ES tiesību tiešā iedarbība un pārākums

Introduction

This chapter has as its focus the status of EU law in the member states, in particular, the reasons for the supremacy of EU law. The topic of the transfer and division of competences which was considered in chapter 3 provided the starting point for a consideration of supremacy.

5.1 The supremacy of EU law

The supremacy or priority of EU law can be considered from two perspectives; first, from the point of view of the Union and secondly, the member states, although dealing with this latter aspect in a Union now of twenty-seven member states must of necessity be very selective. Therefore, only a sample of the member states will be chosen, concentrating on the older and larger member states. As with the doctrine of direct effects, it is through the decisions and interpretation of the Court of Justice that the reasons and logic for the supremacy of Community law and now EU law have been developed and that is the view considered here first.

cross reference
Considered in chapter 8.

5.1.1 The view of the Court of Justice

There is, despite the reforms introduced by the Lisbon Treaty, and the inclusion of an express statement in the abandoned Constitutional Treaty (CT), still no express declaration or specific legal base for the supremacy of EU law in the Treaties. It can be argued that some of the Articles of the Treaties impliedly require primacy; for example, Article 4(3) TEU (ex Article 10 EC) (the fidelity or good faith clause, which requires member states to comply and not hinder the objectives of the Community), Article 18 TFEU (ex Article 12 EC) (the general prohibition of discrimination on the grounds of nationality), Article 288 TFEU (ex Article 249 EC) (the direct applicability of Regulations) and Article 344 TEU (ex Article 292 EC) (the reservation of Community and not national dispute resolution for matters coming within the scope of the treaties). In the initial absence of an express statement written into the Treaties, another route was needed to establish this supremacy of Community law over national law.

Note the 2007 Lisbon Treaty has sidestepped the direct expression of supremacy which was contained in the CT, Article I-6, by adding yet another Declaration (No. 17) which instead supports supremacy by reference to the case law of the ECJ on supremacy and referring to the Opinion of the Council Legal Service which confirmed the same conclusion.

From the outset, the Communities included their own supreme Court of Justice which is the equivalent of a constitutional court to adjudicate on disputes between the institutions of the Communities and between the member states and the institutions. Without an express statement of priority, the Court of Justice took the lead in providing basic constitutional principles on which the new legal order was based.

cross reference
For further details of the Court, refer to chapter 2, section 2.5.

The Court of Justice's view on supremacy is quite straightforward. In the first pronouncement dealing with this, the Court of Justice held in ***Case 26/62*** *Van Gend en Loos*, that the member states had limited their sovereignty, albeit within limited fields as agreed in the Treaty, and held that individuals in the Community could uphold rights under Community law in the national courts and in the face of conflicting national law.

The language of the earlier case law will be retained, but where the term Community is used, this is to be read now as also meaning Union.

From its progressive case law, notably Case 26/62 *Van Gend en Loos*, Case 6/64 *Costa* v *ENEL* and Case 106/77 *Simmenthal*, it is clear that Community law was assumed to be an autonomous legal order which is related to international law and national law but nevertheless distinct from them and thus subject to its own logic in relation to supremacy over the law of the member states.

Case 26/62 *Van Gend en Loos*, as the leading case in the development of the doctrine of direct effects, substantially prepared the ground for the Court of Justice to build its argument for supremacy of Community law. The case affirmed the Court's jurisdiction in interpreting Community legal provisions, the object of which is to ensure uniform interpretation in the member states. The case established the direct effect of Community law in the national legal orders. The Court of Justice held that 'the Community constitutes a new legal order of International law for the benefit of which the States have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only member states but also their nationals'.

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cross reference

See also the case coverage of Van Gend in chapter 8, section 8.1.3.1.

It was not long though before this supremacy over national law was stated expressly by the Court of Justice and further elaboration of the new legal order in *Van Gend en Loos* was provided in ***Case 6/64*** *Flaminio Costa* v *ENEL*. This case primarily concerned the payment of an electricity bill of a very low value (then approximately £1.00). In 1962, the Italian Government passed an act to nationalize the electricity industry and the newly nationalized industry sent out bills to recover debts previously outstanding. Mr. Costa claimed the action was in conflict with then Article 37 of the EEC Treaty concerned with State monopolies, and he refused to pay his bill. The case, however, also raised the wider issue of whether a national court should refer to the Court of Justice if it considers Community law may be applicable or, in the view of the Italian Government, simply apply the subsequent national law.

In addressing this question, the Court of Justice again stressed the autonomous legal order of Community law:

> By contrast with ordinary international treaties the EEC Treaty has created its own legal system which became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community the member states have limited their sovereign rights and have created a body of law to bind their nationals and themselves.

The Court also established that Community law takes priority over all conflicting provisions of national law whether passed before or after the Community measure in question:

> The integration into the laws of each Member State of provisions which derive from the Community, and more generally, the terms and spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.

As additional justifications, the Court of Justice also invoked the use of some of the general provisions of the EEC Treaty: old Article 5 (now 4(3) TEU) (the requirement to ensure the attainment of the objectives of the Treaty); old Article 7 (now 18 TFEU), the prohibition of discrimination, both of which would be breached if subsequent national legislation was to have precedence; and old Article

189 (now 288 TFEU), regarding the binding and direct application of Regulations, which would be meaningless if subsequent national legislation could prevail. The Court summed up its position:

> It follows... that the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Therefore, the conclusion must be that Community law must be supreme over subsequent national law.

Later, in ***Case 106/77*** *Simmenthal*, the Court of Justice ruled that:

> A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary of its own motion to set aside any conflicting provisions of national legislation, even if adopted subsequently.

cross reference
This case is considered further below in respect of constitutional practice.

The Court of Justice ruled that directly effective provisions of Community law preclude the valid adoption of new legislative measures to the extent that they would be incompatible with Community provisions. Any inconsistent national legislation recognized by national legislatures as having legal effect would deny the effectiveness of the obligations undertaken by the member state and imperil the existence of the Community.

Therefore, the voluntary limitation of sovereignty and the need for an effective and uniform Community law requires supremacy. To give effect to subsequent national law over and above the Community legal system which member states have accepted would be inconsistent.

In ***Case 213/89*** *Factortame (No. 1)*, the Court of Justice, building on the principle laid down in *Simmenthal* that a provision of EC law must be implemented as effectively as possible, held that a national court must suspend national legislation that may be incompatible with EC law until a final determination on its compatibility has been made. Thus, national rules which prevented a national court from issuing an interim injunction suspending the application of a national statute during a dispute whilst considering the existence of alleged rights under Community law, must be set aside. It was later held in Case C-221/89 that the UK law did in fact breach Community law.

cross reference
Discussed in chapter 8, section 8.3.

Finally, in this context it is worth mentioning the consequence of a member state not giving primacy to EU law when it should have done, in that liability on the part of the state will be incurred. This principle was first established by the Court of Justice in *Francovich* and later confirmed in *Factortame III* and other cases.

So far, the national legislation considered has been so-called 'ordinary' domestic national legislation and the Court of Justice has maintained a consistent position on supremacy. What about provisions of a member state's constitution? It is in this respect that the most serious conflicts between the views of the national judiciaries and the Court of Justice have arisen.

5.1.2 Supremacy and member state constitutional law

The Court of Justice's view in respect of national constitutional law differs little from that in respect of 'ordinary' national law.

Case 11/70, *Internationale Handelgesellschaft*, concerned the claim that Community levies were contrary to the German Constitution (Articles 2.1 and 14 *Grundgesetz*) and thus, as far as the national court was concerned, inapplicable. On referral to the Court of Justice, it held that national courts do not possess the power to review Community law. However, in diffusing the question, the Court of Justice held that there had been no breach by Community law of constitutional rights in the case.

The important question arising from the case was whether the Court of Justice was in a position to declare supremacy over national constitutional law and thereby in effect review that law. In doing so, it would effectively deny national courts the right to ignore the distinction or separation of the national and Community law legal systems but nevertheless do so itself.

This distinction is termed 'the autonomy of jurisdictions'.

In other words, national courts could not question the supremacy of Community (now EU) law but the Court of Justice would be able to determine that national constitutional law was not in conformity with Community (now EU) law, something clearly of great concern to national supreme courts.

The second case arises from a conflict between the Italian Constitution and Community law. In Italy, the constitutional practice existed that the power to disregard or declare invalid a provision of national law was the sole right of the Italian Constitutional Court.

In ***Case 106/77*** *Simmenthal*, a lower court was faced with inconsistency between a Community law provision and a national provision. The national court was aware that a reference to the Italian Constitutional Court would have the effect of subrogating Community law to national legal practice, inconsistent with existent Community case law on the matter, as was evident from the earlier Case 6/64 *Costa* v *ENEL*. However, disregarding the national law was contrary to Italian constitutional requirements. The Italian magistrate referred to both courts but asked the Court of Justice whether subsequent national measures which conflict with the Community must be disregarded without waiting until those measures are set aside by legislative or other constitutional means.

The Court of Justice first declared that the doctrine of direct effects of Community legislation was not dependent on any national constitutional provisions but a source of rights in themselves. Therefore national courts must give full effect to those rights including a refusal to apply conflicting national legislation. The Court of Justice also ruled that directly effective provisions of Community law also preclude the valid adoption of new legislative measures to the extent that they would be incompatible with Community provisions. The national court should disregard the inconsistent national law. The Court established that if there was no violation of Community fundamental rights, the Community measures were acceptable and there should be no reference to national constitutions to test their validity.

It held:

> The law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure.

The Court of Justice has not been so expressly forthright since *Simmenthal*. The conclusion following this case is that any inconsistent national legislation recognized by national legislatures as having legal effect would, in the Court's view, deny the effectiveness of the obligations undertaken by the member states and, in particular, the good faith clause, Article 10 EC (now Article 4(3) TEU)

and thus imperil the very foundations of the Community. In its widest interpretation, the judgment holds that: 'Inconsistent national measures of any sort which are introduced by member states are effectively invalid from their adoption.'

cross reference
This will be further reviewed from the German perspective in section 5.4.2.2 below.

The stance taken by the Court of Justice is in sharp contrast to the initial stance by some of the member states' courts. Indeed, the *Internationale Handelgesellschaft* case produced a head-on clash between the Court of Justice, the German Federal Constitutional Court and the German Constitution.

Case C-213/89 *Factortame (No. 1)* is a further confirmation that national constitutional practices or rules, in this case no less than the important constitutional doctrine of parliamentary sovereignty in the UK, must not be allowed to stand in the way of a Community law right. It was previously the position in the UK under the doctrine of parliamentary sovereignty that the courts had no power to set aside or not apply an Act of Parliament. The Court of Justice held that even if the Community law rule was still in dispute, the national procedure should be changed so as not to, even possibly, interfere with the full effectiveness of the Community law right.

cross reference
Considered further in chapter 8, section 8.4.

This case is also a witness to Community law incursion into national procedure. The Court of Justice is therefore clear that Community and now EU law is supreme over all types of national law. The above cases are just the leading cases on supremacy, those which expressly declare EU law primacy. Many other cases imply EU law supremacy; for example, all cases which declare direct effects must also acknowledge supremacy. If EU law is not supreme over national law, especially subsequent law, than direct effects would be denied. Conversely if direct effects were denied where they fulfil the criteria, supremacy is therefore also denied because national law would be seen to prevail.

5.1.3 Section summary

In summary, the Union view on supremacy is that because of its unique nature, EU law denies the member states the right to resolve conflicts of law by reference to their own rules or constitutional provisions. EU law obtains its supremacy because of the transfer of state power and sovereignty to the Union in those areas agreed. The member states have provided the Union with legislative powers to enable it to perform its tasks. There would be no point in such a transfer of power if the member states could annul or suspend the effect of EU law by later national law or provisions of the constitutions. If that were allowed to be the case, the existence of the EU legal order and the Union itself would be called into question. A precondition of the existence and functioning of the Union is the uniform and consistent application of EU law in all the member states. It can only achieve such an effect if it takes precedence over national law.

thinking point

Is it possible to have binding EU law which is not supreme over national law?
Equally, is it possible to have EU law supremacy without it being binding in the face of conflicting national law?

