheme ended suddenly and without warning: Chapter 14.) In *Opel Austria GmbH v Council* (case T-l 15/94) the Court held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law. Thus, where the Community had entered into an obligation and the date of entry into force of that obligation is known to traders, such traders may use the principle of legitimate expectations to challenge measures contrary to any provision of the international agreement having direct effect.

The principle of non-retroactivity, applied to Community secondary legislation, precludes a measure from taking effect before its publication. Retrospective application will only be permitted in exceptional circumstances, where it is necessary to achieve particular objectives and will not breach individuals' legitimate expectations. Such measures must also contain a statement of the reasons justifying the retroactive effect *(Diversinte SA v Administration Principal de Aduanos e Impuestos Especiales de la Junqueros* (case C-260/91)).

In *R v Kirk* (case 63/83) the principle of non-retroactivity of penal provisions (activated in this case by a

Community regulation) was invoked successfully. However, retroactivity may be acceptable where the retroactive operation of the rule in question improves an individual's position (see, for example, *Road Air BV v Inspecteur der Invoerrechten enAccijnzen* (case C-3 10/95)).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Union law when it is not directly effective (the *Von Colson* principle, see Chapter 5). In *Pretore di Said v Persons Unknown* (case 14/86) in a reference from the Said magistrates' court on the compatibility of certain Italian laws with EEC Water Purity Directive 78/659, which had been invoked against the defendants in criminal proceedings, the Court held that:

A Directive cannot of itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the Directive.

The Court went further in *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86). Here, in response to a question concerning the scope of national courts' obligation of interpretation under the *von Colson* principle, the Court held that that obligation was 'limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity'. Thus national courts are not required to interpret domestic law to comply with EC law in violation of these principles. This would appear to apply even where the EC law in question has direct effects, at least where criminal proceedings are in issue (see *Berlusconi* (joined cases C-387/02, C-391/02 and C-403/02), discussed in Chapter 5).

Problems also arise over the temporal effects of ECJ rulings under Article 234. In *Defrenne v Sabena (No 2)* (case 43/75) the Court held that, given the exceptional circumstances, 'important considerations of legal certainty' required that its ruling on the direct effects of the then Article 119 (now 141 post Lisbon, 157 TFEU) should apply prospectively only. It could not be relied on to support claims concerning pay periods prior to the date of judgment, except as regards workers who had already brought legal proceedings or made an equivalent claim. However, in *ArieteSpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 and 128/79) the Court affirmed that *Defrenne* was an exceptional case. In a 'normal' case a ruling from the ECJ was retroactive; the Court merely declared the law as it always was. This view was approved in *Barra* (case 309/85). However, in *Blaizot* (case 24/86), a case decided the same day as *Barra*, 'important considerations of legal certainty' again led the Court to limit the effects of its judgment on the lines of *Defrenne.* It came to the same conclusion in *Barber v Guardian Royal Exchange Assurance Group* (case 262/88). These cases indicate that in exceptional cases, where the Court introduces some new principle, or where the judgment may have serious effects as regards the past, the Court will be prepared to limit the effects of its rulings. *Kolpinghuis Nijmegen* may now be invoked to support such a view. Nevertheless, the Court did not limit the effect of its judgment in *Francovich* (cases C-6 and 9/90) contrary to Advocate-General Mischo's advice, despite the unexpectedness of the ruling and its 'extremely serious financial consequences' for Member States. Nor did it do so in *Marshall (No 2)* (case C-271/91) when it declared that national courts were obliged, by Article 5 of Directive 76/207 and their general obligation under Article 10 (ex 5) EC to ensure that the objectives of the directives might be achieved, to provide full compensation to persons suffering loss as a result of infringements of the directive, a matter which could not have been deduced either from the ECJ's case law or from the actual wording of the directive (see further Chapter 8).

The question of the temporal effect of a ruling from the ECJ under Article 234 EC was considered by the Italian constitutional court in *Fragd (SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) in the light of another general principle. Although the point did not arise out of the reference in question, the Italian court considered the effect that a ruling under Article 234 holding a Community measure void should have on the referring court if the ECJ had held that the ruling would apply for future cases only, excluding the judgment in which it was given. The Italian constitutional court suggested that in the light of the right to judicial protection given under the Italian constitution, such a holding should have effect in the case in which the reference was made. A finding of invalidity with purely prospective effect would offend against this principle and would therefore be unacceptable.

