Complete EU Law: Text, Cases, and Materials (5th edn)
Elspeth Berry, Barbara Bogusz, Matthew Homewood, and Sophie Strecker

p. 94

4. Enforcing EU law rights in national courts

Elspeth Berry, Reader in Law, Nottingham Trent University, Barbara Bogusz, Lecturer in Law, University of Leicester, Matthew Homewood, Deputy Dean, Nottingham Trent University, and Sophie Strecker, Principal Lecturer in Law, Nottingham Trent University

https://doi.org/10.1093/he/9780192846419.003.0004
Published in print: 04 August 2022
Published online: September 2022

Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter discusses the development of the concepts of the direct effect and indirect effect of EU law—in other words, the rights of an individual or business to rely on a provision of EU law in their national courts; the rules that apply to the grant of remedies in national courts for breach of directly or indirectly effective EU law; and the relationship between direct and indirect effect, and the principle of State liability.

Keywords: EU law, direct effect, indirect effect, remedies, breach of law, State liability

Key Points

By the end of this chapter, you should be able to:

- understand and analyse the development and meaning of the concept of direct effect;
- explain the concept of indirect effect and the way in which it has been interpreted and applied by the courts;
- explain generally the rights of an individual or business to rely on a provision of EU law in their national courts;
- identify and explain the rules that apply to the grant of remedies for breach of EU law; and
- analyse (in conjunction with Chapter 5) the relationship between direct and indirect effect, and State liability.

Introduction

The ability of individuals and businesses to rely on their rights under EU law, and to enforce them in national courts, is an essential feature of the integrated legal system set up by the European Union (EU). Although the Court of Justice is the supreme authority on the interpretation of EU law, the national courts that form the lower tiers of the EU law system must also be able to apply EU law if the rights contained in it are to be effective in practice.

Whether it is possible for an applicant to enforce their EU rights depends primarily on whether either (or both) of two concepts developed by the Court of Justice apply: direct effect or indirect effect. Although both have limitations and neither guarantees an ultimate remedy, they do provide those intended to benefit from rights under EU law with the opportunity to make those rights real.

If an applicant is successful in the national courts in establishing a breach of EU law, whether through direct effect (see 4.1) or indirect effect (see 4.2)—or, indeed, through a separate action for State liability (see Chapter 5)—the remedy that will be awarded is governed principally by national law. However, the problem that this poses for the uniform application of EU law, and the effectiveness of rights granted by it, has led the Court of Justice to develop a number of principles with which national courts must comply when awarding a remedy (see 4.3).

4.1 Direct effect

The Court of Justice ruled as early as 1963, in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, that in order for rights under EU law to be effective, they must be capable of **direct effect**.

direct effect

According to the Court of Justice, a measure that has direct effect is one that is capable of direct enforcement in national courts.

p. 95 ↵ Before discussing direct effect in detail, it is important to distinguish between direct applicability (see Chapter 3) and direct effect.

Thinking Point

> What does 'directly applicable' mean in the context of EU law? If you cannot remember, look back at Chapter 3.

EU law is part of a Member State's legal system and some EU laws are said to be 'directly applicable' in the sense that they become part of a Member State's law without the need for them to be transposed into national law. For example, Treaties, Regulations, and Decisions are all directly applicable, whereas Directives are not (see further 3.4.2 on these different forms of EU law).

Although all of these measures have been held by the Court of Justice to be in principle capable of direct effect (see 4.1.1), this is subject to the fulfilment of certain conditions (see 4.1.2). It might seem odd that not every provision of EU law is capable of judicial enforcement, but in practice the same is true of national law: not every provision of every statute or statutory instrument is directly enforceable by a particular individual or business.

4.1.1 The candidates for direct effect

Article 288 TFEU (see further 3.4.2) provides that, in addition to the EU Treaties (see Chapter 1), the EU may exercise its powers through various other types of legislation: Treaty Articles, Regulations, Decisions, Directives, Recommendations, and Opinions. However, not all of these can have direct effect.

4.1.1.1 Treaty Articles

The case that first established the principle of direct effect, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, concerned a Treaty Article. Van Gend en Loos was required by Dutch law to pay an increased customs duty on imports. It argued in the Dutch courts that this was a violation of what is now Article 30 TFEU, which provided, inter alia, that Member States should not increase such charges. The Dutch court referred to the Court of Justice the question of whether a litigant before a national court could rely directly on the provisions of an EU Treaty and, in particular, on Article 30 TFEU.

Thinking Point

> While reading the following extract, consider why the Court of Justice concluded that Treaty Articles must be capable of having direct effect.

p. 96

Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 11–12

> The first question of the Tariefcommissie is whether Article 12 of the [EEC] Treaty [now Article 30 TFEU] has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.
>
> To ascertain whether the provisions of an international treaty extend so far in their effects, it is necessary to consider the spirit, the general scheme, and the wording of those provisions.
>
> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community [now Union], implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the Preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article 177 [EEC, now Article 267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law [now EU law] has an authority which can be invoked by their nationals before those courts and tribunals.
>
> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

In *Van Gend en Loos*, the Court of Justice established the principle of direct effect on the basis that EU law was intended to confer rights on individuals and that these rights must therefore be enforceable. After its ruling in *Van Gend en Loos*, the Court of Justice went on in other cases to extend the principle of direct effect to other types of measure.

4.1.1.2 Regulations

In Case 43/71 *Politi SAS v Ministero delle Finanze* [1973] ECR 1039, Italy had levied import taxes on pork, contrary to the provisions of an EU Regulation. An importer, Politi, sought to rely on the Regulation to challenge the
p. 97 Italian taxes. The Italian court made a reference to the ↵ Court of Justice under what is now Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that EU Regulations could be directly effective because, by reason of their nature and function within the EU legal system, they created individual rights that national courts must protect.