The legal and logical consequences of the above summary are that any provision of national law which conflicts with EU law must be overruled, regardless of its date of enactment or rank.

5.2 EU law in the member states

With twenty-seven member states now, it would occupy far too much space to look at the reception of EU law in all of them; therefore, only a sample of states has been chosen and headlining those is an extended look at the UK. Before this is undertaken, it needs to be considered how international law, as the Treaties and EU law were first thought to be, can be received into the national legal systems.

5.2.1 Theories of incorporation of international law: monism and dualism

The method of incorporation of international law into the member states' legal systems and EU law is determined initially by the particular outlook a state has in respect of the validity of such law. There are two prevailing theories of the incorporation of external law into national legal systems which are applicable in the context of the initial incorporation of the Treaties into the member state legal systems. These theories are **monism** and **dualism**.

Monism basically assumes that international law and national law form part of a single system or hierarchy of law, Therefore the acceptance of international law would not require formal incorporation by legislative transformation. After Treaty agreement and assent or ratification, it would be self-executing. In other words, it would be directly applicable within the state. Therefore, all that is required by such a state to achieve this is the assent to, or ratification of, an international treaty.

Dualism, on the other hand, regards international law and national law as fundamentally different systems of law which exist alongside each other. In order to overcome the barrier existing between the two systems, legislation is required to transform the rules of international law into the national legal system before it can have any binding effect within the state in such circumstances. It is for the member states to determine where the international law is then placed within the national hierarchy of laws.

It does not, however, determine where on the single hierarchy, the international law should be placed and this leaves open any difficulties of whether in individual states, it takes priority over all law or just over municipal/ordinary national law and not constitutional law. France is a good example of a monist state and will be considered below.

This is known in EU terminology as the acceptance of the acquis communautaire.

The UK is a very clear example of a dualist state.

5.2.2 EU law in the UK

cross reference
This concept has also been considered in chapter 1, section 1.4.1.4.

The UK was not one of the original and founding member states of the original Communities. It had a number of difficulties to overcome in order to accommodate the duties of membership of the EEC in 1973. It had to accept all the previous Community legislation passed including the Treaties, the Regulations, Directives and the judicial legal developments of this established new legal order.

It had on the other hand, time to adjust to this. Being a later entrant state, the UK could see in advance the legal and constitutional problems which would arise as a result of membership

and the judicial developments of direct effects and the supremacy and take account of them before entry. The particular difficulties faced by the UK legal system in accommodating membership and EC law were that of the largely unwritten constitution, the dualist approach to international law and the doctrine of parliamentary sovereignty. These will be considered before looking at how entry was achieved and how Community and now EU law has been received by the UK courts.

5.2.2.1 The 'Unwritten' Constitution

The UK does not have a single codified constitutional document; instead the UK Constitution is made up of a number of written and unwritten elements. Furthermore, there is no concept or form of entrenchment of the Constitution itself nor any parts or elements of it which may be regarded as particularly important. This includes Acts of Parliament, all of which can be removed by simple repeal by the same or any future Parliament. As a consequence, even if a particular political action or legal action is considered so important and envisaged to be required for the long term if not permanently, it is very difficult, if not impossible, under UK constitutional law to entrench this. Hence then, it is impossible to alter the UK Constitution with any certainty. Thus, any transfer of power to the Communities and Union under traditional constitutional thinking could not be regarded as permanent and could always be reversed by a subsequent Act of Parliament.

cross reference
The cases we shall consider below in section 5.3.2.6 help demonstrate this.

5.2.2.2 The dualist approach to international law

International treaties are a prerogative of the Crown as represented by the government in Parliament in the UK and the courts have no jurisdiction in respect of the validity of such treaties, although they can provide persuasive arguments for the interpretation of national law. In order to apply expressly and be binding in the UK legal order, a provision of an international treaty has to be converted into domestic law by being enacted by the UK Parliament as an act of national legislation. The Human Rights Act 1988, which provided legal validity for the ECHR in UK domestic law, is a good example of that. Prior to the Act, the ECHR had no binding validity in UK domestic law. This particular approach to international law provoked the question of how to convert the original three EC Treaties into national law without transforming every provision into an Act of Parliament, which would have been contrary to the Treaty. Furthermore, it was necessary to ensure that the Treaties or any of their provisions were not simply overruled by the implied repeal of subsequent Acts of Parliament. As it stood, the dualist approach, if followed, would not have recognized the unequivocal supremacy of Community law as set out by the European Court of Justice.

5.2.2.3 The doctrine of parliamentary sovereignty

Formally, UK parliamentary sovereignty means that there are no legal limitations on the UK Parliament and it has the right to make or unmake any law whatsoever. Further, no person or body is recognized as having a right to override or set aside the legislation of Parliament. The doctrine also implies that, as such, it is impossible to bind future Parliaments. Subsequent Acts can either expressly or impliedly override a prior Act. There is no constitutional role for UK courts, which therefore cannot review the validity of Acts passed by Parliament. The courts must enforce and apply Acts of Parliament equally and without question.

One of the problems in considering this doctrine of parliamentary sovereignty is the nature of the concept itself. It is not a rigid constitutional enactment and is really just a constitutional

convention which was built up over centuries and refined by eminent jurists to the position stated by Dicey in the latter half of the nineteenth century. As a convention it is subject to the erosion of time to reflect the changing circumstances in which it must be employed. Even Dicey conceded that this was not an absolute convention and there were political, if not legal limits to it. The fact that there has been considerable comment and publicity about the attack on parliamentary sovereignty as a consequence of Community and Union membership misconceives the status of this particular parliamentary convention. It posed, however, a distinct problem for the UK and until relatively recently also for the courts in considering whether in a situation of conflict, Community law or a national statute should take priority.

5.2.2.4 UK entry and the European Communities Act (ECA) 1972

The European Communities Act (ECA) 1972 was the Act of Parliament which facilitated UK entry into the Communities. Both entry to the EC and Community law implementation in the UK initially focuses on how the ECA 1972 observes and takes account of such well-established Community law concepts as direct effect and supremacy and the difficulties noted above in respect of dualism and sovereignty. In contrast to the earlier practice of the incorporation of international Treaties, the ECA did not reproduce the whole of the Treaties or subsequent secondary legislation as Acts of Parliament. If this was done, the words of any future Act which conflicted with Community law obligations could override the prior Treaty. Instead, the Community Treaties were adopted by a simple assent. Section 1 of the ECA 1972 was intended to future proof the Act by allowing for subsequent EC and EU Treaties to be regarded in the same way as the original Treaties, including, of course, most recently the Lisbon Treaty and the changes that it has made to the EU and EC Treaties. The Act thus impliedly recognizes the unique new legal system and may be regarded now as a special form of UK legislation, although this is still subject to the argument that it can be repealed.

This is described as ***sui generis*** as in not being within a general class but a special class of its own.

Some support has been given to this view by the High Court judgment in *Thoburn* v *Sunderland City Council* [2002] 1 CMLR 50 which is considered below.

Section 2(1) recognizes the legal validity and direct applicability of Community Treaties and Regulations already in existence in the Community legal order and provides that all such future Community legal provisions shall also be recognized as such. It also recognizes the doctrine of direct effects.

It provides:

> All such rights powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly.

It is somewhat convoluted but the subsection recognizes the doctrine of direct effects and allows for future developments by the Court of Justice. This is termed in the Act as 'enforceable Community right...and similar expressions'. Thus, those rights or duties which are, as a matter of Community law, directly applicable or effective are to be given legal effect in the UK.

Section 2(2) allows for the implementation of other Community obligations which are not automatically applicable in the UK, via forms of UK secondary legislation such as Orders in Council or Statutory Instruments. The power that the executive has to make secondary

legislation is subject to the limits in Schedule 2 of the Act, in respect of the imposing or creation of taxation, the introduction of retrospective legislation, sub-delegation, and the introduction of new criminal offences with more than a two-year period of imprisonment as penalty or a higher value limit of more than level 5 on the fine scale.

These figures are subject to revision from time to time as determined by an Order in Council.

Section 2(4) is the subsection which recognizes the supremacy of Community EU law and therefore also concerns sovereignty:

> Any such provision and any enactment passed or to be passed (that refers to any secondary legislation and act of Parliament which has been passed previously or may be passed in the future) shall be construed and have effect subject to the foregoing provisions of this section.

That is a reference to the entire section and in particular s. 2(1), and means that any future Act of Parliament must be construed in such a way as to give effect to the enforceable Community rights in existence. This is achieved by denying effectiveness to any national legislation passed later which is in conflict and this in turn is controlled by directions to the courts concerned with the application or construction of legislation. The courts are required to interpret any future Act to be consistent with Community EU law or in effect, to be subordinate where inconsistency arises.

This view was clearly confirmed by the House of Lords in *Factortame* when it held that s. 2(4) should be understood as if 'a section were incorporated into the Merchant Shipping Act which enacted that the provisions with regard to the registration of British fishing vessels were to be "without prejudice to the directly enforceable Community rights of national of any member states of the EC"'.

See *R v Secretary of State for Transport, ex parte Factortame and others (No. 1)* [1990] 2 AC 85 at 140.

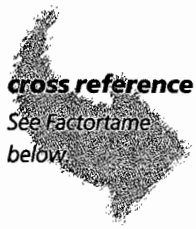
Section 3(1) then instructs the courts to refer questions on the interpretation and hence the supremacy of Community and now EU law to the Court of Justice if the UK courts cannot solve the problem themselves by reference to previous Court of Justice rulings. This follows the *Costa* v *ENEL* ruling and is backed up by s. 3(2) which requires the courts judicially to follow decisions of the Court of Justice on any question of Community law. This would include direct effects and supremacy although it does not expressly say so.

The combination of s. 2(1) and (4) with the control of s. 3(1) and (2) would appear to achieve the essential requirements of the recognition of direct effects and the supremacy of Community and now EU law for past and future UK legislation.

5.2.2.5 The ECA and parliamentary sovereignty

The view of how the ECA has affected parliamentary sovereignty is determined by what the Act actually achieves. There are two main viewpoints. Either s. 2(4) acts as a rule of construction or it attempts a form of entrenchment whereby it modifies the doctrine of parliamentary sovereignty. As a rule of construction it commands the courts to interpret national law to comply with Community and EU law. The earlier decisions on Community law by courts in England and Wales considered that the rule of construction should apply only where the

national legislation is reasonably capable of such construction; see for example, the cases of *Macarthy's* v *Smith* and *Roberts* v *Cleveland Area Health Authority.* However, this view is being modified because it is regarded as too restrictive a view of what is achieved by the ECA. The alternative of limited entrenchment means that it allows the courts directly to apply Community and EU law over national law regardless of the actual words. This enables the courts to ignore any implied repeal or unintentional inconsistency of future Acts of Parliament and thus arguably modifies the doctrine of parliamentary sovereignty in that one Parliament has been seen to bind a future one. Express inconsistency and thus repeal remains a problem even under this interpretation. However, how Community and now EU law is received in the member states is often and ultimately dependent on the national judiciary as well as national parliaments; therefore a consideration of its reception in the courts is vital.



5.2.2.6 Judicial reception of Community and EU law in the UK

Where there is a conflict between an earlier UK law and later Community and now EU law, there is no difficulty; the rule of legislative repeal within parliamentary supremacy and the supremacy of EU law will produce the same result.

For example in ***Case 83/78*** *Pigs Marketing Board (Northern Ireland)* v *Redmond* from 1979 in which the later CAP rule on the organization of the market was held to prevail over earlier national law.

The difficulty arises when there is a conflict between a later UK law and an earlier Community or EU law provision. In such a case, are the words within the ECA to be taken as a rule of interpretation or a question of entrenchment which effectively involves the modification of doctrine of parliamentary supremacy by ss. 2(4) and 3 of the ECA?

The most important of the earlier cases is *Macarthy's* v *Smith* concerning a clash between the Equal Treatment Act s. 6 and the then Article 119 of the EC Treaty, in which the Court of Appeal clearly held:

> It is important now to declare and it must be made plain. The provisions of Article 119 take priority over anything in our English Statute on Equal Pay which is inconsistent with Article 119. That priority is given by our own law, by the ECA 1972 itself. Community law is now part of our law and whenever there is any inconsistency Community law has priority.