Resjudicata is a principle accepted in both the civil- and common-law traditions; its significance has been recognised also by the Human Rights Court in Strasbourg (see eg *Brumarescuv Romania* (28342/05)). Essentially it operates to respect the binding force of a final judgment in a matter; once any relevant time limits for appeal have expired, the judgment cannot be challenged. The ECJ has recognised this principle in many cases. In *Kobler* (case C-224/01), the ECJ held that:

attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *resjudicata.* In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. [Para 38.]

Applying this in *Kapferer* (case C-234/04) the ECJ ruled that in the light of *resjudi cata,* a national court does not have to disapply domestic rules of procedure con ferring finality on a decision, even though doing so would enable it to remedy an infringement of Community law by the decision at issue. Surprisingly, in *Lucchini Siderurgica* (case C-l 19/05), the ECJ came to the opposite conclusion. An undertak ing was seeking to claim state aid, which had been granted by the Italian government in breach of the state aid rules. The undertaking had a decision of an Italian court to this effect, whose judgment was protected by the principle of *resjudicata.*

In proceedings to challenge this decision, the ECJ addressed the question of whether Community law precluded the appplication of *resjudicata.* The ECJ concluded that it did. The Advocate-General in *Lucchini* pointed out that the principle is not absolute; the systems of the various Member States allow exceptions under certain strict conditions and the ECtHR has accepted this. Some commentators have questioned whether the circumstances in *Lucchini* come within the ECHR case law, however. Certainly, *Lucchini* is best regarded as an isolated case on exceptional facts.

6.6.3 Procedural rights

Where a person's rights are likely to be affected by EC law, EC secondary legislation normally provides for procedural safeguards (eg, Regulation 1/2003, competition law; and Directive 2004/38/EC, free movement of workers, Chapter 25). However, where such provision does not exist, or where there are lacunae, general principles of law may be invoked to fill those gaps.

6.6.4 Natural justice: The right to a hearing

The right to natural justice, and in particular the right to a fair hearing, was invoked, this time from English law, in *Transocean Marine Paint Association v Commission* (case 17/74) by Advocate-General Warner. The case, which arose in the context of competition law, was an action for annulment of the Commission's decision, addressed to the claimant association, that their agreements were in breach of EC law. The Court, following Advocate-General Warner's submissions, asserted a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his views known. Since the Commission had failed to comply with this obligation its decision was annulled. The principle was affirmed in *Hoffman-La Roche & Co AG v Commission* (case 85/76), in which the Court held that observance of the right to be heard is, in all proceedings in which sanctions, in particular fines and periodic payments, may be imposed, a fundamental principle of law which must be respected even if the proceedings in question are administrative proceedings.

Another aspect of the right to a fair hearing is the notion of 'equality of arms'. This is exemplified in a series of cases against the Commission following a Commission investigation into alleged anti-competitive behaviour on the part of ICI and another company, Solvay. In the *Solvay* case (case T-30/91) the Court stated that the principle of equality of arms presupposed that both the Commission and the defendant company had equal knowledge of the files used in the proceeding. That was not the case here, as the Commission had not informed Solvay of the existence of certain documents. The Commission argued that this did not affect the proceedings because the documents would not be used in the company's defence. The Court took the view that this point was not for the Commission to decide, as this would give the Commission more power vis-a-vis the defendant company because it had full knowledge of the file whereas the defendant did not. Equally, in the *ICI* cases (T-36 and 37/9 1) the Commission's refusal to grant ICI access to the file was deemed to infringe the rights of the defence.

There are, however, limits to the rights of the defence: in *Descom Scales Manufacturing Co Ltd v Council* (case T-171/94), the ECJ held that the rights of the defence do not require the Commission to provide a written record of every stage of the investigation detailing information which needed still to be verified. In this case, the Commission had notified the defendant company of the position although it had not provided a written record and the ECJ held that this was sufficient.

The right to a hearing within Article 6 ECHR also includes the right to a hearing within a reasonable period of

time. The ECJ, basing its reasoning on Article 6 ECHR, thus held that, in respect of a case that had been pending before the CFI for five years and six months, the CFI had been in violation of its obligation to dispose of cases within a reasonable time *(Baustahlgewerbe v Commission* (case C-1 85/95 P)).

The right to a hearing has arisen in more difficult circumstances, that of the freezing of assets of persons thought to be involved in or supporting terrorism. Even in these circumstances, the European courts have reiterated the principle of the right to be heard *(OMPI v Council (OMPI I)* (case T-228/02). Nonetheless, the CFI recognised that this right is subject to broad limitations in the interests of the overriding requirement of public security, which relate to all aspects of procedural justice rights, including the hearing of certain types of evidence, It seems in these circumstances the right to a hearing is limited to a right to be notified as soon as possible as to the adoption of an economic sanction; given this finding, the duty to state reasons has a still greater significance than it usually would have. The rule of law is protected by the right to seek a review of the decision-making process subsequently. In *OMPI II* (case T-256/07) the CFI clarified that the right to a hearing does not necessitate a formal hearing if the relevant legislation does not provide for it; nor is there a right to continuous conversation. Rather, it suffices if the persons involved have the right to make their views known to the competent authorities (See *OMPI II*, para 93; see also *Common Market Fertilisers* v *Commission* (cases T-l 34-5/03, para 108)).