4.1.1.3 Decisions

The direct effect of EU Decisions was recognized by the Court of Justice in Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825 (see also 4.1.3). A Decision provided for the replacement of national freight taxes by a common EU freight tax. A freight transporter sought to rely on the Decision to challenge a German freight tax. The German court made a reference to the Court of Justice under what is now Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that since Decisions had binding effect, they must be capable of enforcement by those who were affected by them. The Court also adduced the argument that since what is now Article 267 TFEU permitted national courts to refer to the Court of Justice questions concerning 'all acts' of the EU institutions (see further Chapter 6 on Article 267 TFEU), this presupposed that those courts could in the first place apply 'all acts'. On the facts of the case, however, Grad lost because (unusually) this Decision stated that it did not come into effect until the date specified in it, and since that date had not yet passed, the Decision had not yet become directly effective.

4.1.1.4 Directives

As discussed at 3.4.2, Article 288 TFEU provides that Regulations and Decisions are, like Treaty Articles, binding in their entirety and that Regulations are, like Treaty Articles, directly applicable in the Member States (as are Decisions, although this is not explicitly stated). However, in contrast, Directives are binding on Member States only as to the *result* to be achieved. The *detail* of their transposition into national law is therefore left to the discretion of the Member States. Direct effect should therefore not be necessary, since it should be possible to rely, in a national court, on the particular national law that transposed the provisions of the Directive in question. Unfortunately, the position is not so simple, as a Member State may have adopted national transposing legislation that does not accurately reflect the objectives of the Directive or, indeed, it may have failed to adopt any transposing legislation at all. The Court of Justice has therefore recognized that, in certain circumstances, a Directive may have direct effect.

The case in which the concept of direct effect was first established in relation to Directives is Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. Van Duyn, a Dutch national, applied for permission to enter the UK to work for the Church of Scientology. As the UK authorities officially disapproved of this organization, permission was refused under what is now Article 45 TFEU (see further 11.2.1), which allowed Member States to derogate on public policy grounds from the right to freedom of movement for workers. Van Duyn sought to enforce Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the

movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 1964 56/850, which stated that such derogations could be based only on the personal conduct of the applicant.

p. 98

Thinking Point

> While reading the following extract, consider why the Court of Justice considered that it should be possible to enforce a Directive directly.

Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337

> 11. The United Kingdom observes that, since Article 189 of the [EEC] Treaty [now Article 288 TFEU] distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.
>
> 12. If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community [now Union] authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law [now EU law]. Article 177 [EEC, now Article 267 TFEU], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

The Court of Justice held that it was possible to rely directly on a Directive to enforce rights contained in it. It reasoned that in order for Directives to have a useful effect, they must be capable of producing direct effects, subject to the nature and wording of the Directive in question.

On the facts, Van Duyn lost because the Court held that personal conduct could include membership of a particular organization (see 11.3.1).

4.1.1.5 Recommendations and Opinions

Thinking Point

> Given that Article 288 TFEU provides that neither Recommendations nor Opinions have binding legal force (see 3.4.2), do you think that they should be capable of having direct effect?

p. 99 ↵ The key case on whether an EU Recommendation (or Opinion) can have direct effect is Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407 (see also 4.2.1 and 3.4.2). Grimaldi suffered from a disease that was classified under an EU Recommendation as an occupational disease, thereby entitling him to compensation. Under French law, however, it was not so classified and therefore, under that law, Grimaldi was not entitled to any compensation. Grimaldi sought to rely directly on the provisions of the Recommendation. The French court made a preliminary reference to the Court of Justice under what is now Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).

The Court of Justice ruled in *Grimaldi* that since Recommendations were not intended to have binding legal effect, it would clearly be inappropriate for them to have direct effect. Grimaldi could therefore not rely directly on the Recommendation.

The same applies, *mutatis mutandis*, to Opinions.

4.1.2 The condition for the direct effect of Treaty Articles and Regulations

The conditions that must be satisfied in order for a particular piece of EU law to have direct effect vary according to the type of EU law at issue. The position in relation to Treaty Articles and Regulations is relatively simple: the only precondition for any of these measures to have direct effect is that the provision in question must be sufficiently clear, precise, and unconditional for reliance to be placed on it in the national courts.

A measure may be sufficiently clear even if its precise scope requires interpretation by the Court of Justice under the preliminary reference procedure (see further Chapter 6 on the preliminary reference procedure).

Thinking Point

> While reading the following extract, consider why the Court of Justice concluded that the particular Treaty Article at issue had direct effect.

Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12–13

> With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9 [EEC, now Article 28 TFEU], which bases the Community [now the Union] upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12 [EEC, now Article 30 TFEU].
>
> 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
> p. 100 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. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.
>
> [...]
>
> It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

In *Van Gend en Loos*, the Court of Justice ruled that the statement in the Treaty Article at issue, that 'Member States shall refrain from introducing any new customs duties ... and from increasing those which they already apply ...; imposed a clear prohibition on such measures that was not conditional on Member States adopting national measures.

It is not necessary for an EU law to be clear in its entirety for direct effect to apply, but only those rights which are sufficiently clear are capable of having direct effect. An example of this is provided by Case 43/75 *Defrenne v SABENA* [1976] ECR 455, which involved a dispute over the policy of the Belgian airline SABENA to pay its female cabin crew less than its male crew, and compulsorily retire them at a younger age. Defrenne, a female member of cabin crew employed by SABENA, claimed that this infringed the principle of equality contained in what is now Article 157 TFEU. The Belgian court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) as to the effect of what is now Article 157 TFEU.

Thinking Point

> While reading the following extract, consider which elements of what is now Article 157 TFEU the Court of Justice considered to be clear and which it did not.