However, Lord Denning, in an *obiter* passage, thought that with regard to an express or intentional repudiation of the Treaty by Parliament or expressly acting inconsistently, the courts would be bound to follow the express and clear intent of Parliament to repudiate the Treaty or a section of it by the subsequent Act. That not being the case, however, Community law takes priority according to the Court of Appeal. This case has survived the years, and the subsequent cases of the House of Lords concerned with the relationship between Community and national law have not removed it from our consideration because, even though Denning's words are merely *obiter*, they remain the only clear statement by a superior court about what might happen in the event of an express statement by Parliament of the intention to conflict with Community or EU law.

In *Garland* v *BREL*, the first important statement from the House of Lords, Mrs Garland had complained that the practice of allowing the families of male ex-employees of BREL concessionary rail

travel facilities after retirement but not families of female ex-employees was discriminatory. Under s. 6(4) of the Sex Discrimination Act 1975, provisions in relation to retirement were exempted from the rules on sex discrimination and Mrs Garland's claim failed initially.

Previous UK case law and notably *Roberts* v *Cleveland Area Health Authority* had determined that s. 6(4) Sex Discrimination Act 1975 be given a wide interpretation so as to discount anything to do with or connected to retirement; therefore, discrimination in such circumstance was lawful. Old Article 119 EEC and Directive 76/207, however, made no such exception regarding retirement, therefore UK and Community law were regarded by the House of Lords as inconsistent. The House of Lords asked the Court of Justice to give a ruling on the interpretation of Article 119 to determine if it covered conditions in retirement. The Court of Justice held that it did so. Upon return to the House of Lords they considered themselves bound in view of the Court of Justice ruling and ECA 1972 to interpret the Sex Discrimination Act 1975 in such a way as not to be inconsistent with the UK obligations under Community law.

Whilst the House of Lords stated that the case was no occasion to pronounce on any further effects of the ECA they nevertheless did state *in obiter* that UK courts should interpret UK law to be consistent no matter how wide a departure from the prima facie meaning it was. The case therefore very much follows the line that s. 2(4) allows courts to construe subsequent statutes quite widely in order to give consistency to Community and now EU law; clearly, therefore a rule of construction.

The case of *Duke* v *GEC Reliance* is also instructive as it was brought at roughly the same time as the *Marshall* case.

The *Marshall* case was one of the leading cases on the direct effect of Directives

Mrs Duke was required to retire at sixty, earlier than men who could retire at sixty-five. Section 6(4) of the Sex Discrimination Act 1975 applied to the factual discrimination to render the discrimination lawful. The House of Lords considered the *Marshall* ruling in which the Equal Treatment Directive was held to apply to retirement itself and to have direct effects but because this concerned a private sector employer, the House of Lords rightly concluded that the Directive itself could not be enforced against individuals, i.e. it had no horizontal direct effects.

cross reference
For the importance of this refer to chapter 8, section 8.1.3.3.

Therefore, a head-on clash between the Directive and a UK statute took place with the Directive being later in time. The post-accession statute was inconsistent with a later Community obligation. It was therefore too late for Parliament to intend to comply with the Directive in the provisions of the national law. Consequently, the House of Lords held that there was no enforceable Community right which the provisions of the English Sex Discrimination Act would be required to give way to under s. 2(4) of the ECA. Therefore s. 2(4) could not apply to construe a UK statute to enforce Community Directives against individuals. In the view of the House of Lords in the case, it could only apply to directly applicable Community law. The House of Lords held that s. 2(4) refers to s. 2(1) which only refers to directly effective Community law or directly applicable law; therefore, it was not appropriate.

Mrs Duke was refused relief by the House of Lords and with this judgment was the view that s. 2(4) could be used very widely as a rule of construction. This case was not followed by the House of Lords in later cases.

Pickstone v *Freemans plc* involved a generous interpretation of the UK 1983 Equal Pay (Amendment) Regulations, which amended the Equal Pay Act 1970, to read consistently with Community law

obligations. This was largely based on the intention of Parliament in passing the Regulations to ensure that national law complied with the Community Directive but also in line with Court of Justice rulings. Section 2(4) was used to justify the Court's interpretation of national law but only in so far as it was reasonably possible. *Duke* was then distinguished on the basis that the Sex Discrimination Act 1975 was not intended to give effect to the later Community law or capable of doing so.

The case of *Litster* v *Forth Dry Dock & Engineering Co. Ltd* concerned the rights of employees on the transfer of the undertaking of a business. A number of employees were claiming unfair dismissal after a ship-repairing company was transferred between owners. The relevant law is 'The Transfer of Undertakings (Protection of Employment) Regulations' which purported to implement the obligations contained in the EEC Council Directive 77/187 but the national regulations were considered to be somewhat ambiguous. The Directive could not give rise to direct effects because it involved an attempt to enforce it against a private employer. The House of Lords could not therefore achieve a satisfactory result in keeping with the European Directive and the case law of the Court of Justice by a literal attempt; therefore, it concluded that it must use the Community legislation to construe the later UK legislation contrary to its literal meaning and imply additional words to achieve consistency with the purpose of the Directive. Here s. 2(4) is clearly being used as a rule of construction and quite a generous one.

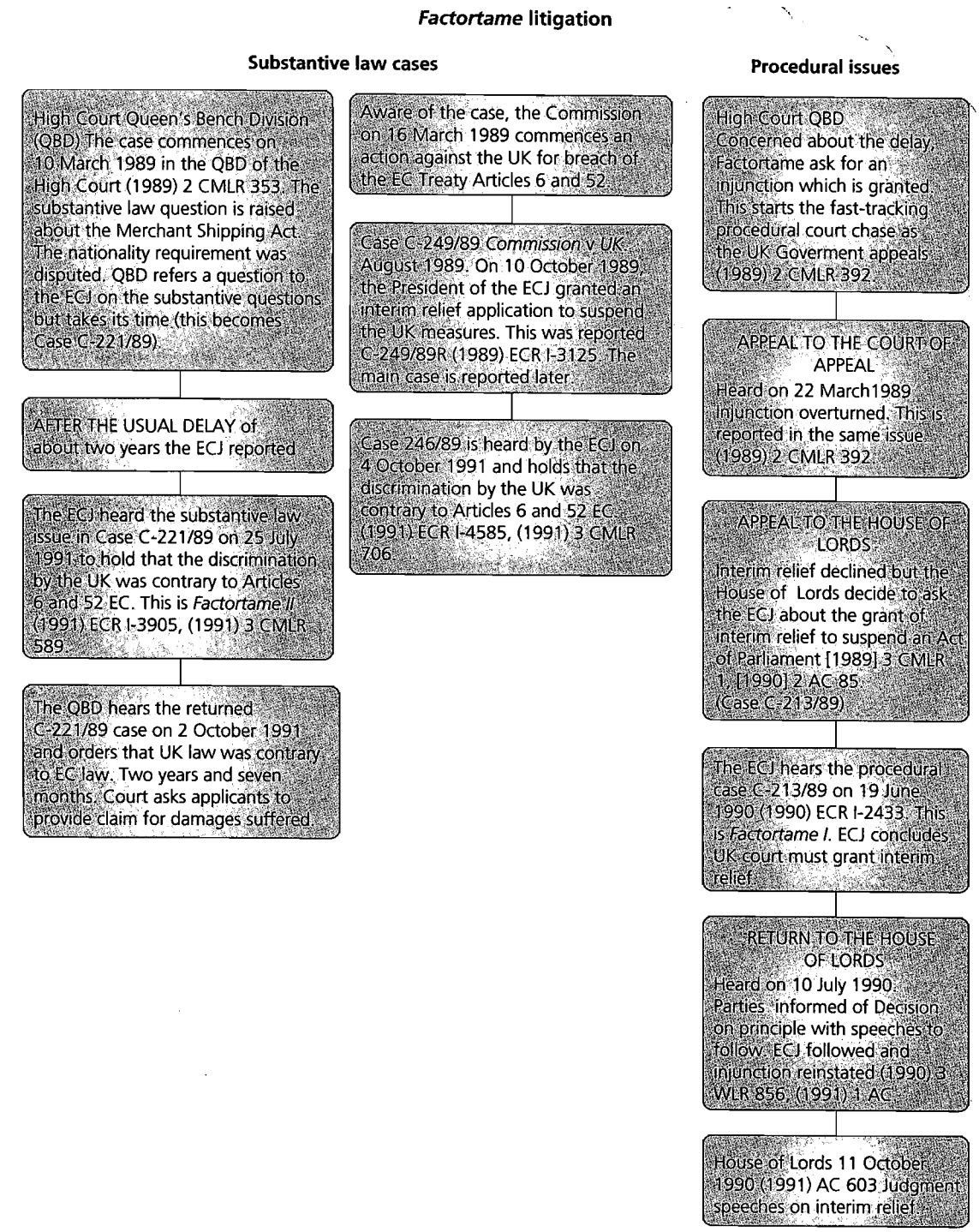
The *R* v *Secretary of State for Transport ex p. Factortame Ltd* case is a particularly important statement of the view of the House of Lords to the supremacy of Community law. You may find the series of litigation in the *Factortame* cases very confusing, particularly since the case numbers are not always used consistently. To try and clarify the matter, the facts and procedure of the case are as follows.

The UK wanted to protect the British fishing quotas under the European quota system and passed the Merchant Shipping Act in 1988 aimed at stopping the practice of quota-hopping by Spanish-owned vessels registered in the UK by requiring that a minimum percentage of the directors of companies owning fishing vessels registered in the UK be British nationals. The companies and vessel-owners sought an interim injunction against the Crown not to apply a disputed national regulation issued under that Act. This was granted in the main action on merits by the Queen's Bench Divisional Court which decided, rather slowly, to refer the substantive issue to the Court of Justice, and this case was given the Court of Justice docket number C-221/89. This is *Factortame No. 2*. The Crown appealed against the injunction, raising a procedural point and a second line of cases commenced which was appealed up to the House of Lords, who also made a reference to the Court of Justice but this time on the procedural matter.

The procedural action was, however, subject to a much faster appeal process so that it was received earlier by the Court of Justice than the substantive law case and was given the docket number C-213/89, hence it is *Factortame (1)*.

The procedural aspect was decided by the Court of Justice, which essentially held that the national court should grant interim relief. On receipt of the ruling, the House of Lords held that if a national rule precludes a national court from granting an interim relief, whilst it was being determined whether there is a conflict between national law and Community law, irreparable harm could be done. Therefore the national court must set aside that rule. If the injunction against the Crown was not granted, the Spanish fishing companies would most probably go out of business whilst waiting for the Court of Justice to decide the substantive issues and for that to be returned to the QBD and decided: a process that actually took two years and seven

Diagram 5.1


Factortame litigation
Substantive law cases
Procedural issues
High Court Queen's Bench Division (QBD) The case commences on 10 March 1989 in the QBD of the High Court (1989) 2 CMLR 353. The substantive law question is raised about the Merchant Shipping Act. The nationality requirement was disputed. QBD refers a question to the ECJ on the substantive questions but takes its time (this becomes Case C-221/89).
AFTER THE USUAL DELAY of about two years the ECJ reported
The ECJ heard the substantive law issue in Case C-221/89 on 25 July 1991 to hold that the discrimination by the UK was contrary to Articles 6 and 52 EC. This is *Factortame II* (1991) ECR I-3905, (1991) 3 CMLR 589.
The QBD hears the returned C-221/89 case on 2 October 1991 and orders that UK law was contrary to EC law. Two years and seven months. Court asks applicants to provide claim for damages suffered.
Aware of the case, the Commission on 16 March 1989 commences an action against the UK for breach of the EC Treaty Articles 6 and 52.
Case C-249/89 *Commission* v *UK* August 1989. On 10 October 1989 the President of the ECJ granted an interim relief application to suspend the UK measures. This was reported C-249/89R (1989) ECR I-3125. The main case is reported later.
Case 246/89 is heard by the ECJ on 4 October 1991 and holds that the discrimination by the UK was contrary to Articles 6 and 52 EC. (1991) ECR I-4585, (1991) 3 CMLR 706.
High Court QBD Concerned about the delay, Factortame ask for an injunction which is granted. This starts the fast-tracking procedural court chase as the UK Goverment appeals (1989) 2 CMLR 392.
APPEAL TO THE COURT OF APPEAL
Heard on 22 March1989 injunction overturned. This is reported in the same issue (1989) 2 CMLR 392.
APPEAL TO THE HOUSE OF LORDS
Interim relief declined but the House of Lords decide to ask the ECJ about the grant of interim relief to suspend an Act of Parliament [1989] 3 CMLR 1, [1990] 2 AC 85 (Case C-213/89).
The ECJ hears the procedural case C-213/89 on 19 June 1990 (1990) ECR I-2433. This is *Factortame I*. ECJ concludes UK court must grant interim relief.
RETURN TO THE HOUSE OF LORDS
Heard on 10 July 1990. Parties informed of Decision on principle with speeches to follow. ECJ followed and injunction reinstated (1990) 3 WLR 856, (1991) 1 AC.
House of Lords 11 October 1990 (1991) AC 603 Judgment speeches on interim relief.

months. Although the substantive point of Community law in relation to the UK law had not been decided at that stage, the House of Lords nevertheless considered that if Community law rights are to be found to be directly enforceable in favour of the appellants, those rights will prevail over the inconsistent national legislation, even if later. *In obiter* it was held:

> This [s. 2(4)] has precisely the same effect as if a section were incorporated into the national statute...which in terms enacted that the provisions...[of an Act]...were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.