6.6.5 The duty to give reasons

The duty was affirmed in *Union Nationale des Entraineurs et Cadres Techniques Professionels du Football (UNECTEF) v Heylens* (case 222/86). In this case, M Heylens, a Belgian and a professional football trainer, was the defendant in a criminal action brought by the French football trainers' union, UNECTEF, as a result of his practising in Lille as a professional trainer without the necessary French diploma, or any qualifications recognised by the French government as equivalent. M Heylens held a Belgian football trainers' diploma, but his application for recognition of this diploma by the French authorities had been rejected on the basis of an adverse opinion from a special committee, which gave no reasons for its decision. The ECJ, on a reference from the Tribunal de Grande Instance, Lille, held that the right of free movement of workers, granted by Article 39 EC, required that a decision refusing to recognise the equivalence of a qualification issued in another Member State should be subject to legal redress which would enable the legality of that decision to be established with regard to Community law, and that the person concerned should be informed of the reasons upon which the decision was based.

Similarly in *Al-Jubail Fertiliser Company (SAMAD) v Council* (case C-49/88) in the context of a challenge to a Council regulation imposing antidumping duties on the import of products manufactured by the applicants, the Court held that since the applicants had a right to a fair hearing the institutions were under a duty to supply them with all the information which would enable them effectively to defend their interests. Moreover if the information is supplied orally, as it may be, the Commission must be able to prove that it was in fact supplied.

The duty to give reasons was considered in the OMPI cases. These have a greater significance due to the potential for a limited right to a hearing. In *OMPI II*, the CFI emphasised that the Council was under an obligation to provide actual and specific reasons justifying the inclusion of a person on a sanctions list. This requires the Council not only to identify the legal conditions found in the underlying regulation, but why the Council considered that they applied to the particular person, justifying their inclusion on the sanctions list. The duty to give reasons does not, however, include the obligation to respond to all points made by the applicant.

6.6.6 The right to due process

As a corollary to the right to be informed of the reasons for a decision is the right, alluded to in *UNECTEF v Heylens* (case 222/86), to legal redress to enable such decisions and reasons to be challenged. This right was established in *Johnston* v *Chief Constable of the Royal Ulster Constabulary* (case 222/84). The case arose from a refusal by the RUC (now the Police Service of Northern Ireland) to renew its contracts with women members of the RUC Reserve. This decision had been taken as a result of a policy decision taken in 1980 that henceforth full-time RUC Reserve members engaged on general police duties should be fully armed. For some years women had not been issued with firearms nor trained in their use. Ms Johnston, who had been a full-time member of the Reserve for some years and wished to renew her contract, challenged the decision as discriminatory, in breach of EC Directive 76/207, which provides for equal treatment for men and women in all

matters relating to employment. Although the measure was admittedly discriminatory, since it was taken solely on the grounds of sex, the Chief Constable claimed that it was justified, arguing from the 'public policy and public security' derogation of Articles 30 (goods, see Chapter 20) and 39 (workers, see Chapter 25), and from Article 297, which provides for the taking of measures in the event of, inter alia, 'serious internal disturbances affecting the maintenance of law and order'. As evidence that these grounds were made out the Chief Constable produced before the industrial tribunal a certificate issued by the Secretary of State certifying that the act refusing to offer Ms Johnston further employment in the RUC Reserve was done for the purpose of safeguarding national security and safeguarding public order. Under Article 53(2) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) a certificate that an act was done for that purpose was 'conclusive evidence' that it was so done. A number of questions were referred to the ECJ by the industrial tribunal on the scope of the public order derogation and the compatibility of the Chief Constable's decision with Directive 76/207. The question of the Secretary of State's certificate and the possibility of judicial review were not directly raised. Nevertheless this was the first matter seized upon by the Court. The Court considered the requirement of judicial control, provided by Article 6 of Directive 7 6/207, which requires states to enable persons who 'consider themselves wronged' to 'pursue their claims by judicial process after possible recourse to the competent authorities'. This provision, the Court said, reflected:

a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.

