

# Valsts atbildība

The following analysis may therefore represent the position reached. Directives are being interpreted to determine the validity of national law in an action which may affect the legal position of a private party to a court action. Any such incidental effect applies only to prevent reliance on national law not conforming with Community law, hence the term or view that the effect as far as the private parties is concerned is incidental. The real or underlying purpose is the Court's willingness to uphold the provisions of the Directive. This translates generally as not allowing the application of non-conforming national law. As such, then, this merely enforces the public law obligations of the state rather than directly interfering with the contractual relations between parties. Although, as was seen in some of the cases, there are clear consequences for those relations. Viewed in terms of estoppel, parties may rely on the Directive as a shield to estop another party from relying on national law which would otherwise harm their interests. They are not using it as a sword to attack the other party. Furthermore, it could be said that both incidental effects and indirect effects are part of the broader view of direct effects in Case 8/81 *Becker* that national law should not be allowed to apply where it does not in comply with EU law.

The cases also serve to highlight the fact that legal difficulties between individuals can be caused by the failure of a member state to comply with an EU law Directive. In such circumstances, where a failure by a state adversely and directly affects an individual, a judicial remedy has been provided by the Court of Justice which holds the state liable to compensate the individual for any loss sustained. This is considered next.

## 8.3

## State liability: the principle in *Francovich*

State liability is the term given to the action first raised and accepted by the Court of Justice in Cases C-6 and 9/90 *Francovich*. This case essentially condoned an action for compensation by an individual against a member state when the member state failed to comply with Community law obligations and which resulted in damage or loss to that individual. The *Francovich* case has provided an addition, therefore, both to Commission actions against member states to enforce EU law and overcome the difficulties generated by the lack of horizontal direct effects of Directives, or indeed the entire absence of direct effects where the EU law provision fails to satisfy the *Van Gend en Loos* criteria. Instead, the state is held liable for its failure which results in damage to an individual.

The *Francovich* case concerned a claim by Italian nationals against the state for a guaranteed redundancy payment granted by Directive 80/987, which had not been implemented by Italy, or alternatively for damages incurred as a result of the state failing to implement the Directive in time. *Francovich* and other workers were made redundant when the company employing them became insolvent. The company itself had made no payments and as a result of the insolvency, no action was possible against the company. The Court of Justice had held already, following Article 226 proceedings in *Case 22/87 Commission v Italy*, that Italy had breached its obligations by its failure to implement the Directive; however, this could not help *Francovich* and his co-workers because the purpose of the enforcement action is to establish a breach of Community law by the member states and not to provide an individual remedy. The Court of Justice held that the Directive was not capable of direct effects because of the discretion granted to the member states as to the result

to be achieved. In particular, it was unclear which authority was to be responsible for setting up a compensation agency and, part of the problem for the national court in the first place, there was no national law to interpret in conformity with the Directive, nor any national procedural law to support an action against the state for compensation. Instead, relying heavily on the fundamental doctrines of Community law of direct effects and supremacy, as outlined in the *Van Gend en Loos*, *Costa v ENEL*, *Simmenthal* and *Factortame* cases, the Court determined that the duty of the member states to ensure the full application and enforcement under Articles 10 and 249 (now Articles 4 (3) TEU and 288 TFEU), if breached, would give rise to liability. The Court rejected the defence that the liability of the state was only a matter for the national laws. It held that the protection of individuals would be weakened if they could not claim damages for loss caused by a member state's failure to comply. It considered, therefore, that the principle was inherent in the scheme of the Treaty, that member states should make good any damage caused to individuals which was the consequence of a breach of Community law. The Court held, however, that the claim required the Directive to contain an individual right, which could be determined by the provisions of the Directive itself and that there must be a link between the breach and the damage caused.