Case 43/75 *Defrenne v SABENA* [1976] ECR 455

> 18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 [EEC, now Article 157 TFEU] between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community [now Union] or national character.
>
> p. 101 ↵ [...]
>
> 21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.
>
> 22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.
>
> 23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.
>
> 24. In such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect.

The Court of Justice held that what is now Article 157 TFEU imposed a clear and unconditional prohibition on direct discrimination (discrimination based directly on grounds of sex) and was directly effective to this extent. It noted, however, that it was not sufficiently clear in respect of more indirect discrimination (discrimination that was purportedly based on factors other than sex, but which resulted in discrimination between men and women), since it did not identify what might constitute such discrimination.

It is worth mentioning that the final paragraph of the extract from *Defrenne* (para 24) provides an example of the confusion in terminology which has sometimes arisen in this area. The Court of Justice concluded that in certain circumstances Article 119 EEC (now Article 157 TFEU) is 'directly applicable' (on direct applicability, see

further 4.1). In fact, that Article—like all other Articles of the EU Treaties—is *always* directly applicable, meaning that it automatically becomes part of national law. What the Court meant was that it was capable of having direct effect, at least insofar as direct discrimination was concerned.

In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, [2014] 1 WLR 2921, the applicant, a member of the native population of the Chagos Archipelago in the British Indian Ocean Territory, challenged the UK government's decision to remove that population from the islands and prohibit them from returning, in order for the UK to use the islands for defence purposes. He sought to rely on Articles 198 and 199 TFEU, under which Members States agreed to associate countries and territories with which they had special relationships (known as Overseas Countries and Territories, or OCTs) with the EU, in order to promote their development, further their interests, and apply the same treatment to trade with them as was applied to trade between Member States. The Court of Appeal of England and Wales held that Articles 198 and 199 TFEU were statements of aspiration about the attainment of the objectives of association between OCTs and the EU; they were not about the detailed ways in which those objectives could be fulfilled, so as to constitute directly effective provisions of EU law. As a UK case, this is of course not binding on EU Member States, but similar arguments are likely to be advanced elsewhere.

p. 102 ↵ In *Banks v Revenue & Customs Commissioners* [2020] UKUT 101 (TCC), [2020] STC 996, the UK's Upper Tax Tribunal similarly considered that Article 4(3) TEU was not directly effective because the obligations contained in it were not sufficiently precise. Article 4(3) provides that the Member States must facilitate the achievement of the EU's tasks, and refrain from measures which could jeopardize the attainment of the EU's objectives. The applicant had alleged that UK law was contrary to Article 4(3) because although it made some donations to political parties exempt from tax, this was conditional on the party having either at least two MPs in the UK Parliament, or one MP and 150,000 votes. The applicant's donation to the political party UKIP was therefore not tax exempt, and he alleged that this discouraged donations to political parties which were successful in European Parliamentary but not national elections, such as UKIP, and therefore interfered with the proper functioning of the European Parliament and jeopardized the EU's aims of equality and democracy. However, the Tribunal held that 'The obligations relied on [in Article 4(3)] are in the nature of general objectives or aspirations, concerning the co-operation between Member States and the EU and such matters as equality and democracy, rather than detailed requirements as to how those objectives are to be fulfilled. Furthermore, the funding of political parties is an area in which Member States are likely to have legitimate differences, not least because of differing political systems and traditions.' The Tribunal also considered that, in any event, the ineligibility of a political donation for tax exemption did not interfere with or have a detrimental impact on the functioning of the European Parliament.

Just like Treaty Articles, Regulations must be sufficiently clear and unconditional if they are to have direct effect. As Advocate General Warner stated, in Case 131/79 *R v Secretary of State for Home Affairs, ex p Santillo* [1980] ECR 1585, 1608: 'Unquestionably every provision of every regulation is directly applicable, but not every provision of every regulation has direct effect, in the sense of conferring on private persons rights enforceable by them in national courts.'

Review Question

> Suppose that you have recently suffered from a respiratory infection contracted while swimming in polluted seawater off a beach in Ireland. Tests indicate that the water contains 2.5 per cent blisterium, a chemical known to produce respiratory infections. (Fictitious) Regulation 00/00 provides that the presence of any amount over 2 per cent leads to the awarding of compensation to anyone contracting infection as a consequence. How, if at all, could direct effect apply in this scenario?
>
> *Answer*: A Regulation will have direct effect and thus be directly enforceable in the national courts if the Regulation is sufficiently clear, precise, and unconditional (*Politi*). (Fictitious) Regulation 00/00 is clear as to the prohibition, as it specifies the level and the substance. It also appears to be clear that compensation must be provided to anyone contracting infection as a consequence. However, it is not clear as to the amount or source of the compensation, and it therefore cannot have direct effect.

p. 103

4.1.3 The conditions for the direct effect of Decisions

In Case 9/20 *Grad v Finanzamt Traunstein* [1970] ECR 825, para 9 (see also 4.1.1.3), the Court of Justice ruled that a Decision could have direct effect if it was 'unconditional and sufficiently clear and precise to be capable of creating direct effects'—in other words, subject to the same single condition as Treaty Articles and Regulations (see further 4.1.2). By way of exception, however, if a particular Decision is stated to apply only from a specified future date (which is very rare), that Decision cannot have direct effect until that date has passed. *Grad* itself is an example of such a situation.

At the time of the judgment in *Grad*, what is now Article 288 TFEU (see further 3.4.2) provided for only one type of Decision, a Decision that had one or more addressees, and stated that such Decisions were binding (only) on their addressee(s). However, as a result of amendments introduced by the Treaty of Lisbon (2007) (see further 1.18), Article 288 TFEU now provides both for this type of Decision and for Decisions that do not have an addressee. Decisions that do not have an addressee are, in that respect, similar to Treaty Articles and Regulations in that they are generally applicable; and they are subject to the same single condition for direct effect as Treaty Articles and Regulations—that is, that they must be sufficiently clear and precise (as explained in the context of Treaty Articles and Regulations at 4.1.2). The same single condition applies to Decisions addressed to specific private individuals or businesses.