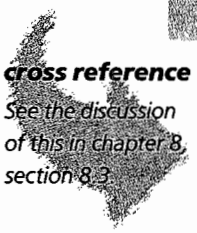
Lord Bridge commented on the view that the earlier Decisions in favour of Community law were an attack on parliamentary sovereignty:

> If the supremacy within the European Community of Community law over the National law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the ECA 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of National law found to be in conflict with any directly enforceable rule of Community law. Thus, there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Factortame (2), dealing with the substantive matter, was decided in the High Court as predicted, that Community law had been breached by the UK legislation.

As a result of this case, the view of s. 2(4) ECA is that it is a direct rule to give priority rather than a rule of construction which requires there to be national law to construe. It would also seem to suggest that, as far as the House of Lords is now concerned, entry to the Communities and s. 2(4) of the ECA have led to the modification of the doctrine of parliamentary sovereignty and that Community law in the areas agreed by Treaty is supreme over national law. Whether this overrides the dictum in *Macarthy's* v *Smith* is open to question. It remains open for Parliament to expressly repeal the Act or pass legislation expressly in breach of Community and now EU law obligations. Politically, however, this is extremely unlikely.

The series of *Factortame* cases is extremely important for a number of reasons in Community law, in particular from the point of view of supremacy over national law and constitutional doctrine and should be most carefully studied. The *Factortame* case returned to the High Court (*Factortame No. 3*) on whether damages would be payable and in arguing ever finer points of law on damages and limitation in *Factortames Nos. 4* and *5*, the details of which thankfully go beyond that needed for courses on EU law.



cross reference

See the discussion of this in chapter 8, section 8.3

Subsequently, the House of Lords confirmed in **Case C-9/91** *R* v *Secretary of State for Employment ex parte EOC*, the conclusion reached in *Factortame* and held that in judicial review proceedings, UK courts could declare an Act of Parliament to be incompatible with EC law, although this does not extend to being able to annul the UK Act of Parliament nor indeed to command a government to repeal the Act or compel or command a minister to change the law.

Therefore, whilst judicially in the UK, EU law supremacy appears to be an accepted and settled matter, this does not prevent cases reaching the courts on this topic. The most prominent thus far is the *Metric Martyrs* case (*Thoburn v Sunderland City Council*) in which an argument was raised that a later UK Act, the 1985 Weights and Measures Act, had impliedly repealed the 1972 ECA and that UK law should then take precedence over EC law. The High Court rejected this view, making the comment that the 1972 Act had acquired a 'constitutional quality' which prevented implied repeal. The case appears to confirm the view that there has been a kind of entrenchment introduced which does amend our view of parliamentary sovereignty in the UK.

The conclusion for the UK is that it has clearly and unambiguously accepted the supremacy of EU law even over UK Acts of Parliament and over constitutional practice. Whether this is four-square on the basis of the logic of EU law as provided by the Court of Justice and not by reference to the UK, the 1972 ECA remains unclear. The case law points to both conclusions; however, the UK seems to have gone further than some of the other member states. Certainly the *Factortame* litigation and the conclusion at the end of it that in matters of EU law, the UK courts are able not to apply UK Acts of Parliament, does introduce a form of constitutional review by the courts, hitherto not the case in the UK and therefore does impact and undermine the doctrine of parliamentary sovereignty, at least as far as EU law is concerned.

5.3

Reception of community and EU law in other member states

A majority of member states have not experienced any problems so far, although there is always room judicially for this position to change. It would be beyond this particular text to conduct a tour of all the member states, thus only the following states have been selected.

5.3.1 Belgium

In Belgium, the constitution was amended under Article 25a to allow for the transfer of powers to institutions governed by international law. However, because Belgium was a dualist country, later laws would prevail over earlier, including international treaties if simply converted into national law. Furthermore, as in the UK, the courts in Belgium have no role in respect of judging the validity of international agreements; however, they accepted Community law supremacy in its own right as if it were a monist country and not by dependence on a Belgian statute.

See *Minister for Economic Affairs* v *S.A. Fromagerie 'Le Ski'*, in which it was held that in the case of conflict between national law and the directly effective law of an international treaty, the latter would prevail, even if earlier in time.

Its position since that early case has not changed.

5.3.2 Germany

5.3.2.1 The German Constitution (*Grundgesetz*)

In Germany, in contrast, difficulties were experienced, especially in respect of the relationship between fundamental rights' provision in the German Constitution (*Grundgesetz*) and in the Community legal order. Traditionally, Germany adopted the dualist approach to the reception of international law whereby some form of transformation or adoption of international law was necessary in order for it to have any direct application in the state. There had to be a process of incorporation by statute and, once incorporated, a law would simply rank as with other *Gesetze* (Acts of the German Parliament). If a later law was in conflict with an earlier law, the later law would prevail. Articles 24 and 25 of the *Grundgesetz* provided for the peaceful cooperation of the German State with international organizations. Article 24 of the *Grundgesetz* allowed for membership of international organizations and a transfer of powers to them and was used to establish membership of the European Communities. Although Article 25 declared general rules of public international law to be an integral part of federal law and to take precedence over national law, it was silent as to the effect of international law on German constitutional law. In order to cater specifically for further European integration, particularly into new areas as proposed in the Maastricht Treaty and to take account of the increasing concern about possible infringements of the *Grundgesetz*, a new **Article 23** of the *Grundgesetz* was added and amendments were made to other key provisions.

Joint approval was also required for the ratification of the EU Treaty and is further required for any future changes affecting the contents of the *Grundgesetz*.

Article 23 provides that sovereign powers can be transferred to the EU provided that the transfer has the approval of both houses of the German Parliament, the *Bundestag* and *Bundesrat*.

5.3.2.2 The reaction of the German courts

Previously, German courts had been divided as to the effect of Community primary law and secondary law and at times, had refused to make a reference in cases of doubt or non-acceptance, thus denying the parties to the case the chance to see whether EC law would have affected the outcome of the case. The most important court in Germany is the Federal Constitutional Court (FCC) because of its constitutional position in the German State.

In the *Internationale Handelsgesellschaft* case, known in Germany as '*Solange I*', the Constitutional Court held that as long as the recognition of human rights in the EEC had not progressed as far as those provided for by the *Grundgesetz*, German courts retained the right to refer questions on the constitutionality of secondary Community law to the FCC with the possible result that Community law might be ignored if it did not have sufficient regard for basic rights.

This position has been modified with the later rulings by the FCC.

In the *Wünsche Handelsgesellschaft* Decision, known as '*Solange II*', the FCC has accepted that Community recognition and safeguards of fundamental rights through the case law of the Court of Justice are now sufficient and of a comparable nature to those provided for by the *Grundgesetz*. Thus, as long as EC and now EU law ensures the effective provision of fundamental rights, the FCC will not review EC law in the light of the rights provisions of the Constitution. The Court also stated

that it would not be prepared to accept constitutional complaints against Community law from lower courts on this basis. It is argued that a reservation of supremacy is still inherent in the ruling.

The basis for the decision is not, however, the inherent supremacy of EU law, but the fact that Article 24 of the *Grundgesetz* allowed a transfer of powers to the Community and the subsequent Accession Act obliges the German courts to accept the supremacy of Community and EU law. The decision by the FCC in *Solange II* also held that the Court of Justice was a statutory court within the meaning of Article 101 *Grundgesetz* and individuals have the right to have access to statutory courts. This effectively means that German courts can no longer refuse to make references in the last instance to the Court of Justice. This happened in the case of *Kloppenburg (Bundesfinanzhof 25 April 1985, NJW 1988, 1459, [1988] 3 CMLR 1).* The Federal Tax Court had denied the direct effects of Directives and refused a reference to the Court of Justice.

The Federal Constitutional Court held in *Re: VAT Exemption (NJW 1988, 2173, [1989] 1 CMLR 113),* the follow-up to the *Kloppenburg* case, and in the separate case of *Re: Patented Feedstuffs (NJW 1988, 1456, [1989] 2 CMLR 902)* that German courts which are courts of last instance in terms of Article 234 EC Treaty (now Article 267 TFEU), would be in breach of the German Constitution if they failed to refer to the Court of Justice when necessary. The earlier judgment of the Federal Tax Court was consequently annulled.

Therefore, German courts of last instance are obliged to make a reference where a dispute as to interpretation or application of EU law exists. Applications to the FCC to question the constitutionality of Community legislation have now been declared to be inadmissible because the Court considered that such acts are not acts of German public authorities within the scope of the *Grundgesetz* and cannot thus be complained of to the FCC. Following these cases there would seem to be no procedural difficulty in getting EU rights at least considered in the proper forum in Germany. Any court which refuses either to follow a previous ruling of the Court of Justice or to make an Article 267 TFEU ruling may be subject to the review of the FCC for a breach of Article 101(1) of the *Grundgesetz*.

The German Accession Act to the TEU was passed by the German Parliament in December 1992. However, as a result of considerable criticism that there had been no real debate on the Maastricht Treaty of European Union in Germany and that a referendum had not been held to test public opinion on further integration, constitutional complaints were made to the FCC.

In its judgment in *Brunner et al.* v *the Federal Republic of Germany*, the FCC considered the changes to the Constitution, the constitutionality of the TEU, and generally the relationship between the EC and the German Constitution. Whilst it held that the transfer of powers was compatible with the principles of the *Grundgesetz*, future extensive transfers could not be made without the approval of the German Parliament and that the FCC would reserve to itself a right to review the compatibility of EC law fundamental rights' provisions and the range of rights exercised by the EC with the German Constitution, thus appearing to backtrack on its previous judgments.

After the Maastricht judgment, the relationship between the Court of Justice and the FCC remains unclear. Even though the FCC claims that fundamental rights will be protected and upheld by a relationship of cooperation between both courts, it does not clearly explain how this protection will work in practice. It seems that the FCC has accepted the standard of basic rights' protection provided by the Court of Justice but reserves a right to review EU Acts that

could evidently infringe basic rights under the *Grundgesetz*, if the Court of Justice does not offer protection. So far this has been a theoretical case.

A more recent decision of the FCC (*case 2BvE 2/08 Lisbon Judgment*) indirectly deals with EU matters as the focus is on the constitutional compatibility of German legislation which dealt with the Lisbon Treaty. Following the agreement on the Lisbon Treaty on further integration of the EU by the member states, the German *Bundestag* and *Bundesrat* passed the transformation act and an accompanying law extending and strengthening the rights of the *Bundestag* and the *Bundesrat* in European matters. This latter law was challenged before the FCC by German MPs. The Court decided that the Lisbon Treaty and its transformation act were compatible with the Constitution but that the accompanying act strengthening the rights of the *Bundestag* and *Bundesrat* were not. It held that European integration could not be achieved by means that abolished the member states' discretion to organize or establish economic, cultural and social conditions of life. In this respect constitutional organs such as the *Bundestag* and *Bundesrat* had a responsibility to integrate. Thus, the participation rights of these two organs within negotiations at European level had to elaborated in a much clearer way than had happened in the challenged statute.