The decision in *Francovich* provides individuals with a remedy which stems from the breach by the member state of the general obligations in Articles 4(3) TEU and 288 TFEU (ex Articles 10 and 249 EC) to comply with EU law. Hence, this adds a remedy for individuals to fill the gap left where EU law provisions have not been implemented by member states or are held not to be directly effective or because Directives are only effective on the vertical and not horizontal axis. Damages are consequently to be assessed in accordance with national procedural rules, subject, however, to overriding EU law principles which will be considered in the final section of this chapter.

The ruling has been described by Bebr as the ultimate consequence of *Van Gend en Loos*. ☺

The judgment in *Francovich* adds again to the effective judicial protection by providing individuals with rights against the state and deters the state from breaching EU law. It is though an independent action from direct and indirect effects, and provides uniform EU conditions for liability, not dependent on each national set of laws, although the assessment of the quantum of damages is for national procedural law.

Note that the 1994 judgment in **Case C-91/92 *Faccini Dori v Recreb Srl*** confirmed the Court's continued opposition to horizontal direct effects. Whilst stressing the need for national courts to interpret national law wherever possible to comply with Directives, the Court pointed out that in circumstances where a state had caused damage caused by non-implementation of Community law, the state would be liable to compensate any loss in line with the principle established in the *Francovich* case.

Since those cases, the Court of Justice has had the opportunity to develop the law, starting with joined cases *Brasserie du Pêcheur v Federal Republic of Germany* (C-46 and 48/93) and *Factortame (3) v UK*.

*Factortame* concerned the breach of a Treaty Article rather than the failure to comply with a Directive but this was held by the Court of Justice to be no bar to incurring liability. The result of this case law is that the principle of state liability is applicable to all domestic acts and omissions, legislative, executive and judicial which are in breach of EU law, directly effective or not and in principle by all three arms of state. There was, however, a new focus on the seriousness of the breach. *Factortame (3)* introduced the revised criteria that if the state was facing choices

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comparable to the institutions when law-making, which essentially involves balancing many interests, the seriousness of breach also must be analogous to that applied to the EC institutions for damage caused unlawfully by legislative acts under Article 288(2) (now 340 TFEU).



This is known as the 'Shöppenstedt formula' (after Case 5/71 *Zuckerfabrik Shöppenstedt*).

#### **cross reference**

This case will be considered in chapter 9, section 9.4.7.

In order for liability to arise on the part of the member state, there must have been a sufficiently serious breach of a superior rule of law designed for the protection of individuals. This is the standard applied to damage caused by a legislative act rather than from administrative action. As such, it is a higher standard because, according to the Court of Justice, the creation of legislative acts involves choices of economic policy and is thus far more difficult to achieve.

The sufficiently serious requirement was further elaborated by the Court of Justice in *Factortame*. It suggested that this would be satisfied where a member state had manifestly and gravely disregarded the limits of its discretion. The appropriateness of this standard for member states will be considered further below.

The factors that should be taken into account by the national court assessing this are:

- the clarity and precision of the rule breached;
- the measure of discretion;
- whether the infringement and damage was intentional or involuntary;
- whether the error in law was excusable or inexcusable;
- whether there was any contribution to the problem by the Community institutions; and
- whether any incompatible national law was being maintained.

#### **cross reference**

This was considered in chapter 7.

#### **cross reference**

See chapter 9 for the discussion of this in respect of Community acts and see chapter 2 on voting in Council if you do not understand the significance of how difficult it is to reach agreement.

The cases also confirmed that liability can occur without having to establish a breach by the member state by an Article 226 (now 258 TFEU) action by the Commission. However, in cases where the infringement is not yet clear, this could be problematic. If proven, damages arise from the date of the infringement and not the date of proving the infringement, unlike the Article 260 TFEU penalty.

At both the Community level and at the state level, further case law determined how serious a breach must be to incur liability. At the Community level, it has proved to be extremely difficult to succeed in damages against the Community institutions.



According to the AG in the *Factortame* case, up to 1995, only eight awards had been made in 38 years. [1996] ECR 1029 at 1101. (See also chapter 9, section 9.4.7.)