However, a Decision which is addressed to the Member States (as opposed to a business or individual, or which has no addressees) will have direct effect only if a second condition is satisfied. In C-80/06 *Carp v Ecorad* [2007] ECR I-4473, the Court of Justice held that a Decision which was addressed to the Member States was binding only on them and could not be relied upon against an individual or a business. It justified this ruling

by reference to the same arguments that it had previously developed in relation to Directives (discussed at 4.1.4), since Directives are always addressed to the Member States. A Decision addressed to the Member States therefore has direct effect only if the following conditions are satisfied:

- it is sufficiently clear and precise (as explained in the context of Treaty Articles and Regulations at 4.1.2); and
- the defendant against whom it is being enforced is a Member State or an emanation of the State (as explained in the context of Directives at 4.1.4).

4.1.4 The conditions for the direct effect of Directives

The position with regard to Directives is rather different because of their nature (see 4.1.1 and Chapter 3). There are three conditions that must be satisfied in order for a provision of a Directive to have direct effect, one of which is the same as that applicable to Treaty Articles, Regulations, and Decisions (see 4.1.2 and 4.1.3):

p. 104
- the provision must be sufficiently clear, precise, and unconditional;
- the deadline for transposition into national law must have passed; and
- the defendant must be an emanation of the State.

We will now consider these conditions in more detail.

4.1.4.1 The provision must be sufficiently clear, precise, and unconditional

The first condition is broadly the same as that applicable to Treaty Articles, Regulations, and Decisions. The discussion at 4.1.2 and 4.1.3 is therefore relevant here, although in practice Directives are rather more likely to be unclear or imprecise because they (unlike Treaty Articles, Regulations, and Decisions) are not intended to become law exactly as they are written.

In Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357 (see also 5.2 and 5.3), the applicant wished to rely on Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1980 L283/23. This provided that employees whose employers had become insolvent must be able to obtain compensation for unpaid wages, holiday pay, and other money owed to them by their employers. The Court of Justice examined whether the Directive was sufficiently clear to have direct effect in three respects: the identity of the persons intended to benefit from the compensation; the scope of that compensation; and the identity of the person or entity liable to provide the compensation.

Thinking Point

> While reading the following extract, consider in what respect the Court of Justice held the Directive to be unclear (and therefore to be incapable of having direct effect).

Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357

13. With regard first of all to the identity of the persons entitled to the guarantee, it must be observed that according to Article 1(1) the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1); the latter provision defines the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of 'employee' and 'employer'. Finally, Article 1(2) provides that the member-States may, by way of exception and under certain circumstances, exclude claims by certain categories of employees listed in the annex to the directive.

p. 105

14. Those provisions are sufficiently precise and unconditional to enable the national court to determine whether or not a person should be regarded as a person intended to benefit under the directive ...

[...]

18. In this case the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the member-States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required.

19. That is to say, as the Commission and the applicants have pointed out, it is possible to determine the minimum guarantee provided for by the directive by taking the date whose choice entails the least liability for the guarantee institution. That date is that of the onset of the employer's insolvency, since the two other dates, that is to say that of the notice of dismissal issued to the employee and that on which the contract of employment or the employment relationship was discontinued are, according to the conditions laid down in Article 3, necessarily subsequent to the onset of the insolvency and thus define a longer period in respect of which the payment of claims must be ensured.

20. With regard to the possibility under Article 4(2) of limiting that guarantee, it should be observed that such a possibility does not make it impossible to determine the minimum guarantee. It follows from the wording of that Article that the member-States have the option of limiting the guarantees granted to employees to certain periods prior to the date referred to in Article 3. Those periods are fixed in relation to each of the three dates provided for in Article 3, so that it is possible in any event to determine what extent the member-State could have reduced the guarantee provided for by the directive depending on the date which it would have chosen if it had transposed the directive.

21. As regards Article 4(3), according to which the member-States may set a ceiling on liability in order to avoid the payment of sums going beyond the social objective of the directive, and Article 10, which states that the directive does not affect the option of member-States to take the measures necessary to avoid abuses, it should be observed that a member-State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the directive: see, in relation to an analogous option concerning the prevention of abuse in fiscal matters, Case 8/81, *Becker v. Finanzamt Münster-Innenstadt* [[1982] ECR 53].

22. It must therefore be held that the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee.

[...]

25. ... It follows from the terms of the directive that the member-State is required to organise an appropriate institutional guarantee system. Under Article 5 the member-State has a broad discretion with regard to the organisation, operation and financing
p. 106 of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organise the guarantee system that the State may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the State takes on an obligation which in principle is not its own.

26. Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

It is noteworthy that the existence of a choice in Directive 80/987 as to the period in respect of which compensation was payable did not make the Directive unclear, because a minimum period could be identified. Nor did the option given to Member States to set a limit on the total compensation payable to an individual prevent the Directive from possessing sufficient clarity, since the State's failure to exercise this option by passing the necessary legislation by the deadline for the transposition of the Directive meant that it had lost the right to do so (see 4.1.4.2 in relation to the expiry of the deadline). However, the lack of clarity as to the source of the compensation was fatal to the claim that the Directive had direct effect.

Cross-Reference

The Court of Justice in *Francovich* developed an entirely new route for the claimant to enforce their rights: see further Chapter 5.

The Court reached a different conclusion as to the direct effect of Directive 80/987 in Case C-441/99 *Riksskatteverket v Gharehveran* [2001] ECR I-7687 because, in that case, the Member State (Sweden) had made provision for compensation to be provided from public funds. The Court concluded that since the identity of the person liable to provide the compensation was, on the facts, clear (in contrast to the situation in *Francovich*), the Directive could have direct effect.