The FCC has made clear that it retains its competence to review any EU acts in order to ensure that they do not exceed the limits of what EU organs have been authorized to do by the Member States and has thus, in this latest case, confirmed the line taken already in the Maastricht Treaty case.

Turning to the ruling of the highest German court in civil and criminal matters, the German Supreme Court (*Bundesgerichtshof*) accepted the principle of state liability on the part of the German state for a legislative breach of Community law in Case C-46/93 *Brasserie du Pécheur* v *Federal Republic of Germany*. However, the Court held that the breach, which was the prohibition of the use of additives in brewing beer contrary to EC free movement of goods rules, had not been sufficiently serious to impose liability.

5.3.3 Italy

In Italy the position both constitutionally and judicially was and is very similar to Germany whereby both had new constitutions set up after the Second World War with strong provision for fundamental rights. Both states allowed a transfer of power to international organizations but were silent as to its effect on constitutional law.

Article 11 of the Italian Constitution provides for the limitation of national sovereignty in favour of international arrangements to secure peace and justice between nations.

As in Germany, the focus in Italy is on its Constitutional Court. Given that two of the leading EU cases on supremacy, *Costa* v *ENEL* and *Simmenthal,* arose from Italy, it should certainly have been clear to the Italian Constitutional Court what was expected of it. Again there has been a mixed reaction, also along the lines of the German Constitutional Court.

Despite the previous less-than-enthusiastic response to Community and EU law, the supremacy of Community law was accepted in the case of *Frontini* v *Ministero delle Finanze*, the supremacy of the European Court was accepted in *Granital* v *Administrazione delle Finanze* (Judgment of 8 June 1984 [1984] 1 Giui It 1521). The decision was based both on the basis of an interpretation of Article

11 of the Italian Constitution, allowing for the limitation of sovereignty in favour of international organizations, and by reason of the case law of the Court of Justice.

The case did, however, make the reservation that Italian law should only be cast aside where directly applicable Community law exists – similar, in effect, to the judgment of the House of Lords in the *Duke* case.

A later decision in *Fragd* v *Administrazione delle Finanze* [1985] ECR 1605 suggests that the Italian Constitutional Court is still prepared to review EU law in the light of the fundamental rights provision in the Italian Constitution if EU law was regarded as not respecting these rights.

Thus far, this remains the situation in Italy with the possibility for outright rejection of EU law supremacy.

5.3.4 France

The French courts are divided into two hierarchies, each with their own Appeal Courts and final appeal and in addition, a Constitutional court (*Conseil Constitutionnel*). They have had, however, significantly different attitudes to EC law, despite the fact that both are subject to Article 55 of the French Constitution which is monist and gives international law a rank above municipal law but is silent as to the effect on the Constitution. This is the point that has led to discrepancies between hierarchies.

5.3.4.1 The French Courts of Ordinary Jurisdiction

The Courts of Ordinary Jurisdiction have felt no hesitation in making Article 234 (now Article 267 TFEU) references to the Court of Justice and giving supremacy to Community and thus now EU law on the basis of Article 55 of the Constitution. The French Supreme Court of Ordinary Jurisdiction, *le Cour de Cassation,* has in fact gone further and found for the supremacy of Community law without direct reference to Article 55 of the Constitution and more on the basis of the inherent supremacy and direct effects of Community law itself. See the *Café Vabre* case ([1975] 2 CMLR, 336) in which old Article 95 EEC was held to prevail over a subsequent national statute.

These rulings have been consistently followed by the lower courts and reference to either Article 55 of the Constitution or even the above decisions is rarely made, for example, *Garage Dehus Sarl* v *Bouche Distribution.*

5.3.4.2 French Administrative Courts

These courts deal with complaints by citizens against any acts of the state administration. The Supreme Administrative Court, the *Conseil D'État* has from time to time completely denied the supremacy of Community law or the need to make reference to the Court of Justice relying heavily on the French principle of law, **Acte clair**.

Acte clair states that where a provision of law is clear, there is no need to refer to a higher court but simply to apply it.

The leading case is *Minister of the Interior* v *Cohn-Bendit (Decision of the Conseil d'Etat, 22 December 1979, 8 Dalloz 1979)* in which Daniel Cohn-Bendit (Danny the Red) was deported from France in 1968 and in 1975 requested re-entry but was refused. He claimed that the refusal was contrary to the free movement Directive, Directive 64/221, previously declared directly effective by the Court of Justice in the *Van Duyn* case. The *Conseil D'Etat* held that individuals could not directly rely on Directives to challenge an Administrative Act and declined to follow previous Court of Justice rulings or make a reference itself.

The judgment in the *Cohn-Bendit* case has been followed by the same court and lower courts. Two cases have though demonstrated a much more cooperative attitude on the part of the French administrative courts.

In *Nicolo*, the *Conseil d'Etat* reviewed the supremacy of international law including EEC Treaty Articles and held the latter to take precedence over subsequent national law, largely on the basis of Article 55 of the Constitution. The submissions of the government commissioner were instructive in his use and observation of the decisions from the courts of other member states and their acceptance of Community law supremacy.

Secondly, in *Boisdet*, incompatible national law was declared invalid in the face of a Community Regulation. In doing so the *Conseil d'Etat* followed the case law of the Court of Justice.

The cases of *Rothmans* and *Philip Morris Tobacco* and *Arizona Tobacco* held that not only are EC Directives to be given priority over national law, even where the Directive pre-dated the French statute, but also that an award of damages against the French authorities can be made where damage is suffered as a consequence of non-compliance with EC law, clearly following the lead of the Court of Justice in the *Francovich* case.

Previously receiving no direct mention in the French Constitution, the European Communities and the European Union are now referred to in a new Article 88. This was introduced as a result of the *Conseil Constitutionnel* ruling that the move into new policy areas under the Maastricht Treaty would be incompatible with the Constitution. It too, as with Article 55, the original validation of Community membership and Community law within the French legal order, still requires reciprocity. As a result of the change to Article 88 of the Constitution, the French Constitutional Court has declared that it will no longer review Community law in the light of the Constitution, save in relation to express elements which is taken to mean those protecting fundamental rights (Decision 2004/496 of 10 June 2004).

Reciprocity in the above context means that in order for any international Treaty and also now the EU Treaties to be upheld and complied with in France, they must be upheld reciprocally by the other party or parties. Failure to comply by another party under the customary international law understanding of this principle would mean that France is itself no longer obliged to comply with the Treaty or the part of it not complied with.

cross reference

See also section 7.1.4.5 concerned with defences to Commission enforcement actions in chapter 7.

Clearly in a Union of twenty-seven states, this is not very practical; in any event, reciprocity was expressly excluded as a defence to a breach of Community law in Cases 90–1/63 *Commission* v *Belgium and Luxembourg* and C-146/89 *Commission* v *UK (Fishing limits).* However, despite the change to the Constitution and the rules more sympathetic to the supremacy of EU law, cases taking a less cooperative position are still being decided by the *Conseil d'Etat*.

5.3.5 The Netherlands

An original member state, the Netherlands was already part of an economic union (Benelux) with Belgium and Luxembourg, itself conceived and constituted by the governments of those countries in wartime London. At first, in the negotiations leading to the original treaties, the Netherlands promoted the intergovernmental solution to Community Governance by the Council of Ministers, a view though which gave way to more supranationalism as progress with the Communities was made and as the larger states of the EU exerted more their influence. Supranationalism was regarded as a better buffer against the re-emergence of nationalism.

The Netherlands is a monist country as far as international law is concerned and the Dutch Constitution specifically recognizes and ranks international law. Article 93 of the Constitution provides that provisions of treaties and of decisions by international institutions may have direct effect in the Dutch legal system and further that they take precedence over Dutch laws. This is backed up by Article 94 which provides that some international rules of law take precedence over all other laws and that national statutory provisions that are incompatible with these rules do not apply. European law under these two articles takes precedence over all national law. As the member state giving rise to the leading case in EU law (*Van Gend*), one would expect the Netherlands not to have any difficulties with accepting EU law supremacy.

Up to the 1990s though they had a poor record in the transposition of EU Directives but which improved in that decade when administrative procedures changed.

The Dutch electorate though, along with that of France in 2006, voted against the CT but there is no serious question that the Netherlands should withdraw from the EU.

5.3.6 Denmark

Together with Great Britain, Norway and Ireland, Denmark applied for membership of the EC in 1961 and 1967, but on each occasion de Gaulle vetoed British membership and Denmark did not wish to enter the Community without Great Britain largely because of the close trade relationship with the UK. As was noted in chapter 1, entry negotiations were resumed after the summit meeting in the Hague in 1969, and from 1 January 1973 Denmark became a member together with Ireland and Great Britain. This was preceded by a binding referendum in which 63.3 per cent voted in favour and 36.7 per cent against membership.

The Danish Constitution, paragraph 20(2) allows for the delegation of powers to international authorities by statute adopted by a five-sixths parliamentary majority or a simple majority in a popular vote if the former is not reached or not chosen by the Parliament, which has largely been the case in Denmark. Fundamental changes to the EU have been put to the electorate in binding referenda with the following results:

- in 1986 56.2 per cent voted for and 43.8 per cent against the Single European Act;
- in 1992 49.3 per cent voted for and 50.7 per cent against the Maastricht Treaty;
- in 1993 56.8 per cent voted in favour and 43.2 per cent against the Maastricht Treaty with the opt-outs agreed in Edinburgh. The opt-outs included defence policy, the third phase of EMU and a common currency, union citizenship and in the judicial field;
- in 1998 55.1 per cent voted for and 44.9 per cent against the Amsterdam Treaty; and

- in 2000 53.1 per cent voted against and 46.9 per cent for Denmark's joining the Single European Currency, the euro, which of course then it did not join.

In contrast, Denmark ratified the Lisbon Treaty, without a prior referendum, by way of consent of the Danish Parliament under Article 19 of the Constitution.

Denmark enjoys the dubious reputation, almost equal with the UK, of being the most eurosceptic EU member state, although two of the 2004 EU entrant states (the Czech Republic and Poland) would clearly rival that honour, largely through the expressed views of their Presidents. However, as with the UK, Denmark also enjoys a positive track record of faithful implementation of EU laws and having a very low, if not the lowest, number of infringement proceedings before the Court of Justice.

In 1998, the Danish Constitutional Court considered that Community law might not be applicable in Denmark if the Community or Commission had breached its delegated powers and the issue was not satisfactorily then resolved by the Court of Justice, thus reflecting the reservation in other states such as Germany, Italy and Ireland, noted in this section.

5.3.7 Finland

Finland was a member of the EEA prior to obtaining full membership in 1995, following a membership referendum in which 57 per cent voted in favour of accession. At the same time it enacted a new constitution containing a new fundamental rights catalogue and later made changes so that otherwise unconstitutional obligations could be entered into if approved by a two-thirds parliamentary approval.

Finland is a dualist country in its attitude to international law and a consequence of this is that in order to give binding effect to an international treaty, it must be transformed into national law. It then assumes the same rank and hierarchy of the law into which it has been transformed. That resembled the position in the UK also prior to EU membership. However, when it came to EU membership and the position of EU law, Finland accorded Union law with precedence over national law including the Constitution. As a result of this, the Finnish courts appear largely to have taken EU law fully on board and accorded it priority where needed, largely by the interpretation of national law, note though, there is no Constitutional Court in Finland. It has been noted, however, that no cases of serious potential conflict have yet arisen, and in particular with regard to the Constitution itself, but that if one were to arise it would be as a result of the Finnish individual-rights protection, thus no different to other member states.

5.3.8 Sweden

Sweden joined the European Union on 1 January 1995, before which it had a Free Trade Agreement from 1972 and was a founding member state of the European Economic Area (EEA). As was mentioned in chapter 1, sections 1.4.1.5 and 6, much of the membership entry work had already been done in connection with the EEA agreement of 1992; hence, it was an easier process than might otherwise have been. Sweden is a dualist country and international agreements must be transformed into national law to have binding validity

within Sweden, with the exception of the amendments made to the Swedish Constitution to provide for the Swedish Parliament, the *Riksdag* to transfer decision-making rights to the EU as a whole.