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The Court of Justice has taken a similar approach in respect of the member states in **Case C-392/93, *R v HM Treasury ex parte British Telecom PLC***. In this case the UK Government successfully argued that its incorrect implementation of a Directive was due to a misunderstanding of what the Directive required. The Court of Justice agreed that the Directive was capable of more than one interpretation and thus no liability arose.

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Likewise in **Case C-319/96 *Brinkmann***, the incorrect application of a tax classification by Denmark, which although financially damaging to a company, was not deemed sufficiently serious to incur liability because it was a mistake in the interpretation of the Directive which was also made by other states.

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These cases comply with the analysis at the EU level, in that where there is discretion on the part of the member state in deciding exactly what action is necessary to implement the EU law obligation or where there is an excusable error in interpretation, then the standard of fault for liability will be raised, making it more difficult to obtain compensation. In line with this view, where the obligation is much clearer and the breach much more obvious, then liability will be easier to impose. See the cases *Francovich* and *Factortame*, noted above and C-5/94 *Hedley Lomas* involving a clear breach of Article 29 EC (now 35 TFEU) by the UK for imposing an export ban, Case C-178/94 *Dillenkofer* in which the failure to implement the Package Holidays Directive by Germany was in itself a sufficiently serious breach and C-140/97 *Rechberger* which involved the misinterpretation of the Package Holidays Directive which simply established liability on the grounds of a straightforward infringement of Community law.

The more recent case C-278/05 *Robins* confirms that the lower the degree of discretion on the part of the member state and the clearer the requirements of the directive, the higher the chance would be that the member state would incur liability for a mere breach. Conversely, the more ambiguous or unclear a provision of Community law was, the more discretion would be enjoyed by the member state in implementing this and the breach would correspondingly have to be much more serious before the member state incurred liability. In the *Robins* case, the argument hinged on the minimum level of protection required under Directive 89/987 for the protection of employees in the event of insolvency of the employee. It was argued that requirement was imprecise and that this was a view of a number of member states. The Court of Justice accepted this and held that, in view of the discretion to interpret the imprecise duty, the UK was not liable.

#### cross reference

This will be considered further in chapter 9, section 9.4, damages actions under Article 340 TFEU (ex 288 EC).

#### cross reference

For further details on the impact on national procedural law of EC law rights, see section 8.4 below.

**Case C-352/98P *Bergaderm*** indicates an approach of the Court of Justice to align the rules on liability for member states and the Community institutions so that it may be easier in future for individuals to obtain compensation from Union institutions for mere infringements which have not involved a great deal of discretion on the part of the institution.

In cases where liability does arise, the determination of the degree of the seriousness of the breach and thus whether and the level of damages to be awarded, if any, remain questions of national procedural law providing that remedies are not excessively difficult to obtain in the national legal systems and that damages, where applicable, are an adequate remedy.

Whilst previous case law under *Francovich* has indicated that the Court of Justice holds the view that state liability is applicable to all branches of government, there was some reticence that this might apply to the judicial branch given the respect for the independence of the judiciary accorded in western democracies.

However, in **Case C-224/01 *Gerhard Köbler v Republic of Austria***, the Court of Justice held that the State may also, potentially at least, be liable for the breaches of Community (and now EU) law by the national courts of last instance provided they were manifest and sufficiently serious. It was held, however, in the particular case that the breach complained of was not serious enough despite the opinion of AG Leger that the error of Community law made by the Austrian Administrative Court was not an excusable error.

The case does open the door for incorrect application or interpretation of EU law by a superior national court to lead to state liability in the future, considered next.

## 8.3.1 The extension of *Francovich*

### 8.3.1.1 Extension to the private sphere

Apart from the development of the *Francovich* remedy noted above, two cases here serve to highlight its further effect on the national legal systems.