In C-176/12 *Association de Mediation Sociale v Union Locale des Syndicats CGT and others* [2014] 2 CMLR 41 (see also 4.1.5), the applicant sought to enforce Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002 L80/29. This stated that Member States must provide for employee information and consultation rights in undertakings with at least 50 employees, or establishments employing at least 20 employees, in any one Member State. On a preliminary reference by the French court (see further Chapter 6 on the preliminary reference procedure), the Court of Justice held that the Directive did not prescribe exactly how these thresholds were to be calculated, but did contain a clear definition of employees, and so imposed a directly effective prohibition on Member States from excluding such persons when calculating whether the threshold was reached.

All Directives include an obligation on Member States to transpose the rights contained in them into national
p. 107 law (see 3.4.2). Directives are therefore always conditional in the sense ↵ that they are conditional on Member States taking further action to implement the obligations contained in them—unlike Treaty Articles, Regulations, and Decisions. This, however, has not been an obstacle to the Court of Justice ruling that Directives can be sufficiently clear to have direct effect. For example, in Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723, Marshall, a dietician, sought to rely on the provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40 (the Equal Treatment Directive), in opposing her enforced retirement at the age of 62, which was three years earlier than her male colleagues. She sought to rely on the Directive, which had not been properly transposed by the UK and which prohibited discrimination at work on grounds of sex. The UK court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court held that the Directive was sufficiently unconditional to have direct effect.

Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723

> 52. Finally, with regard to the question whether the provision contained in Article 5(1) of Directive 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.
>
> 53. It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.
>
> 54. With regard, in the first place, to the reservation contained in Article 1(2) of Directive 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *ratione materiae*, it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive 76/207 provided for in Article 2 thereof are not relevant to this case.
>
> 55. It follows that Article 5 of Directive 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

p. 108 ↵ The need to seek clarification of the correct interpretation of a provision of EU law from the national courts or from the Court of Justice through the preliminary reference procedure (see further Chapter 6 on the preliminary reference procedure) also does not prevent such a provision from being held to be sufficiently clear to have direct effect. This was expressly acknowledged by the Court of Justice in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 (see 4.1.1.4) when considering whether Directive 64/221 was sufficiently clear and unconditional to have direct effect, as the following extract demonstrates.

Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337

> 13. By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, Article 3(1) of Directive No. 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community [now Union] or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.
>
> 14. If the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the courts, taking into account also the procedure under Article 177 of the [EEC] Treaty [now Article 267 TFEU].
>
> 15. Accordingly, in reply to the second question, Article 3(1) of Council Directive No. 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.

4.1.4.2 The deadline for transposition of national law must have passed

Thinking Point

> Why might giving effect to a Directive which a Member State has failed to transpose by the deadline for it to do so, or which it has transposed incorrectly, be necessary in order to ensure the effectiveness of EU law?

In Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629, Ratti's company had complied with Council Directive 77/728/EEC of 7 November 1977 on the approximation of the laws, regulations and administrative provisions
p. 109 of the Member States relating to the classification, ↵ packaging and labelling of paints, varnishes, printing inks, adhesives and similar products, OJ 1977 L303/23, as to the information to be supplied on labels on chemicals. However, Italy had failed to transpose the Directive into national law and prosecuted Ratti under its own, stricter, laws. The Italian court made a preliminary reference to the Court of Justice (see further Chapter 6 on the preliminary reference procedure).

The Court of Justice ruled that the Directive had not become directly effective because the deadline for its transposition had not passed. Until that time, it was not intended to have legal effect and Ratti could not rely on it.

If a Member State wishes to take advantage of the discretion provided by a Directive, it must pass transposing legislation to set out how this discretion will be exercised. If it does not, it cannot rely on an option provided in the Directive, as the Court explained in Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357 (see 4.1.4.1). For example, in *East Riding of Yorkshire Council v Gibson* [2000] 3 CMLR 329, a swimming instructor employed by a local authority sought to rely directly on the Working Time Directive (Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ 1993 L307/18), which provided for four weeks' annual paid leave and which the UK had not transposed into national law by the deadline contained in it. The House of Lords (now the Supreme Court) held that the provision on paid leave was not directly effective. However, it stated that had the provision been directly effective, the local authority could not have relied on the option in the Directive permitting Member States to specify a three-week leave period, rather than four, during a transitional period, because the UK had failed to pass legislation transposing this option into national law. It was not open to the State, or an emanation of it, to rely upon an option which it had not exercised.

It is worth noting that the Court of Justice has, albeit rarely, recognized exceptions to the requirement that a Directive cannot have direct effect until the deadline has passed.

First, if it is a principle of law of the Member State in question that more favourable (to the accused) criminal laws should apply retroactively, and the provisions of a particular Directive are capable of having direct effect, that Directive may be applied retroactively by the courts of that Member State even where the cause of action arose before the date set for compliance with the Directive. For example, in Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi* [1998] ECR I-6781, the Court of Justice ruled that Council Directive 91/439/EEC of 29 July 1991 on driving licences, OJ 1991 L237/1, was directly effective because it was clear and precise and the deadline date had passed, even though it had only passed after the cause of action arose. The Member State in question, Belgium, recognized the principle that more favourable provisions of criminal law had retroactive effect, and therefore Awoyemi could rely on the more favourable, directly effective, provisions of the Directive even before the deadline for transposition of that Directive into national law had passed.