The Court went on to say that Article 5 3(2) of the Sex Discrimination (Northern Ireland) Order 1976, in requiring the Secretary of State's certificate to be treated as conclusive evidence that the conditions for derogation are fulfilled, allowed the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision was contrary to the principle of effective judicial control laid down in Article 6 of the directive. A similar approach has, in fact, been taken by the European Court of Human Rights in relation to such certificates issued in relation to a variety of substantive issues (eg, *Tinnelly and ors v UK*, ECHR judgment, 10 July 1998).

Although the ECJ's decision was taken in the context of a right provided by the directive it is submitted that the right to effective judicial control enshrined in the European Convention on Human Rights and endorsed in this case could be invoked in any case in which a person's Community rights have been infringed. The case of *UNECTEF* v *Heylens* (case 222/8 6) would serve to support this proposition. Further, the CFI has held that the Commission, in exercising its competition-policy powers, must give reasons sufficient to allow the Court's review of the Commission's decision-making process, if that decision is challenged (eg, *Ufex v Commission* (case C-1 19/97P)).

In the *OMPI* cases, the CFI made clear that reasons of public security could not remove the decisions and the decision making processes at issue from the scope of judicial review (see also *Kadi*, para 344 and see comments of Advocate-General at para 45), although that review may necessarily be limited. In *OMPI II*, the CFI clarified (at paras 138-41) the scope and standard of review, at least as regards decisions concerning economic sanctions. While the Council has broad discretion as to whether to impose sanctions, the CFI must ensure that a threefold test is satisfied: whether the requirements of the applicable law are fulfilled; whether the evidence contains all information necessary to assess the situation and whether it is capable of supporting the inferences drawn from it; and whether essential procedural guarantees have been satisfied. The CFI seems to have taken a surprisingly tough stance in favour of the protection of procedural rights here.

Thus general principles of law act as a curb not only on the institutions of the Union but also on Member States, which are required, in the context of EU law, to accommodate these principles alongside existing remedies and procedures within their own domestic systems of administrative law and may result eventually in some modification in national law itself. There are, in any event, problems in determining the boundaries between matters of purely national law and matters of Union law (see 6.9 below).

6.6.7 Right to protection against self-incrimination

The right to a fair trial and the presumption of innocence of 'persons charged with a criminal offence' contained in Article 6 ECHR are undoubtedly rights which will be protected as general principles of law under Community law. However, in *Orkem* (case 3 74/87) and *Solvay* (case 27/8 8) the ECJ held that the right under Article 6 not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings; it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EC competition law. This view was placed in doubt following a ruling from the Court of Human Rights in the case of *Funke v France* (case SA 25 6A) ([1993] 1 CMLR 897) and has been the subject of some academic criticism.

Funke involved a claim, for breach of Article 6 ECHR, in respect of a demand by the French customs' authorities for information designed to obtain evidence of currency and capital transfer offences. Following the applicant's refusal to hand over such information fines and penalties were imposed. The Court of Human Rights held that such action, undertaken as a 'fishing expedition' in order to obtain documents which, if found, might produce evidence for a prosecution, infringed the right, protected by Article 6(1) ECHR, of anyone charged with a criminal offence (within the autonomous meaning of that phrase in Article 6 ECHR), to remain silent and not incriminate himself. It appears that Article 6, according to its 'autonomous meaning', is wide enough to apply to investigations conducted under the Commission's searchand-seizure powers under competition law, and that *Orkem* and *Solvay* may no longer be regarded as good law. This view, assimilating administrative penalties to criminal penalties, appears to have been taken by the ECJ in *Otto BVv Postbank NV* (case C60/92). Moreover, in *Mannesmannrbhren-Werke AG v Commission* (case T-l 12/98), also a case involving a request for information about an investigation into anticompetitive agreements, the CFI held that although Article 6 ECHR could not be invoked directly before the Court, Community law offered 'protection equivalent to that guaranteed by Article 6 of the Convention' (para 77). A party subject to a Commission investigation could not be required to answer questions that might involve an admission of involvement in an anticompetitive agreement, although it would have to respond to requests for general information.