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**Case C-453/99 *Courage Ltd v Crehan*** involved a dispute between two private parties involving a claim that a breach of competition law Article 81 EC by another private party caused loss to the applicant. Building on the foundation cases of *Van Gend en Loos*, *Costa v ENEL*, and *Francovich*, the Court of Justice reasoned that the extension of the principle of state liability was required by the new legal order and for the effective protection of rights which would be undermined if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

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*Francovich* liability therefore has been extended to determine liability between private parties and not just against member states where one has caused loss to the other by a breach of EU law. This has since been followed up in Cases C-295–298/04 *Manfredi* making clear that individuals must be able to obtain full compensation as a result of loss caused by a breach of EU competition rules.

### 8.3.1.2 Extension to the national courts

Case C-224/01 *Köbler*, noted above already, extends the possibility that state liability applies also to breaches of EU law rights by the judiciary, in which case the member state would have to compensate. The *Köbler* case has now been followed up:

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In **Case C-173/03 *Traghetti del Mediterraneo SpA v Italy***, it was alleged that a company had been forced into liquidation as a result of the errors in interpretation committed by the Supreme Court in Italy. Furthermore, the chance to correct those errors was denied by that court which did not make a reference to the Court of Justice. In a further action by the administrator, the Court of Justice held that it could not rule out that 'manifest errors' by a national court would lead to compensation under the principle of state liability. However, it was held that it was up to the national courts to decide in each case.

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The consequence of this slight extension of liability is that liability for damage caused by courts is not limited as in *Köbler* to 'intentional fault and serious misconduct' by a court in situations where that standard would have excluded liability for 'manifest infringement'. In other words, it extends liability to where national courts have manifestly infringed the law in their interpretation which has caused damage.

## 8.4

# National procedural law and the system of remedies

The development of individual remedies as established and developed by the Court of Justice has added a second system of vigilance to the existing direct enforcement of Community law by

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 The idea that the **national procedural rules** were independent and beyond the influence of EU law is wrapped up within the term 'national procedural autonomy'.  
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the Community institutions and member states. Inevitably, however, because direct and indirect effects, incidental effect and state liability are individual remedies which are pursued before the national courts, their overall effectiveness is dependent on national rules of procedural law which are of course by their very nature outside the jurisdiction and direct influence of the Union and Court of Justice. These rules can affect and interfere with the realization of EU rights at the national level. Also, in comparison between member states this situation can be complicated by different rules on standing or time limits or burden of proof or because certain remedies are not simply recognized in some member states. However, because the procedure of EU law in the national courts was not within the scope or competence of any of the Treaties, it was originally considered to be entirely within the reserved and exclusive competences of the member states. However, to counter this, a new principle of EU law appears to be developing to protect individual rights and can be referred to as the general principle of effective legal protection.

### 8.4.1 The principle of national procedural autonomy

In the absence of harmonized rules on procedure, rights conferred by EU law must be exercised before national courts in accordance with the traditions laid down by national procedural rules which, in strict terms, are autonomous from the EU legal system. To what extent, however, should they be respected where they interfere with EU law rights? There are general arguments for and against. For example, if national procedural law was entirely respected, the rule of law and legal certainty of EU law would be undermined or if respected in each state, differences in remedies would arise between member states which may distort the uniformity of EU law and the realization of the internal market. On the other hand, it is arguably better to leave the provision of remedies to those who know their own systems best. The position of the Court of Justice up to the 1980s was one which essentially respected **national procedural rules** subject, however, to certain guidelines as developed through its case law.

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In **Case 33/76 *Rewe-Zentralfinanz***, the Court of Justice held that national courts were entitled to apply national procedural limits provided national rules are no less favourable for Community law rights as for domestic situations or make the community right impossible to realize.

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In **Case 45/76 *Comet***, the Court of Justice held that it was up to each member state to determine the procedural conditions governing those actions but that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and should ensure the protection of the rights which citizens have from the direct effect of Community law.