Second, if a Directive enshrines a general principle of EU law (see 3.4.5), then that general principle must be respected even before the deadline for transposition of the Directive into national law has passed, and a Member State should not enact or maintain legislation which conflicts with that principle. The leading case here is Case C-144/04 *Mangold v Helm* [2005] ECR I-9981. Mangold had been employed by Helm on a fixed-term contract when he was 56 years old. Under German law, a fixed-term contract need not be objectively
p. 110 justified if the ↵ employee was aged 52 or older. The deadline for transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16, which laid down a general framework for prohibiting discrimination and provided that differences in treatment did not constitute discrimination if they were objectively justified, had not yet passed. The Court of Justice held that the German legislation was incompatible with the Directive, and the fact that the deadline for transposition had not yet passed at the time at which the facts of the case arose could not justify that incompatibility. It was settled law that Member States were obliged, prior to the deadline

for transposition of a Directive, to 'refrain from taking any measures liable seriously to compromise the attainment of the result prescribed' by that Directive (*Mangold*, at para 67), since a Directive was binding on Member States as to the result to be achieved under Article 288 TFEU (see further 3.4.2). Furthermore, the principle of equal treatment was not laid down by the Directive in question; the prohibition on discrimination was a general principle of EU law stemming from international law and the constitutional traditions common to the Member States.

Strictly speaking, this second 'exception' is not really an exception to the conditions for direct effect, because what is being given effect ahead of the deadline for transposition is not the Directive, but the underlying general principle of EU law.

Cross-Reference

See also Case C-555/07 *Kücüdeveci* [2010] ECR I-365, discussed at 9.4.3.

Review Question

> Suppose that you have recently suffered from a respiratory infection contracted while swimming in polluted seawater off a beach in Ireland. Tests indicate that the water contains 2.5 per cent blisterium, a chemical known to produce respiratory infections. (Fictitious) Directive 00/00 provides that the presence of any amount over 2 per cent leads to the awarding of compensation to anyone contracting infection as a consequence. How, if at all, could direct effect apply in this scenario?
>
> *Answer*: The comments made in the previous review question would apply equally here, but with the authority of, for example, *Van Duyn* rather than *Politi*, because a Directive rather than a Regulation is at issue.
>
> However, there are two further conditions that must be satisfied in order for a Directive to have direct effect:
>
> - the deadline set out in the Directive for its transposition must have passed (*Ratti*); and
> - the defendant must be the State or an emanation thereof (see 4.1.4.3).
>
> The deadline for transposition is not specified and it would be necessary to check the full text of the Directive to ascertain this, but, given that it dates from 2000, it is almost certain that it has passed. If it has passed, then the Directive is capable of direct effect if the other two conditions are met. If it has not passed, then the Directive is not capable of direct effect. Ireland would still be under an obligation to refrain from measures liable to compromise the objectives of the Directive (*Mangold*), but the facts here do not disclose that it is acting in breach of this obligation.

4.1.4.3 The defendant must be the State or an emanation of the State

Directives can only have what is sometimes referred to as 'vertical' direct effect—in other words, they can have direct effect only in proceedings brought by an individual or business against the State (or against an
p. 111 authority or 'emanation' of the State). This can be contrasted ↵ with the concept of 'horizontal' direct effect, which is where an EU measure has direct effect in proceedings brought by an individual or business against another individual or business. Unlike Directives, Treaty Articles, Regulations, and Decisions can have horizontal, as well as vertical, direct effect and therefore the distinction is not meaningful when discussing them.

Thinking Point

> What gap does this leave in the protection of rights under EU law?

The case that clearly established the principle that Directives can only have vertical direct effect was Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723 (see 4.1.4.1 for the facts of *Marshall*), in which the Court of Justice ruled that the Equal Treatment Directive was directly effective against the defendant in the case (the employer health authority).

Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723

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

47. That view is based on the consideration that it would be incompatible with the binding nature which Article 189 [EEC, now Article 288 TFEU] confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

48. With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

p. 112

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

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

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

> [...]
>
> 56. Consequently, the answer to the second question must be that Article 5(1) of Council Directive 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

The Court of Justice held that Directives were binding only against a Member State and its authorities, although the *capacity* in which the State or authority thereof acted, for example whether as public authority or employer, was irrelevant. The Court of Justice ruled out the possibility of horizontal direct effect on the grounds that the binding nature of a Directive applied only to its Member State addressees. A Directive could not impose obligations on an individual and should not be relied upon against them. However, since the defendant here was 'a public authority' (*Marshall*, at para 50), *and* the Directive was sufficiently clear, precise, and unconditional to have direct effect, *and* its deadline for transposition had passed (*Marshall*, at para 46), Marshall succeeded in her claim.

The Court of Justice restated this position in Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, despite the Opinion of Advocate General Lenz in that case (see further 2.4.1 on Advocate Generals' Opinions) in which he persuasively argued that Directives should have horizontal direct effect.

Thinking Point

> While reading the following extract, consider which you find more compelling: the Advocate General's arguments in favour of the horizontal direct effect of Directives or the arguments that he acknowledged against it.

p. 113

Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, Opinion of Advocate General Lenz

(2) Horizontal applicability of directives

43. The answer afforded by the court's consistent case law to the question as to the effects of an unimplemented directive on legal relations between private persons—also known as horizontal effect—is straightforward and clear: a directive may not of itself impose obligations on an individual.

[...]

47. However, such an approach appears unsatisfactory to me ...

48. Considerations favouring the horizontal effect of directives reflect a drive to do justice by the beneficiary of a provision which the Community [now Union] legislator intended to be binding and not to abandon his situation for an indefinite period to the whim of a member state in default of its obligations.

[...]

50. Foremost among the arguments in favour of directives having horizontal effect is that relating to equality of the conditions of competition. Moreover, in the absence of horizontal effect, persons in member states which comply with Community law [now EU law] are frequently placed at a disadvantage.

51. The principle of the prohibition of discrimination, which ranks as a fundamental right, also militates in favour of directives being given horizontal effect, from several points of view. First, it is unsatisfactory that individuals should be subject to different rules, depending on whether they have comparable legal relations with a body connected with the state or with a private individual. Secondly, it is contrary to the requirements of an internal market for individuals to be subject to different laws in the various member states even though harmonising measures have been adopted by the Community.