Prior to entry, Sweden held a national referendum, in which a total of 52.3 per cent voted in favour, 46.8 per cent voted against membership in a high turnout of 83 per cent. In 2003, Sweden held a second referendum on EU integration, specifically whether to join the European monetary union. The vote result was a no to Sweden introducing the euro as its currency, which it thus remains outside.

cross reference
This issue is of course one of the balance between the member states and the EU also considered in respect of section 3.4 on competences in chapter 3.

The Swedish jurisprudence acknowledges the supremacy of Community law over statutes and the Constitution by a judgment of the Swedish supreme Administrative Court in 1997 as there is no Constitutional Court in Sweden. However, as in the case with Germany, Italy and Denmark noted above, with a strong provision for fundamental rights present in the Constitution, which international treaties are expected to respect, it is theoretically and constitutionally possible that the Swedish Courts may reserve application of EU law which does not respect those rights.

Further details on EU law (initial implementation and reception in the courts) in the member states can be found in the articles listed in further reading below and through online resources.

Summary

The Communities and now Union were established by a transfer of powers by the member states to enable them to act independently of those member states and create their own laws and legal system, which was of course one of the reasons for establishing them in the first place. This chapter has considered the nature of the EU law which stems from this transfer of power, which is the question of supremacy or primacy of EU law and then its reception in the member states.

A consensus appears to be emerging from the national and constitutional courts that EU law supremacy is accepted only in so far as it does not infringe the individual rights' protection of the national constitutions, in which case the constitutional courts will exercise their reserved rights over national constitutions to uphold them over inconsistent EU law. Only a few states appear to be accepting EU law unconditionally, such as Belgium and the UK, which may be because their constitutions are more flexible, at least from the point of view of the judges. Whether it will ever come to a direct rejection of EU law supremacy by a national court is debatable. Perhaps more important is that such a direct rejection is probably avoidable if the Court of Justice is allowed to diffuse any possible conflict before the case reaches a constitutional court, if the question of conflict is referred to the Court of Justice via the Article 267 TFEU preliminary ruling procedure first. In view of the number of constitutional courts which appear to be reserving a power of review, this is something the member states, the Union and the Court of Justice need to take seriously.

cross reference
This procedure is considered in chapter 6.

Questions

1. Outline the reasons and logic provided by the ECJ in the *Costa* v *ENEL* and later judgments for the supremacy of EC (now EU) law over national law.
2. Is EU law supreme over any form of conflicting national law in the UK?
3. Would your answer be any different if a UK Act of Parliament expressly stated that it was aware of a conflict with EU law but that the Act shall nevertheless apply or contains an instruction to the judges that they shall nevertheless apply the UK Act and not set it aside in favour of EU law?

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8

Remedies: direct and indirect effects and state liability

Learning Objectives

In this chapter, you will learn about the remedies developed by the European Court of Justice, concentrating on the following issues:

- direct applicability and direct effects;
- direct effects of Treaty Articles, Regulations, Directives, Decisions and international agreements;
- the distinction between vertical and horizontal direct effects;
- the problems resulting from this distinction and solutions to resolve them;
- expanding the concept of the state;
- indirect effects;
- the principle of state liability; and
- the impact on national procedural law.

Introduction

cross reference
Considered briefly in the introduction to chapter 6.

cross reference
Both of which are also considered below in this chapter.

This chapter considers the remedies which have been developed by the European Court of Justice. It was relatively early in the life of the Union that the Court of Justice was presented with cases in which individuals were confronted with two sets of laws applicable to their situation; one national and the other EC law, but which conflicted in some way. As will be seen in the series of cases which follow in this chapter, the very significant starting point for this development was that the Court of Justice held that Community law concerned not just the member states but also directly concerned individuals. From this relatively simple concept, the doctrine of direct effects arose. This development was, however, just the starting point for the development of a number of remedies which contribute to the system of dual vigilance including, most notably, also indirect effects and the principle of state liability. In addition, this chapter will also consider the concept of direct applicability, found now in Article 288 TFEU (ex 249 EC), to distinguish it from direct effects. This chapter will provide an explanation of and review of the development of the doctrine of **direct effects** through thorough case law. It will include the problems generated by this development in certain circumstances.

Direct effects (in the plural) is the way in which this term was first introduced by the Court of Justice in Case 26/62 *Van Gend en Loos* and for this reason is used throughout in this work. Directly applicable is the term found in Article 288 TFEU (ex 249 EC, originally Article 189 EEC) relating to the individual forms of legislation possessing certain characteristics but direct applicability is also used to describe generally the process whereby international law and EU Regulations in particular become directly applicable without separate implementation into domestic law.

8.1 Directly applicable and direct effects

8.1.1 Definitions and the distinction between directly applicable and direct effects

These two elements of the EU legal system and the distinction between them are fundamental to the study and understanding of EU law. The doctrine of direct effects is a judicial development of the Court of Justice. It is connected and very often confused with direct applicability; however, there are fundamental differences between the two concepts. Direct effects plays a central role in the EU legal order because of its link with the application and enforcement of EU law in the courts of the national legal systems. It is therefore very much related with the supremacy of EU law. Unfortunately, the terminology of the Court of Justice and many of the national courts has not always been consistent. This has without doubt added greatly to the difficulty in understanding these concepts. Very often the courts do not use the term 'direct effects' but describe a provision of EU law as directly applicable but in the sense that the provision gives rise to rights enforceable by individuals before the national courts. Thankfully, such confusing use of terms is less frequent these days. Direct effects was sometimes considered to be a sub-concept of directly applicable such that direct applicability

was a prerequisite for direct effects, but that is not the case as will be demonstrated by the cases that follow.

The Court of Justice has spoken of Regulations which are directly applicable but which by their very nature can have direct effects in ***Case 131/79*** *Santillo*, which suggests this is automatically the case.

In ***Case 9/70*** *Grad*, the Court of Justice stated that the ability of an individual to invoke a Decision before a national court leads to the same result as would be achieved by a directly applicable provision of a Regulation, again as if to suggest that the concepts are the same, hence the confusion and the need for clarification. The *Grad* case also involved a Directive which, combined with the Decision, gave rights to individuals. The case though is cited generally to support the result that it is not just Regulations because of their direct applicability that can give rise to direct effects and that other forms of EU binding laws, Directives and Decisions can also give rise to direct effects.

8.1.2 Directly applicable

Directly applicable, a term previously recognized in international law, should be used to describe the way in which some provisions of EU law have legal validity in the member states. It is therefore a mode of incorporation of law which is generally or universally binding. In the EU context, it a concept of EU constitutional law which describes the process by which Regulations become directly applicable without separate implementation under domestic law.

'Directly applicable' is specifically mentioned in Article 288 TFEU (ex 249 EC) in relation to Regulations.

The term 'self-executing' is also often used to describe such law, in that the legal provision itself establishes its validity in the host state.

A **Regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

The member states are obliged not to transform Community **Regulations** into national legislation, except where necessary under the Regulation: see Cases 39/72 *Commission* v *Italy* (*Slaughtered Cows*) and 128/78 *Commission* v *UK* (*Tachographs*). In the latter case, the UK, by not putting into place the necessary administrative procedures for the enforcement and monitoring of tachographs, was held to be in breach of the obligations imposed by the Regulation. They become law, usually as specified when published or if not specified, twenty days after publication. The term applies also in respect of Treaty Articles as these also satisfy the criteria of directly applicable law by their automatic validity in the member states following the ratification of the Treaty. The Treaty Articles themselves are not actually transformed into national law and they are generally binding in that they also obligate individuals and not just the member states.

8.1.3 Direct effects

Direct effects is the term given to judicial enforcement of rights arising from provisions of EU law which can be upheld in favour of individuals in the courts of the members states. Providing that certain criteria are satisfied, an EU law provision will give rise to a right which is

enforceable by individuals in the national courts. Whereas directly applicable applies only to Regulations and Treaty articles, direct effects have been declared by the Court of Justice in a series of cases in respect of Treaty Articles, Regulations, Directives, Decisions and provisions of international agreements to which the Community is a signatory.

8.1.3.1 Treaty Articles

The first and leading case in which this doctrine was established is Case 26/62 *Van Gend en Loos*, which concerned the increase of a customs tariff by the Dutch authorities allegedly contrary to Community law, old EEC Treaty **Article 12** (now 30 TFEU), which provided:

> member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

In the *Van Gend en Loos* case, the defendant customs authority argued that as the Treaty Article was addressed to the member state, it could not be enforced by individuals against the state. In support of this view, the Belgian, German and Dutch Governments and even the Advocate General argued that the correct way to enforce the Treaty obligation was by formal action by the Commission under the Treaty (then Article 169 EEC, now Article 258 TFEU)) or by another member state but not by individuals. The Court of Justice rejected this view and held that the Community had been endowed with sovereign rights, the exercise of which affects not only member states but also their citizens and that Community law was capable of conferring rights on individuals which become part of their legal heritage and enforceable by them before the national courts. It held that the provision (old Article 12 EEC), was suited by its nature to produce direct effects.

To be capable of direct effects which are enforceable in the national courts, a Treaty provision must satisfy the criteria established by the Court of Justice. In the words of the Court, these were:

> The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states.

These criteria, repeated in many cases since, have been summarized in the following general terms, that the Community (and now EU) law provision in question must:

(a) be clear and precise;
(b) be unconditional (e.g. as to time limits);
(c) not require implementing measures to be taken by member states or Community (and now Union) institutions; and
(d) not leave any discretion to member states or Community (and now Union) institutions.

The Court of Justice thus enabled private parties to defend their rights arising in Community (and now EU) law in the face of inconsistent or contrary national law. In doing so it added to the system of enforcement of EU law by empowering individuals to take action which would have the result of enforcing EU law in situations where a member state had failed to comply

cross reference
This is the dual vigilance, previously considered in the Introduction to chapter 6.

with EU law and where the Commission had not taken any action. This is regarded as particularly helpful as private individuals have clear reasons of self-interest for bringing actions and, because there are so many of them who may be affected by EU law, the vigilance of EU law is much more widespread and effective.

Case 48/65 *Alfons Lütticke GmbH* v *Hauptzollamt Saarlouis* is an early demonstration of the difference between Articles of the Treaty which could give rise to direct effects and those which could not. The case declared that old Article 95 EEC (now 110 TFEU) satisfied the criteria so as to give rise to direct effects but that Article 97 EEC (now repealed) did not. The Court of Justice ruled that Article 95 had created direct effects but that since member states had a discretion to decide whether to levy an average rate of tax, Article 97 did not produce direct effects.

Old Article 95 provided that 'No Member State shall impose, directly or indirectly...any internal taxation of any kind...' and old Article 97 provided that 'member states...may, in the case of internal taxation...establish average rates...'. (Note that old Article 97 EEC has been repealed by the Treaty of Amsterdam.)

Since these early cases, direct effects have been found to arise from many Treaty Articles, which often obligate not just organs of the state as in a vertical relationship but other individuals in a horizontal relationship, in particular in the EU context, employers. It was confirmed by the Court of Justice that employers are obligated to comply with the requirements of a Treaty Article and other individuals may enforce corresponding rights directly against the obligated party who has failed to comply with Community (and now EU) law.

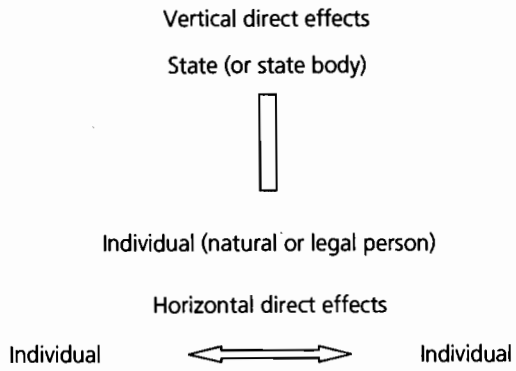
The first case to confirm horizontal direct effects was ***Case 43/75*** *Defrenne* v *Sabena (No. 2)* in which the rights of an air hostess for equal pay guaranteed under Article old 119 EEC (now 157 TFEU) were upheld against the employing airline Sabena who were in breach of the obligation.