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Thus, where an EU law right is involved, national procedural law must not deprive a litigant of their rights under EU law. Both as a consequence of this and in support of it is the general principle of Article 18 TFEU (ex 12 EC), that there be no discrimination of the grounds of nationality, which must not be breached. From the first cases and other early case law, stem the principles of practical impossibility and principle of equivalence. The latter holds that EU law rights should be treated in the same way as national rights. It was already seen in relation to cases in respect of supremacy such as *Case 6/64 Costa v ENEL*, that the Court of Justice will not allow national rules to stand in the way of a reference to the Court of Justice or the supremacy of Community (and now EU) law. Furthermore, it was also seen in the *Simmenthal*

and *Factortame (No. 2)* cases, so that it is not just national substantive laws which must give way to EU law, but also any national rules of procedure, including constitutional rules which might get in the way of the effective application of an EU law right, regardless of the origin of these rules.

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However, it was clearly stated by the Court of Justice in Case 158/80 *Rewe v Hauptzollamt Kiel*, that no new remedies were intended to be created in the national courts to ensure the observance of Community law over and above that already existing in national law. Equally, however, it became clear that in some cases further intervention was necessary.

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The alternative would be the agreement of the member states to harmonize national procedural rules or replace them with common Union rules. However, this is neither politically acceptable, as member states do not wish to hand over control of their legal systems to the EU, nor practically possible, due to the very different and nationally idiosyncratic legal systems in existence. It would not be an impossible task but one exceedingly difficult and time-consuming.

## 8.4.2 Intervention by the Court of Justice

Whilst the principle of equivalence would ensure the non-discriminatory application of national rules, this does not go far enough to remedy the situation in all cases. National remedies must, however, also provide an effective remedy. Any rule which actually prevents individuals from relying on an EU law right would be incompatible with the principle of effective legal protection.

### cross reference

*This case is also discussed in section 8.3.2 above in relation to indirect effects.*

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In *Case 14/83 Von Colson*, the compensation offered by the national court for the discrimination suffered was the payment of the rail fare home. This was held not to be a dissuasive and adequate remedy. The remedy, according to the Court, must guarantee real and effective judicial protection and must have a real deterrent effect.

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**Case C-213/89 *Factortame*** highlighted just how radical the solution had to be to ensure the protection of Community (and now EU) law rights in the national courts including in the case the right to interim relief against the UK Crown, something which was not constitutionally possible previously.

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**Case C-208/90 *Emmott*** concerned a national three-month time limit in which to bring benefits claims. The time ran from the date the claim arose, according to the relevant legislation, in this case the entry into force date of a Community Directive. However, it was not clear, due to the faulty transposition of a Community Directive, that the applicant's claim was valid and the claim was rejected in any event as being out of time. The Court of Justice held that whilst reasonable time limits are acceptable in respect of a claim based originally in Community law, time can only run from the date the Directive is implemented properly and where the applicant's rights are clear.

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In *Case C-271/91 *Marshall II**, the award for compensation suffered by Ms Marshall for discrimination was set at a statutory ceiling, which was much lower than the real loss of earnings suffered. The Court of Justice held that unlawful dismissal based on a Community right should be subject to



**cross reference**

Discussed above in section 8.3

full compensation including interest, despite the interpretation of the Court of Appeal that under national law damage could not include interest.

In a much more interventionist mode, EC law has also required national courts to provide specific and new forms of remedy, most notably in Case C-6/90 *Francovich* and the establishment of the right to damages from the state where liable.

Thus national rules are respected to the extent that they do not hinder an EU law right, but where they prevent an EU law right from being realized or applied in some way, then the national procedural law must give way. This period of judicial activism and creativeness on the part of the Court of Justice, particularly the *Emmott* case which took things surprisingly far, gave way to a less intrusive period as generally the Court was reacting to being criticized for its overt judicial activism.

### 8.4.3 A more balanced approach

A more balanced approach was shown by the Court of Justice in the next case.

In **Case C-339/91 *Steenhorst-Neerings***, a Dutch national procedural law concerned the restriction of retroactive claims to benefits to one year. This was held to be acceptable to the Court of Justice.