[...]

54. In the case of directives whose content is intended to have effects in relations between private persons and which embody provisions designed to protect the weaker party it is obvious that the failure to transpose a directive deprives it of *effet utile*. Following the expiry of the period for transposition, the application of protective provisions with precise and unconditional content should be possible ...

[...]

57. Although horizontal direct effect of directives appears desirable for the reasons given above, substantial arguments exist against such a change in the case law.

58. Reference is made regularly in those arguments to the wording of art 189 of the [EEC] Treaty [now Article 288 TFEU] and to the nature of directives, which are binding only on member states and then only as to the results to be achieved.

59. In my view, those arguments can be refuted. As regards in the first place the freedom given to the member states as to the choice of the form and methods for implementing directives, that freedom is completely unaffected until the transitional period expires. Even after that, the member states retain—also where individual provisions have direct effect—leeway wherever that is intended by the directive. Only a fraction of provisions of directives will lend themselves to horizontal applicability. For the rest, the member states are not entitled to invoke, after the expiry of the period for transposition, freedoms which were conferred on them only for the purposes of the due implementation of the directive within the time limit laid down.

p. 114

[...]

67. The principle of legitimate expectations is invoked in favour of private individuals on whom a burden is imposed and against the horizontal effect of directives. Expectations deserving of protection certainly exist, in so far as a private individual does not have to reckon with the imposition of additional burdens provided that he acts lawfully within the context of his national legal system. On the other hand, once a directive has been published and the period for transposition has expired, the burden is foreseeable. I would ask whether the expectation that the national legislature will act contrary to Community law is worthy of protection.

68. An argument based on the democratic principle is put forward against the horizontal effect of directives. According to that argument, the democratic deficit, which is deplored in any event in the context of Community legislation, is increased where national parliaments are bypassed when directives are implemented.

[...]

70. The national legislature has every freedom during the period for transposition to choose the form and means of transposing the directive into national law (see *Grad* [Case 9/70 *Grad v Finanzamt Traunstein*] [1970] ECR 825 at 839 (para 13)). Even after the period for transposition has elapsed, the obligation on the national legislature to transpose the directive continues to exist, as well as leeway to fulfil that obligation in one way or another to the extent permitted by the directive (see *EC Commission v Belgium* Case 102/79 [1980] ECR 1473 at 1487 (para 12)). Only provisions of directives or protective rules which are sufficiently precise to be asserted without being fleshed out in any way and therefore have to be taken over by the national legislature would have legal effects as between the addressees of the legislation in question within the national legal system ...

71. The objection that recognition of the horizontal direct effect of directives would increase member state's carelessness in transposing them does not convince me, since the national legislature remains responsible for their implementation in full.

> Recognition in principle of horizontal effect might possibly encourage member states to effect transposition within the prescribed period in order to forestall horizontal application by the authorities and courts of the Community and the member states. In my view, the arguments on the educative effect of horizontal applicability balance themselves out and hence do not tip the balance for or against.
>
> [...]
>
> p. 115 73. ... horizontal effect seems to me to be necessary, subject to the limits mentioned, in the interests of the uniform, effective application of Community law. In my view, the resulting burdens on private individuals are reasonable, since they do not exceed the constraints which would have been applied to them if the member state concerned had acted in conformity with Community law. Lastly, it is the party relying on the unconditional and sufficiently precise provision of a directive who will have to bear the risk of the court proceedings.

The bodies that may be included in the definition of the State for this purpose have come to be known as 'emanations of the State'. The leading case on what constitutes an authority or emanation of the State for the purposes of the direct effect of Directives is Case C-188/89 *Foster v British Gas* [1990] ECR I-3313. British Gas employees were compulsorily retired at the age of 60 if female, but at 65 if male. In accordance with this retirement policy, Mrs Foster was compulsorily retired by British Gas at the age of 60. She alleged that this was contrary to the Equal Treatment Directive (see 4.1.4.1, in relation to *Marshall* and *Johnston*). A preliminary reference was made by the national court under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).

The Court of Justice ruled that, as the deadline for transposition of the Directive had passed without appropriate measures having been taken by the UK, the Directive itself could be directly effective. It relied on *Marshall* as authority for the proposition that the State could not take advantage of its own failure to transpose a Directive.

Thinking Point

> While reading the following extract, consider:

(a) how the Court of Justice defined an authority or emanation of the State and how this prevents the State from taking advantage of its own failure to transpose a Directive; and

(b) what potential unfairness results from this principle and why the Court of Justice considered that the defendant State was not in a position to complain about this.

Case C-188/89 *Foster v British Gas plc* [1990] ECR I-3313

16. As the Court has consistently held (see *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53) where the Community [now the Union] authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law [now EU law]. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

p. 116

17. The Court further held in *Marshall* [Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723], at paragraph 49, that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

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

19. The Court has accordingly held that provisions of a directive could be relied on against tax authorities (Case 8/81, *Becker*, and Case C-221/88, *ECSC v Acciaierie E Ferriere Busseni* [1990] ECR I-495), local or regional authorities (Case 103/88, *Fratelli Costanzo v Comune Di Milano* [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651), and public authorities providing public health services (Case 152/84, *Marshall*).

20. It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond

> those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.
>
> 21. With regard to Article 5(1) of Directive 76/207 it should be observed that in Case 152/84, *Marshall* at paragraph 52, the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.
>
> 22. The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207 of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

p. 117 ↵ The Court of Justice held that the Directive could be relied upon against British Gas because it was an emanation of the Member State. This was because it satisfied the following three criteria:

- It had been made responsible by the State for providing a public service.
- It provided that service under the control of the State.
- It had been given special powers to provide that service beyond those normally applicable in relations between individuals.