6.7 Equality

The principle of equality means, in its broadest sense, that persons in similar situations are not to be treated differently unless the difference in treatment is objectively justified. This, of course, gives rise to the question of what are similar situations. Discrimination can only exist within a framework in which it is possible to draw comparisons, for example, the framework of race, sex, nationality, colour, religion. The equality principle will not apply in situations which are deemed to be 'objectively different' (see *Les Assurances du Credit SA v Council* (case C63/89), public export credit insurance operations different from other export credit insurance operations). What situations are regarded as comparable, subject to the equality principle, is clearly a matter of political judgement. The EC Treaty expressly prohibits discrimination on the grounds of nationality (Article 12 (ex 6) EC) and, to a limited extent, sex (Article 141 (ex 119) EC provides for equal *pay* for men and women for equal work). In the field of agricultural policy, Article 34(3) (ex 40(3)) prohibits 'discrimination between producers or consumers within the Community'. The To A introduced further provisions, giving the EC powers to regulate against discrimination on grounds of race, religion, sexual orientation or disability (Article 13 EC). There has been some discussion as to whether these aspects of discrimination constitute separate general principles of law, as seemed to be suggested by the ECJ in *Mangold* (Case C-l44/04). Although a number of Advocates-General have discussed the issue, it is indicative of the matter's sensitive nature that in each of the cases, the ECJ has handed down rulings without addressing the *Mangold* point. (See, eg, *Chacon Navas* (case C-l3/05) concerning disability discrimination and see Opinion of Advocate-General at paras 46-56; *Lindorfer* (case C-227/04) and the Opinion of the Advocate-General at paras 87-97 and 132-8; *Palacios de la Villa* (case C-41 1/05) and *Maruko* (case C-267/06) on discrimination based on sexual orientation—see Opinion of Advocate-General at para 78; *The Queen, on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for BERR* (case C-388/07) and *Bartsch v Bosch und Siemens Hausgerdte (BSH) Altersfursorge GmbH* (case C-427/06).) Directive 2000/43/EC ([2000] OJ L1 80, p 22) has been adopted to combat discrimination, both direct and indirect, on grounds of racial or ethnic origin, in relation to employment matters, social protection, education, and access to public goods and services (see, eg, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Feryn* (case C-54/07)). Directive 2000/78/EC ([2000] OJ L303, p 16) has been adopted to combat discrimination on the grounds of religion or belief,

disability, age, or sexual orientation with regard to employment and occupation. These directives are discussed further in Chapter 27.

However, a general principle of equality is clearly wider in scope than these provisions. In the first isoglucose case, *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* (cases 103 and 145/77), the claimants, who were glucose producers, together with other glucose producers, sought to challenge the legality of a system of production subsidies whereby sugar producers were receiving subsidies financed in part by levies on the production of glucose. Since glucose and sugar producers were in competition with each other the claimants argued that the regulations implementing the system were discriminatory, ie in breach of the general principle of equality, and therefore invalid. The ECJ, on a reference on the validity of the regulations from the English court, agreed. The regulations were held invalid. (See also *Ruckdeschel* (case 117/76); *Pont-d-Mousson* (cases 124/76 and 20/77).)

Similarly, the principle of equality was invoked in the case of *Airola* (case 21/74) to challenge a rule which was discriminatory on grounds of sex (but not pay), and in *Prais* (case 130/75) to challenge alleged discrimination on the grounds of religion. Neither case at the time fell within the more specific provisions of Community law, although would now fall within the scope of Directive 2000/78/ EC (see above).

6.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), is that:

It is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.

It was invoked in the Community context during the 1980s when the Community's competence was extended under the Single European Act. It was incorporated into that Act, in respect of environmental measures, in the then Article 1 30r (now 174) EC (post Lisbon Article 191 TFEU), and introduced into the EC Treaty in Article 5 (ex 3b) by the TEU. Article 5 EC requires the Community to act 'only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community'. Article 5 EC will, should Lisbon come into force, be replaced in substance by Article 5 TEU.

As expressed in Article 5 EC, subsidiarity appears to be a test of comparative efficiency; as such it lacks its original philosophical meaning, concerned with fostering social responsibility. This latter meaning has however been retained in Article 1 (ex A) TEU, which provides that decisions of the European Union 'be taken as closely as possible to the people'. Although it has not been incorporated into the EC Treaty it is submitted that this version of the principle of subsidiarity could be invoked as a general principle of law if not as a basis to challenge EC law then at least as an aid to the interpretation of Article 5 EC (see Chapter 3). The principle of subsidiarity in its narrow form in Article 5 has, on occasion, been referred to as a ground for challenge of EC legislation *(R v Secretary ofState for Health, exparte British American Tobacco and others* (case C-491/01); *R v SoSfor Health exparte Swedish Match* (case C-210/03)), but this has never succeeded.