This apparent step back from *Emmott* means that reasonable time limits are acceptable even though these can vary from state to state. However, *Steenhorst-Neerings* was distinguished from the rule in *Emmott*, which applied after a three-month deadline expired to prevent bringing an action at all. It was held that the state itself had contributed to the failure of the applicant to comply with the strict time limit by advising a wait-and-see attitude to another case concerning the same rule which had also questioned similar rights to equal treatment in payments. The rule in *Steenhorst-Neerings*, in contrast, permitted a claim, but limited the retrospective payments under it, to one year.

In **Case C-188/95 *Fantask***, the Court of Justice gave general grounds for accepting time limits which could result in differences between the member states. It held that national time limits would continue to apply even in situations where the Directive had not been properly implemented into national law for reasons of legal certainty and to protect the national taxpayer and authorities. The case itself concerned a five-year limitation period for the recovery of debts, which was held to be acceptable; i.e. there was to be no EU rule for the recovery of tax payments.

Two similar cases concerned more closely with procedure were decided differently, although both concerned a variation of a national procedural rule which states that it is up to the parties to introduce legal arguments and not the court. However, if EC law, which may be relevant, is not introduced, then a party may suffer as a result. In these circumstances, it was argued that the national court must either introduce the EC law itself or at least make a reference to the Court of Justice, thus infringing the national rule. Questions were referred as to whether indeed the national procedural law must give way.

In **Case C-312/93 *Peterbroeck van Campenhout***, the Court of Justice held that national procedural laws should not prevent references being made. This was seemingly contradicted by **Cases**

**C-430 and 431/93 *Van Schijndel*** in which a similar procedural rule which prevented a reference taking place was upheld as acceptable because the rule was applied in similar domestic circumstances as well and was there to ensure legal certainty and clarity. In other words, the national procedural rules could not be seen to be applied in two different ways according to whether EU or national substantive laws were concerned.

Somewhat unhelpfully in *Van Schijndel*, the Court of Justice held that each rule of procedural law and thus each case has to be judged on its merits, taking into account the rights of defence, legal certainty and the role of the national procedure before determining whether it renders the application of Community law impossible or excessively difficult. This would only seem to provoke further references to the Court of Justice each time a slightly new procedural law is brought into question.

In **Case C-326/96 *Levez v Jennings***, the Court of Justice considered a UK procedural law which limited the period of claim for damages in sex discrimination cases to a period not exceeding two years running backward from the date of commencement of proceedings. The Court of Justice acknowledged that, in the absence of a Community regime on the matter, it was for member states to determine procedural rules governing Community law rights providing they were equivalent to similar domestic actions and were effective. A limit of two years was not criticized. However, Ms Levez had been misinformed or deliberately misled by the employer as to the higher earnings of a male predecessor and had only learnt the truth on leaving her job. Under such circumstances the Court of Justice held that, if applied, the rule would serve to deprive an employee from effective enforcement of Community law because it would be almost impossible to obtain arrears of remuneration and enable employers to avoid paying damages by deceit. In such circumstances the rule would be manifestly incompatible with the principles of EC law.

Following the *Emmott* case, each case requires a clear demonstration that the particular facts of the case will lead to a particular unjust result but this is not very helpful in general terms to determine whether in future cases the national procedural law will upset EU law rights. The cases previously considered above under *Francovich* state liability are also relevant to this discussion in that they also demonstrate the impact on the national legal systems of remedies developed by the Court of Justice and the extension of those remedies both against other individuals under EU law and the courts of the member states. These EU law remedies were simply not available previously, although some member states may have had national remedies which would have achieved the same result. The next case considers and summarizes the scope of the EU law remedy.