Article 12 EC (now amended as 18 TFEU)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 12 EC (now 18 TFEU), the general non-discrimination on the grounds of nationality Article, which is imposed on the member states was found to be capable of horizontal direct

Diagram 8.1
Vertical and horizontal direct effects



effects in Case 36/74 *Walrave and Koch*. This is very important because it can be relied on by the Court of Justice and indeed individuals in many circumstances.

However, **Article 10 EC** (now Article 4(3) TEU), the good faith clause imposing a general obligation on the member states to act in conformity and not against Community (and now Union) interests, was held in Case 44/84 *Hurd* v *Jones* not to give rise to direct effects.

Article 10 EC (now as amended Article 4(3) TEU) Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of Union's objectives.

cross reference

For example, the Von Colson case, considered at section 8.3.2 below and Francovich considered at section 8.3 below.

Subsequently, however, Article 10 EC (now Article 4 TEU) has been highly influential in assisting the Court of Justice to develop other means of enforcing Community and now EU law.

Provisions of the Accession Treaties have also been held to give rise to direct effects.

See, for example, ***Case C-113/89*** *Rush Portuguesa* v *Office National d'Immigration*, which provided details of the rights non-Community workers were entitled to expect whilst working outside their EC country of immigration, in another host member state.

8.1.3.2 Regulations

While Regulations are clearly directly applicable by reason of Article 288 TFEU (ex 249 EC) and can therefore also obligate other individuals, they are not necessarily directly effective. The question of whether they can also give rise to direct effects depends on whether they satisfy the same criteria as for Treaty Articles as laid down in the *Van Gend en Loos* case.

The leading case for Regulations is ***Case C-93/71*** *Leonesio* v *Italian Ministry of Agriculture*, in which Italian farmers were able to enforce a Regulation against the Italian state providing for compensation payments which had been subject to delays by the Italian authorities. The Court of Justice held that the Regulation should not be subject to delays and was immediately enforceable in the national courts.

Given that Regulations are also generally applicable in that they apply to everyone and not only provide rights but are also capable of imposing obligations on everyone, it should not be a surprise that they are capable of giving rise to direct effects horizontally also. For example in ***Case C-253/00*** *Munoz v Frumar Ltd*, the Court of Justice upheld the right of one individual trader to rely on the rights provided by a Regulation in a civil action against another individual not complying with the Regulation.

8.1.3.3 Directives

Directives have caused particular problems for the Court of Justice. At first they were thought, as a general rule, not to be precise enough to give rise to direct effects because they were not directly applicable and only obligated the member states to achieve an end result.

Article 288 TFEU provides that a **directive** shall be 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.

Arguably, because they often provide a wide margin of discretion, they were considered incapable by their very nature of ever fulfilling the *Van Gend en Loos* criteria. However, Case 9/70 *Grad*, discussed above and below, considered and allowed for the possibility that direct effects could arise from other non-directly applicable forms of Community and now EU law outside Treaty Articles and Regulations.

Case 41/74 *Van Duyn* v *The Home Office* confirmed that Directives could give rise to direct effects, provided they also satisfy the same criteria. The provisions of the Directive would have to contain a clear and precise obligation, which they can and often do. In this case, Article 3 of Directive 64/221 was held to give rise to rights directly enforceable against the state before the national courts by Miss Van Duyn.

A further aspect of Directives which might have caused difficulty was that Directives usually allow the member states time to implement them, two years being the most common period provided.

Case 148/78 *Publico Ministero* v *Ratti* considered this aspect. It concerned the prosecution of Mr Ratti by the Italian authorities for breaches of national law concerning product labelling. Although Mr Ratti had complied with two Community product labelling Directives, the expiry period for implementation of one of the two Directives had not expired. The Court of Justice held that he could rely on the one for which the time period had expired provided it satisfied the requirements of clarity and precision etc., but not the Directive whose implementation period had not expired.

Case 51/76 *Verbond* concerned the situation where a Directive had been implemented after the time limit had expired but that the implementation was not faithful to the requirements of the Directive. The Court of Justice held that to deny the rights of individuals in such circumstances would be to weaken the effectiveness of Community obligations and that as a result, individuals helped to ensure that member states kept within the realms of the discretion granted.

The individual nature of the rights contained in the Directive have been stressed in a number of cases, notably ***Case 8/81*** *Becker* as an element in deciding that they can be asserted against the state, although this does not form part of the required criteria, noted above. Furthermore, the *Becker* case also highlighted the wider effects of Community law as a standard by which national law should be judged, noted below.

For a considerable time, the question of whether Directives could be held to give rise to horizontal direct effects and thus be enforceable against other individuals received no answer from the Court of Justice. At the time, arguments against horizontal effects were that Directives did not have to be published and this would have offended against legal certainty. Furthermore, Directives are addressed and obligate member states and not individuals and therefore the latter should not be obligated by them. It was argued that by making them potentially enforceable against everyone, it would blur the distinction between them and the Regulations because they would resemble directly applicable law, something not intended under the scheme of Article 249 of the EC Treaty (now 288 TFEU). Arguments for horizontal direct effects of Directives are that Community and EU law should be equally actionable against the state and other individuals to ensure uniform consistency throughout the Union and to avoid giving rise to two categories of rights. It is also the case that Treaty Articles are addressed to member states but can nevertheless obligate individuals. Directives, whilst not

at first publishable by compulsion, were invariably published and indeed now must be published (see Article 297 **TFEU (ex 254** EC).

Article 297 TFEU

1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council....

Legislative acts shall be published in the Official Journal of the European Union.

The Court of Justice came to a conclusion about Directives in ***Case 152/84*** *Marshall* v *Southampton Area Health Authority* deciding that Directives could only be enforced by individuals against the state or arms of the state and not against other individuals. The case itself concerned vertical direct effects because the health authority was held to be a part of the state.

The court ruling, however, led to a whole host of problems because of the distinction created between the ability to enforce rights against public as opposed to private employers. The result of this decision is that the scope of the concept of what constitutes public service as opposed to a private body became crucial.

cross reference
This case is considered in greater detail in chapter 5, section 5.2.2.6.

This can be seen from the later UK case of *Duke* v *Reliance* in which, on facts similar to *Marshall*, Mrs Duke lost her claim for compensation for being forced to retire earlier than men. Two further decisions in Case 222/84 *Johnston* v *RUC* and Case C-188/89 *Foster* v *British Gas* showed that although the concept of public entity was wide enough to include national law enforcement agencies and nationalized industries and included any form of state control or authority, a distinction between public and private sector rights nevertheless remains.

cross reference
The ways round the unfortunate consequences will be explored further in section 8.2 below.

Case 8/81 *Becker* confirmed the restriction of the direct effects of Directives as operating on the vertical axis only but highlighted the further or wider benefits of direct effects for the Community legal order. The Court of Justice in this case stressed that directly effective Community law also operates in a wider sense as a standard by which national law is in effect evaluated by the Court of Justice to see if it meets the standard of EC law, rather than simply providing a narrower individual right only.

cross reference
See chapter 6 on the Article 267 TFEU (ex 234 EC) reference for further details on this point.

In strict terms, the Court of Justice has no formal right to review the validity of national law; however, direct effects does allow it to declare that there is an incompatibility on the part of the national law with the directly effective standard contained in the EU law. The *Becker* case thus prepares the ground for the establishment of the indirect effects (considered in section 8.2.2 below).

8.1.3.4 Decisions

In ***Case 9/70***, *Grad* v *Finanzamt Traunstein*, the Court held that it would be contrary to the binding nature of Community law if the provisions of a Decision could not be invoked by individuals. They must also satisfy the criteria and can only be enforced against those obligated. In *Grad*, a decision addressed to the German state concerned with the harmonization of tax regimes was held to give rise to effects which could be enforced by an individual affected by it.

8.1.3.5 International agreements

Although there is no statement in the Treaties that international agreements entered into by the Union or by the member states within the Union can give rise to direct effects, the

Court of Justice has held that provisions of them may also give rise to direct effects providing they satisfy the criteria previously established. Agreements such as association agreements between the Union and a single state or even a number of states are capable of producing direct effects. Indeed, due to the limited nature and scope of the agreements, they lend themselves more readily to producing direct effects than the more complex multilateral agreements whose subject matter may well go beyond the jurisdictional scope of the Treaties. For example, provisions of the EEC–Portugal Association, parts of the EEC–Morocco Agreement and provisions of the Yaounde Convention Agreement were held to be directly effective in Case 104/81 *Kupferberg*, Case 87/75 *Bresciani* and Case C-18/90 *Kziber*, respectively. In contrast, provisions of more complex agreements such as the GATT that are mixed agreements involving the competences of both the Community (and now Union) and the member states, have not shown themselves to the Court of Justice to be so amenable to direct effects.

For example, ***Case 21–24/72*** *International Fruit*, in which the Court of Justice held that the GATT provisions in question were not directly effective because they were held to be too flexible and too easily subject to change by political negotiation rather than clearly applicable in a strict and reasonably foreseeable way by the courts.

However, in line with the transition from GATT to the WTO, the Court of Justice has appeared to soften its stance and expressed the possibility in Case C-280/93 *Germany* v *Commission* that the GATT provisions may have direct effects but only where the Community intended to implement a particular GATT provision or expressly referred to it in a Community Act.

See, for example, ***Case 70/87*** *Fediol*, in which a reference in a Community Regulation to a commercial practice identified in GATT would allow the Court to interpret the Community Act according to the GATT rule.

It was, however, emphasized by the Court of Justice in ***Case C-149/96*** *Portugal* v *Council* that the WTO rules do not give rise to direct effects. The Court of Justice did not wish to tie the hands of the Community by confirming binding rules of law for the Community when those same rules are not considered to be rigidly binding by other parties.

The WTO and GATT regimes are not based on binding and immediately enforceable reciprocal rules, but rules, the breach of which lead first to further negotiation.

8.2 Overcoming the lack of horizontal direct effect for Directives

8.2.1 Extending the definition of 'the state'

One way to avoid the unfortunate results of the *Marshall* ruling, which led to differences in treatment between state and private employees, is by expanding the concept of public sector

to include more employers and thus more individuals capable of being able to enforce their rights vertically in the national courts through direct effects.

In ***Case C-188/89*** *Foster* v *British Gas*, the House of Lords referred to the Court of Justice the critical question of what was meant by 'state authority'. In *Marshall*, the health authority was clearly regarded as a part of the state. *Foster* v *British Gas* involved at that time a nationalized but independently run organization. It was later privatized. The Court of Justice held that emanations of the state against whom direct effects were available were those bodies which provided a public service under the control of the state and which for that purpose were granted special powers.

Direct effects are thus available against such bodies. However, although the case showed that the concept was wide enough to include nationalized industries and includes any form of state control or authority, a distinction nevertheless remains between public, however widely framed, and private employers. So, it may be concluded that expanding the scope of what is meant by an 'emanation of the state' will broaden the concept and protect more people, but this still does not reach the heart of the matter. It allows a variation as between public and private employees and because there are inevitably different situations in each of the member states as regards the public and private sector, there will also be a difference in the rights of individuals between the member states. Thus, because of this distinction, a different result can occur in each member state where national concepts of what is within the control of the state may differ. The difficulties and limits to this approach are demonstrated in a UK case.

In *Doughty* v *Rolls Royce plc*, the Court of Appeal considered that the, at the time, largely state-owned and nationalized Rolls Royce company was not a public body for the purposes of the claim to direct effects in the case, because it was not providing a public service and was not subject to special powers.

Whilst the result in the *Rolls Royce* case is probably correct although rather narrow, it can be seen that privatization of once nationalized companies might also affect the rights of individuals. If decided today, *Foster* v *British Gas* would probably have a different outcome. A further case has shed a little more light on what can be included in the concept of the state.

In ***Case C-157/02*** *Rieser Internationale Transporte GmbH* v *Autobahnen- und Schnellstraßen Finanzierungs AG*, the Court of Justice held:

> When contracts are concluded with road users, the provisions of a directive capable of having direct effect may be relied upon against a legal person governed by private law where the State has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person.