6.9 Effectiveness

The doctrine of effectiveness is not usually recognised as a general principle of Union law, save—perhaps—when it is equated with the idea of effective judicial protection. Nonetheless, the principle is ubiquitous and has had a significant effect on the development of Union law. Notably, it was an effectiveness argument that was used to develop the doctrine of supremacy, direct effect *(Van Gend en Loos* (case 26/62) and *Costa vENEL* (case 6/64), and state liability *(Francovich and Bonifaci v Italy* (joined cases C-6 and 9/90), and was used to extend the loyalty principle found in Article 10 EC to the third pillar *(Pupino* (case C-105/03)). As we shall see in Chapter 8, it has been used to ensure effective protection for EC law, and for individuals' rights; indeed sometimes the ECJ seems to blur the boundaries between the two (eg *Courage v Creehan* (case C -453/99)). Should the Lisbon Treaty come into force, Article 19 TEU (as amended by Lisbon) expressly requires Member States to provide remedies so as to ensure effective legal protection of Union law rights. The concept is a somewhat slippery one, used in different contexts for different purposes. Crucially, it can operate both to determine the scope of Union law (identifying the boundary between national and EU law) and to determine the scope of any remedial action needed within the national legal system. While it may be argued that fundamental rights arguments may be used

on both these ways (see below), the broad and amorphous nature of the effectiveness principle(s) make it particularly difficult to determine its proper scope and appropriate use.

6.10 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the ECJ as part of Union law, also affect certain acts of the Member States. These fall into three broad categories:

(a) when EC rights are enforced within national courts

(b) when the rules of a Member State are in (permitted) derogation from a fundamental principle of Community law, such as free movement of goods (Articles 25 and 28 EC) or persons (Articles 39 and 49)

(c) when the Member State is acting as an agent of the Community in implementing Community law (eg, *Klensch v Secretaire d'Etat a VAgriculture eta la Viticulture* (cases 201 and 202/85)).

6.10.1 Enforcement of Community law in national courts

The ECJ has repeatedly held that, in enforcing Community rights, national courts must respect procedural rights guaranteed in international law; for example, individuals must have a right of access to the appropriate court and the right to a fair hearing (see, eg, *Johnston vRUC* (case 222/84) and *UNECTEF v Heylens* (case 222/86)). This applies, however, only where the rights which the individual seeks to enforce are derived from *Community* sources: Ms Johnston relied on the Equal Treatment Directive (Directive 76/207); M Heylens on the right of freedom of movement for workers enshrined in Article 39 EC. In *Konstantinidis* (case C-l68/91), a case concerning the rules governing the transliteration of Greek names, the ECJ handed down a judgment which did not follow the Opinion of the Advocate-General. The Advocate-General suggested that such rules, which resulted in a change in a person's name as a result of the way the transliteration was carried out, could constitute an interference with the rights protected by Article 8 ECHR. Although the ECJ agreed that this could be the case, it held that such rules would only be contrary to EC law where their application causes such inconvenience as to interfere with a person's right to free movement.

The constraints implied by this case seem to have been undermined. *Carlos Garcia Avello* (case C-148/02) concerned a Spanish national's right to register his children's names in the Spanish style in Belgium, where they were born. The case is based not on free-movement rights, but on European citizenship, a factor which both the European Commission and the Advocate-General agree allows a broader scope to EC protection of human rights. The ECJ agreed with the outcome without expressly considering human rights. The decision seems to limit the notion of the internal situation seen in *Kaur* (discussed above) and *Uecker and facquet* (joined cases C64/96 and C-65/96, discussed in Chapter 21) and to extend the scope of circumstances in which the ECJ would be required to respect ECHR rights (see 6.10.4 below). A similar extension can be seen in *Chen* (case C-200/02), in which a baby holding Irish nationality but born in the UK was deemed to have rights to have her mother, a Chinese national, remain in the UK with her (see further Chapter 21).

The extension of human-rights protection is not limited to circumstances in which citizenship is in issue, but arises in the context of any of the treaty freedoms. in *Karner* (case C-71/02), a case concerning advertising on the Internet, the ECJ held that the national rules complained of were not selling arrangements and therefore they would not fall within Article 28 EC (see Chapter 19). In this aspect, the case is different from the preceding cases, as those cases concerned situations where the national legislation fell within the relevant treaty provision. Despite the fact that the situation seemed to lie outside the prohibition in Article 28 (thus rendering a consideration of a derogation, discussed at 5.9.2, unnecessary), the ECJ then went on to give the national court 'guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures' (para 49). According to the ECJ, in this case the national legislation fell within the scope of application of EC law (see further 6.10.4 below).

Finally, any penalties imposed by national judicial bodies must be proportionate (eg, *Watson and Belmann* (case 118/75)).