Case C-432/05 *Unibet*, is a case referred to the Court of Justice by the Swedish Supreme Court about the compatibility of a Swedish law on lotteries with Community law. In order to determine this the national court enquired specifically about the scope of the principle of effective judicial protection and whether Community law required a member state's legal order to provide a self-standing action for a declaration that a provision of its national law conflicted with Community and whether, in waiting for the determination, interim relief must be granted. The Court of Justice held that the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the member states, which is also enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been affirmed by Article 47 of the Charter of Fundamental Rights of the European Union. It confirmed that Article 10 EC (now 4(3) TEU) required member states to ensure judicial protection of individuals' rights and refer to its earlier case law on this including cases 33/76 *Rewe*, 45/76 *Comet* and C-312/93 *Peterbroeck*, noted above. The Court of Justice held though that in the absence of

a Community rule, the member states were left to decide according to their own procedural rules. Consequently, the principle of effective judicial protection does not require the national legal order of a member state to provide for a free-standing action for an examination of whether national provisions are compatible with Article 49 EC (now 56 TFEU), provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue. Furthermore, the principle of effective judicial protection of an individual's rights under EU law must be interpreted as requiring it to be possible in the legal order of a member state for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with EU law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.

This essentially confirms the position previously laid down in Case C-213/89 *Factortame* which provides that this should be no more difficult to obtain than the application for interim relief in cases concerned with domestic law. The principle of the effective judicial protection thus ensures that regardless of the existence of national law remedies, EU law rights are subject to protection before the national courts.

#### 8.4.4 Section summary

National procedural autonomy is still the general rule and is still respected under the EU legal order but the Court of Justice has intruded into the area by developing the demands for effectiveness and equivalence or by providing new remedies in the member states with the aim of ensuring a balance between the objective to protect the national procedural autonomy and at the same time to protect the effectiveness of EU law. Until there is an agreement by all member states to try to harmonize procedural law, a very difficult task at best, the ad hoc case law development we have witnessed is not likely to change. The only change in this respect, which was introduced by the Constitutional Treaty and retained in the Lisbon Treaty, is quite modest. New Article 19(1) TEU provides as a general statement that member states must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, which merely reflects, but in far simpler language the *Unibet* case, considered above.



## Summary


**cross reference**  
Considered in chapters 6, 7 and 9.

The original provision of remedies in the Community legal order were largely those provided by the Treaty and included the direct remedies and the Article 234 EC (now 367 TFEU) preliminary ruling procedure. It can be seen, however, that these only provide half the picture and more important, from the perspective of individuals, are the series of remedies which have been introduced and developed by the Court of Justice. Some of these can be regarded as necessary to plug a gap in the first set of remedies, i.e. direct effects and others, to further

develop and plug gaps in the court-developed remedies, i.e. indirect effects, incidental horizontal effects and state liability. It should be clear that a study of the Treaties alone does not provide the complete picture of remedies in the EU legal order and that the remedies in this chapter are equally important, constituting as they do the second half of the system of dual vigilance which has developed, as outlined at the beginning of this chapter and chapter 6.



## Questions

- 1 Are regulations necessarily directly effective? Give reasons for your answer.
- 2 Has the application of the doctrine of direct effects blurred the distinction between Regulations and Directives? If so, does it matter?
- 3 Look at Articles 35 and 60 TFEU. Are they capable of direct effect? Explain why or why not, as appropriate. 
- 4 Distinguish between horizontal and vertical direct effects. Do these terms apply to all forms of EU law. If not, why not?
- 5 How far have the drawbacks which resulted from the denial of horizontal direct effects of Directives been overcome by the Court of Justice's decisions in subsequent case law?
- 6 What are indirect effects and how are they supposed to assist individuals in realizing EU legal rights?
- 7 What difficulties may be faced by national courts in trying to operate indirect effects? Give case citations to support your answer.
- 8 To what extent does the doctrine of 'state liability' first established in the *Francovich* case add to the range of individual remedies in EU law?
- 9 What criteria must be satisfied before a claim under state liability will succeed and how is this judged?
- 10 To what extent is the principle of national procedural autonomy respected in the EU legal order? To what extent should it be?



## Further reading

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