Therefore, private companies undertaking a public duty come within the scope of the *Foster* ruling. There remains, however, no uniformity and indeed no certainty as to the application of EU law between public and private employers within member states and between member states. Certain individuals are thus denied rights that employees in the public sector can enforce in the face of non-compliance by member states. The scope of the concept of public service as opposed to a private body remains a crucial but sometimes artificial distinction.

8.2.2 Indirect effects

Case 8/81 *Becker*, noted above, and its acknowledgement of a wider concept of direct effects as a standard by which the conformity of national law could in effect be reviewed by the Court of Justice, had already pointed EC (and now EU) law in the direction that was about to be taken in the next development.

Case 14/83 *Von Colson* provided a solution where national law was not in tune with Community law and direct effects could not be considered as an acceptable remedy. The ruling offers an alternative for individuals defeated by the lack of horizontal direct effects. The case concerned Article 6 of the Equal Treatment Directive (76/207) and a claim against a public employer for the lack of adequate compensation when discriminated against. At the same time, ***Case 79/83*** *Harz* v *Tradex* was also heard by the Court of Justice which involved a similar claim against a private employer. Rather than highlight the unfortunate results of the lack of horizontal direct effects of Directives against the private but not the public employer, the Court of Justice concentrated on old Article 5 EEC (now 4(3) TEU) which requires member states to comply with Community obligations.

The Court held that this requirement applies to all authorities of member states including the courts which are obliged therefore to interpret national law in such a way as to ensure that the obligations of a Directive are obeyed, regardless of whether the national law was based on any particular Directive.

The effectiveness of this depends on the willingness or ability of the member states' courts to interpret national law, if it exists, to achieve the correct result.

It would, of course, not have been acceptable for *Van Colson* to have succeeded under direct effects against an arm of the state but *Harz* not to have done so against a private employer, thus an alternative solution was required.

However, the Court of Justice held in ***Case 80/86*** *Public Prosecutor* v *Kolpinghuis Nijmegen BF* that the principle of indirect effects could not be applied by a member state to support the retroactive prosecution of a Dutch firm for stocking adulterated mineral water which was in breach of a Community Directive. The implementation period had expired and the Netherlands should have implemented it, but had not; thus it would not in such circumstances give rise to indirect effects.

The decision is consistent with *Marshall* in that Directives cannot impose obligations on individuals. Thus, the sympathetic interpretation of Community law Directives required by *Von Colson* could not be used in breach of the general principles of legal certainty and non-retroactivity. The lack of national law to interpret, however, has caused problems in furthering the principle provided by *Von Colson*. The next case required a further sleight of hand from the Court to achieve a just result which was consistent with its decision in *Marshall*.

Case C-106/89 *Marleasing* concerned Directive 68/151 which had not been implemented in Spain but which would have determined the outcome of the case. The Spanish courts wanted to know whether the Directive could nevertheless be directly upheld against an individual by another individual. Whilst the Court of Justice reaffirmed that Directives do not give rise to effects between individuals, it also stressed it was up to the courts to achieve the result required by the Directive by the interpretation of national law whether the national law post-dated or pre-dated the Directive. The national law relevant, the Spanish Civil Code, pre-dated the Directive but had to be interpreted in a way clearly not covered by it to conform with the later unimplemented Directive.

Such retroactive interpretation will cause severe difficulties where there is a clear conflict between the national law and an EU Directive. This was the case in the UK House of Lords case of *Duke* v *GEC Reliance* systems in which the House of Lords refused to interpret pre-existing UK law in the light of the later Equal Treatment Directive, in spite of the decision in *Marshall*. This difficulty was highlighted at the Community level before the Court of Justice in Case C-334/92 *Wagner Miret* which also involved Spanish legislation pre-dating a Community Directive but which involved head-on incompatibility. The Court of Justice this time acknowledged the unsuitability of the *Von Colson* sympathetic interpretation for all cases but nevertheless stressed that national courts should both presume an intention on the part of the state to comply with Community law and to try as far as possible to give effect to the Community law in the case at hand.

cross reference
Also considered in chapter 5, section 5.2.2.6.

In Case C-168/95 *Criminal Proceedings against Luciano Arcaro*, the Court of Justice acknowledged that the limits of the *Von Colson* principle would be overreached if there was a retroactive interpretation of national law in the light of the Directive which had not been implemented by the member states and which would have imposed criminal liability on an individual, thus confirming the limitation recognized in the *Kolpinghuis* case.

Case C-105/03 *Pupino* is a more recent case confirming much of this earlier case law. The case actually involves a Framework Decision (2001/220) enacted under the Police and Judicial Cooperation pillar of the EU (pre Lisbon). The Court of Justice held that national courts were obliged to interpret national law in conformity with the Framework Decision on which an individual should be able to invoke them before the national courts, even though it was clear that the Decision, enacted under the third (intergovernmental) pillar, could not have direct effects. The Court of Justice held that the obligation to do so arose from general principles of Community law, in particular legal certainty and non-retroactivity which would be offended if not respected. The case is also important in that the Court of Justice has applied judicial reasoning and EC law principles to what was an intergovernmental part of the Union, although this latter aspect is no longer important in view of the Treaty reforms introduced by the Lisbon Treaty. The case marked a surprising extension into the intergovernmental pillar of the EU at the time and may be noted as a further example of the Court's judicial activism in the face of failure by the member states in moving things forward, at the time with the CT and the delay in reforming the Treaty structure of the Union.

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cross reference
If you are unsure about the significance of this, refer to chapter 1.

More recently, in Cases C-397–401/01 *Pfeiffer v Rotes Kreuz*, the Court of Justice, in considering how far national courts can go in applying *Von Colson*, confirmed that national courts are bound to interpret national law so far as possible in the light of the Directive to achieve the result sought by a Directive. They should also give full effectiveness to Community law taking into account national law as a whole, as opposed to narrowly looking at a particular national implementing provision.

Despite the opinion of the AG in Case C-91/92 *Faccini Dori* that horizontal direct effects of Directives should be recognized, the Court of Justice declined to follow this advice. It reasoned that whilst there was a case for vertical direct effects to stop states relying on their own wrongs, recognition of horizontal direct effects would blur the distinction between Regulations and Directives contrary to the Treaty. Instead, as it did also in Case C-334/93 *Wagner Miret*, the Court of Justice expressed the view that if member states are unable to construe national law to read in conformity, which is a distinct possibility as a result either of the Court being incapable or unwilling to do so, it must be assumed that member states nevertheless intend to comply with its Community law obligations. Thus, if there is a breach, member states must compensate any loss incurred as a result of that breach according to the principles established in *Francovich* (considered in section 8.3 below). In other words, the

failure to succeed under direct or indirect effects should not unfairly extinguish all remedies available. Individuals have then been provided with a final resort to obtain damages instead.

More recently though, there have been cases which appear to muddy the waters once more on whether directives can nevertheless dictate the result of a case between two individuals. ***Case C144/04*** *Mangold,* concerns the employment and protection of older workers, appears to provide for the horizontal direct effects of a Directive and more surprisingly, even before the period of expiry of the transposition period had taken place. However, note carefully that the Court of Justice held that the principle of law breached by the member state was the prohibition of discrimination which is a general principle of EC law. According to the Court of Justice, this could not be undermined by the unexpired transposition period of a Directive, which provided a more exact setting in which the pre-existing general principle could be applied. The argument in the case was that both a strict application of Article 6 of Directive 2000/78 and the application of the general principle would have had the same result. However, if relying on the Directive only, this would have caused problems because of the non-expiry of the implementation period; therefore, in order to overcome those difficulties, it was better to use the general principle.

In other words, the use of a general principle circumvented the fact that the Directive, according to the past case law, was incapable of producing direct effects. The end result, as far as the Court of Justice is concerned, is that it remains the case that horizontal direct effects of Directives is not recognized.

8.2.3 'Incidental' horizontal effects

Although the opinion of the AG in Case C-91/92 *Faccini Dori* that horizontal direct effects of Directives should be recognized by the Court of Justice was rejected, the Court has nevertheless given judgment in a few cases which appear to produce horizontal direct effects. The cases involve a Directive which has influenced the outcome of cases involving private parties, but in an incidental rather than a direct way and without imposing a strict obligation on any of the individual parties. The Directives are pleaded not to exert rights directly but to overcome what would otherwise be the application of incompatible national law in a way detrimental to one of their interests. These cases also support and are supported by the wider view of direct effects put forward in Case 8/81 *Becker,* as a means by which national law is in effect reviewed by the Court of Justice to see if it meets the standard of EC (and now EU) law, rather than providing an individual right to assert an EU law based right against another party. The case law is at the moment limited.

In ***Case C-441/93*** *Panagis Pafitis* v *TKE,* shareholders of a bank who were denied a meeting to protest over an increase in capital, as required under EC but not national law, were able to question the national law on the basis of the Directive. As a consequence, the new shareholders were prevented from relying on the national law which was out of line with Community law. Whilst this clearly affected their rights, it was not a case of a direct application of a Directive against them by other individuals.

It was claimed in the leading case in this line, ***Case C-194/94*** *CIA Security International SA* v *Signalson SA and Securitel SPRL,* that CIA had breached the national technical standard for alarm systems. CIA pleaded the inapplicability of the national standard because of the failure of the state

to notify it to the Commission as required by Directive 83/189. The Court of Justice accepted this argument, which meant that CIA was assisted by the Directive. This in turn removed the obligation to meet the national standard which would have been imposed under national law. The Directive relied on imposed no obligation on the other party; therefore, there is no question of horizontal direct effects of a Directive. It is true that the other party, who had alleged that CIA had not met the standard, was affected in that their allegation was legally unfounded and that they lost the action as a result. However, the national standard could only be rendered lawful by the state complying with the Directive, thus it remained the state's obligation to ensure its law was in compliance with Community law and was not therefore an obligation imposed on an individual. It has been noted that following this case, the number of notifications of technical standards by the member states increased significantly, thus supporting the free movement of goods regime.

Case C-226/97 *Lemmens* does not follow the trend set by the first cases, for good policy grounds. Lemmens was prosecuted for drink driving, the evidence having been obtained by the use of a breath analysis machine whose standards had not been notified to the Commission as required under Directive 83/189. Lemmens sought to argue the inadmissibility of that evidence for his conviction based on the failure of the state to notify the standard. In line with the CIA case that a party need not have to rely on a national standard which has not been notified, he argued his prosecution should not stand. However, the Court of Justice held that whilst the failure to notify the standard may have hindered the marketing of such machines, it did not render unlawful the use of the product and could not therefore aid the defendant in his claim, i.e. it did not affect trade between member states, which was the main purpose of the Directive.

In ***Case C-443/98*** *Unilever Italia SpA* v *Central Foods SpA*, the principle established in the earlier cases was extended to contractual relations between two individual parties. The Italian State had adopted a food standard contrary to the Community Standards Directive and Unilever's supply of olive oil, which did not comply with the Italian standard, was rejected by the purchaser, Central Foods. In an action for payment, Unilever questioned the Italian legislation. The Court of Justice held that the Italian law should not apply, that the case was no different in principle to the *CIA* case above and did not create horizontal direct effects. No obligation had been placed on an individual, merely that unnotified national standards could not apply, regardless of the possible consequence on the contractual relations and liability between the two parties.

Trying to rationalize these cases is not easy. The Court of Justice makes it clear that they do not establish the horizontal direct effect of Directives. For the most part, the cases are mainly narrowly restricted to the application of Directive 83/189 and its replacement Directive 98/34, requiring the notification of technical standards, although as the case law has revealed, this is not the only Directive involved. More to the point, is that the Technical Standards Directive essentially involves the relationship between the member states and the Commission and not, as with most other Directives, the relations between individuals and the state or between individuals.

Case C-129/94 *Criminal Proceedings against Bernáldez* is a little more difficult to reconcile. It concerns an unimplemented Directive imposing an obligation on insurance companies to compensate third-party victims who suffer damage at the hands of drink drivers, not previously a legal requirement in Spanish law. The Court of Justice held that the unimplemented Directive should be applied to support a claim made for compensation, seemingly imposing an obligation not contained in Spanish law but under the Directive, on an individual, namely, the insurance company.

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