6.10.2 Derogation from fundamental principles

Most treaty rules provide for some derogation in order to protect important public interests (eg, Articles 30 and 39(3)). The ECJ has insisted that any derogation from the fundamental principles of Community law must be narrowly construed. When Member States do derogate, their rules may be reviewed in the light of general prin-

ciples, as the question of whether the derogation is within permitted limits is one of Community law. Most, if not all, derogations are subject to the principle of proportionality (eg, *Watson* (case 118/75)). The *ERT*case *(Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* (case C-260/89)) concerned the establishment by the Greek government of a monopoly broadcaster. The ECJ held that this would be contrary to Article 49 (ex 59) regarding the freedom to provide services. Although the treaty provides for derogation from Article 49 in Articles 46 and 55 (ex 56 and 66), any justification provided for by Community law must be interpreted in the light of fundamental rights, in this case the principle of freedom of expression embodied in Article 10 ECHR. Similarly, in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (case C-368/95), the need to ensure plurality of the media (based on Article 10 ECHR) was accepted as a possible reason justifying a measure (the prohibition of prize games and lotteries in magazines) which would otherwise breach Article 28 EC. More recently, in *Schmidberger* (C-l 12/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 EC)) in a context where the main transit route across the Alps was blocked for a period of 28 hours on a single occasion and steps were taken to ensure that the disruption to the free movement of goods was not excessive. The ECJ came to the same end conclusion, noting the wide margin of discretion given to the national authorities in striking a balance between fundamental rights and treaty obligations (and contrast *Commission v France* (case C-265/95)). (See also on Article 8 ECHR, *Mary Carpenter v SoS for the Home Department* (case C-60/00).)

One issue in this context is whether fundamental human rights should properly be seen as a derogation from treaty freedoms, perhaps falling within the scope of the public-policy objection, or whether they should be seen as operating to limit treaty freedoms at an earlier point in the legal analysis. In *Omega Spielhallen* (case C3 6/02), human dignity was seen as forming part of the public-policy grounds of derogation. In her Opinion in this case, Advocate-General Stickx-Hackl emphasised, the importance of the protection of human dignity, and suggested that public policy should be interpreted in the light of the Community-law requirement that human dignity should be protected. Nonetheless, this still leaves human-rights protection with the status of an exception to EC Treaty freedoms rather than constraining the scope of those rights in the first place. Recognition that human-rights protection forms part of the public-policy exception can be seen in *Dynamic Medien Vertiiebs GmbH v Avides Media AG* (C-244/06). The potential problem with this approach is that exceptions to the treaty freedoms are normally narrowly construed and subject to the proportionality test, which hardly puts them on the same footing as the economic treaty freedom. In *Schmidberger* (case C-l 12/00), the ECJ suggested that rather than the usual proportionality test, in such cases the different interests should be balanced; whether this approach is consistently adopted in cases concerning fundamental rights, remains to be seen.

6.10.3 State acting as agent

When Member States implement Union rules, either by legislative act or as administrators for the Union, they must not infringe fundamental rights. National rules may be challenged on this basis: for example, in *Commission v Germany* (case 249/86), the Commission challenged Germany's rules enforcing Regulation 1612/86 which permitted the family of a migrant worker to install themselves with the worker in a host country provided that the worker has housing available for the family of a standard comparable with that of similarly employed national workers. Germany enforced this in such a way as to make the residence permit of the family conditional on the existence of appropriate housing for the duration of the stay. The ECJ interpreted the regulation as requiring this only in respect of the beginning of their period of residence. Since the regulation had to be interpreted in the light of Article 8 ECHR concerning respect for family life, a fundamental principle recognised by Community law, German law was incompatible with Community law. When Member States are implementing obligations contained in Union law, they must do so without offending against any fundamental rights recognised by the Union. In *Wachaufv Germany* (case 5/88)) the ECJ held that 'Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements' (para 19).

6.10.4 Scope of Union law

In all three situations listed above, general principles have an impact because the situations fall within the scope of Union law, specifically Community law. The ECJ has no power to examine the compatibility with the ECHR of national rules which do not fall therein *(Cinetheque SA v Federation Nationale des Cinemas Frangaises* (cases 60 and 61/84), noting the different approach of Advocate-General and Court, and contrast *Karner* (case C-

71/02)). The problem lies in defining the boundary between Community law and purely domestic law, as can be seen in, for example, *Karner*. The scope of Community law could be construed very widely, as evidenced by the approach of the Advocate-General in *Konstantinidis v Stadt Altensteig-Standesamt* (case C-168/91). As noted above, he suggested that, as the applicant had exercised his right of free movement under Article 43 (ex 52) EC, national provisions affecting him fell within the scope of Community law; therefore he was entitled to the protection of his human rights by the ECJ. The Court has not expressly gone this far although some of the citizenship cases can be seen in this light (see *Garcia Avello* (case C-148/02), *Carpenter* (case C-60/00), *Chen* (case C-200/02)).

One particular problem area is where an individual seeks to extend the nature of the fundamental principles recognised in his or her home state by reference to rights protected in other Member States and recognised as such by the ECJ. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachaufv Germany* (case 5/8 8) and *R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C-2/93).

Wachauf was a tenant farmer who, upon the expiry of his tenancy, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. When this was refused, he claimed that this was an infringement of his right to private property, protected under the German constitution. The German authorities claimed that the rules they applied were required by the Community regulation, but the ECJ held that on its proper interpretation the regulation required no such thing: although the regulation did not itself provide the right to compensation, equally it did not preclude it. The discretion thereby given to the Member States by the regulation should be exercised in accordance with fundamental rights, thus, in practice meaning that the applicant should receive the compensation.

Bostock, similarly, had been a tenant farmer. Following *Wachauf* (case 5/8 8) he argued that he too should be entitled to compensation for the value of the reference quantities on the expiry of his lease. Unlike the situation in Germany, though, this right was not protected by British law at the time when Bostock's lease ended. Bostock therefore sought to challenge that British law on the basis that the provisions breached general principles of non-discrimination and unjust enrichment. Despite its approach in *Wachauf*, the ECJ ruled that the right to property protected by the Community legal order did not include the right to dispose of the 'reference quantities' for profit. The ECJ held that the question of unjust enrichment, as part of the legal relations between lessor and lessee, was a matter for national law and therefore fell outside the scope of Community law.

It is difficult to reconcile these two cases if one accepts that general principles accepted by the ECJ should apply across the EU. From recent case law we can still see differences in the approach to the scope of rights deemed worthy of protection. In *Omega Spielhallen* (case C-36/02), the German authorities sought to prevent a laser-dome game operating on the basis that a game based on shooting people infringed respect for human dignity; no such problem arose in the UK where the game operator originated. One clear message seems to be that there are limits to the circumstances when general principles will operate and that a challenge to national acts for breach of a general principle is likely to be successful only when national authorities are giving effect to clear obligations of Community law. In matters falling within the discretion of Member States, national authorities are not required to recognise general principles not protected by that state's national laws.

6.11 Conclusions

This chapter illustrates the importance of general principles of law in the judicial protection of individual rights. Member States' commitment to fundamental human rights has now been acknowledged in Article 6 TEU. Nonetheless, certain points should be noted.

The fact that a particular principle is upheld by the ECJ and appears to be breached does not automatically lead to a decision in favour of the claimant. Fundamental rights are not absolute rights. As the Court pointed out in / *Nold KG v Commission* (case 4/73), rights of this nature are always subject to limitations laid down in the public interest, and, in the Community context, limits justified by the overall objectives of the Community (eg, *O'Dwyer* v *Council* (cases T-466, 469, 473-4 and 477/93)). The pursuit of these objectives can result in some hard decisions (eg, *Dowling v Ireland* (case C-85/90)), although the Court has held that it may not constitute a 'disproportionate and intolerable interference, impairing the very substance of those rights' *(Wachauf (case* 5/88) at para 18). This principle was applied in *Germany v Commission (Re Banana Regime)* (case C-280/93), para 78, another harsh decision,

Thus, where the objectives are seen from the Union standpoint to be essential, individual rights must yield to the common good. In / *Nold KG* v *Commission* the system set up under an ECSC provision, whereby Nold, as a small-scale wholesaler, would be deprived of the opportunity, previously enjoyed, to buy direct from the producer, to its commercial disadvantage, was held to be necessary in the light of the system's overall economic objectives. 'The disadvantages claimed by the applicant', held the Court, 'are in fact the result of economic change and not of the contested Decision'.

The latitude shown to the Union institutions, particularly where they are exercising discretionary powers in pursuit of common Community policies (most notably the CAP) does not always extend to Member States in their implementation of Union law. Where Member States are permitted a certain discretion in implementation (and Member States have little discretion as regards the ends to be achieved), the Court will not substitute its own evaluation for that of the Member State: it will restrict itself solely to the question of whether there was a patent error in the Member State's action *{R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94)). Otherwise, general principles of law are strictly enforced. Thus, under the guise of the protection of individual rights, general principles of law also serve as a useful (and concealed) instrument of policy.

The adoption of the Charter of Fundamental Rights marks a significant further step. Although little more than a summary of the current level of protection recognised by the Union, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights and for this, we wait upon the ratification of the Lisbon Treaty. Nonetheless difficulties remain with its relationship with the ECHR, a convention to which the Union, it now seems, is intended to accede. Of crucial significance in the successful and equal protection of individuals' rights is the relationship between the European Court of Human Rights and both the CFI and, most importantly, the ECJ. This issue has yet to be fully resolved.