For many years, it was assumed—on the basis of para 20 of the judgment, which uses the word 'and' to connect the three parts of the test—that all three elements of the test in *Foster* must be proved. However, in C-413/15 *Farrell v Whitty and others* EU:C:2017:745, the Court of Justice stated that para 20 of *Foster* must be read in the light of para 18 of that judgment, in which the three parts of the test were connected by the word 'or', suggesting that they were alternatives. The Court in *Farrell* therefore concluded that the three parts of the test were not cumulative and that a Directive may be capable of having direct effect against a body that does not satisfy all three requirements.

Case C-413/15 *Farrell v Whitty and others* EU:C:2017:745

22 By its first question, the referring court seeks, in essence, to ascertain whether Article 288 TFEU must be interpreted as not precluding the possibility that the provisions of a directive that are capable of having direct effect may be relied upon against a body which does not display all the characteristics listed in paragraph 20 of the judgment of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313).

23 In paragraphs 3 to 5 of that judgment, the Court stated that the body concerned in the case that gave rise to that judgment, namely the British Gas Corporation, was a 'statutory corporation', 'responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly of the supply of gas', and '[its] members … were appointed by the competent Secretary of State [who] also had the power to give [British Gas] directions of a general character in relation to matters affecting the national interest and instructions concerning its management', and that British Gas had the right 'with the consent of the Secretary of State, to submit proposed legislation to Parliament'.

24 In that context, the Court stated in paragraph 18 of that judgment that it had 'held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals'.

25 The Court concluded, in paragraph 20 of that judgment, that 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon'.

p. 118

26 As the Advocate General stated in point 50 of her Opinion, the fact that the Court chose in paragraph 20 of the judgment of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313) to use the words 'is included in any event among the bodies' confirms that the Court was not attempting to formulate a general test designed to cover all situations in which a body might be one against which the provisions of a directive capable of having direct effect might be relied upon, but rather was holding that a body such as that concerned in the case that gave rise to that judgment must, in any event, be considered to be such a body, since it displays all the characteristics listed in paragraph 20.

27 Paragraph 20 of that judgment must be read in the light of paragraph 18 of the same judgment, where the Court stated that such provisions can be relied on by an individual against organisations or bodies which are subject to the authority or

control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals.

28 Accordingly, as stated, in essence, by the Advocate General in points 53 and 77 of her Opinion, the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State, and must possess special powers beyond those which result from the normal rules applicable to relations between individuals cannot be conjunctive (see, to that effect, judgments of 4 December 1997, *Kampelmann and Others*, C-253/96 to C-258/96, EU:C:1997:585, paragraphs 46 and 47, and of 7 September 2006, *Vassallo*, C-180/04, EU:C:2006:518, paragraph 26).

29 In the light of the foregoing, the answer to the first question is that Article 288 TFEU must be interpreted as meaning that it does not, in itself, preclude the possibility that provisions of a directive that are capable of having direct effect may be relied on against a body that does not display all the characteristics listed in paragraph 20 of the judgment of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313), read together with those mentioned in paragraph 18 of that judgment.

[...]

33 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, not only against a Member State and all the organs of its administration, such as decentralised authorities (see, to that effect, judgment of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraph 31), but also, as was stated in the answer to the first question, against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals (judgments of 12 July 1990, *Foster and Others*, C-188/89, EU:C:1990:313, paragraph 18, and of 4 December 1997, *Kampelmann and Others*, C-253/96 to C-258/96, EU:C:1997:585, paragraph 46).

34 Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers.

p. 119

35 Accordingly, a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon.

NOTE the Court's assertion in para 26 of its judgment in *Farrell* that it had not, in *Foster*, been attempting to formulate a conclusive test for whether any particular body was an emanation of the State. It is perhaps a pity that the Court did not see fit to make this clearer at an earlier point in the almost 30 years that elapsed between its judgment in *Foster* and its judgment in *Farrell*.

In *Farrell* the Court noted that emanations of the State are *different from individuals* and *comparable to the State* because they:

- are legal persons governed by public law that are part of 'the State', as widely defined; or
- are subject to the authority or control of a public body; or
- have been required by such a body to perform a task in the public interest and have been given special powers for that purpose.

The facts of the *Farrell* case were that Ms Farrell had been injured in a motor vehicle accident while she was a passenger seated on the floor in the back of Mr Whitty's van. He was not insured for her injuries and so she sought compensation from the Motor Insurers Bureau of Ireland (MIBI). This was the body that Ireland had set up in response to the Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1984 L8/17 (the Second Motor Insurance Directive), which required Member States to set up a body to provide compensation for property damage or personal injury caused by uninsured or unidentified vehicles. This Directive supplemented the First Motor Insurance Directive (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, OJ 1972 L103/1), which required motor insurance to be compulsory. Farrell's claim was based on the Third Motor Insurance Directive (Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1990 L129/33), which extended the insurance and compensation obligation to all passengers. However, the MIBI rejected her claim on the grounds that Irish law did not require compensation for injuries caused to persons travelling in parts of vehicles that were not equipped to carry passengers.

The Court held that the Third Motor Insurance Directive was directly effective against the MIBI. The MIBI was
p. 120 an emanation of the State because it was required to perform a task that ↵ contributed to the general objective of victim protection pursued by the EU legislation relating to compulsory motor vehicle liability insurance and that task must be regarded as being in the public interest. Further, Irish law made membership of the MIBI compulsory for all motor vehicle insurers and thereby conferred on the MIBI special powers in the form of the power to require all those insurers to become members of it and to contribute funds for the performance of the task conferred on it by the Irish State. The Court therefore concluded that the provisions of a Directive that were unconditional and sufficiently precise could have direct effect against the MIBI.

Other cases have given further guidance on which bodies may fall within the term 'emanation of the State'. For example, in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, the Chief Constable of the Royal Ulster Constabulary (RUC) decided that, in view of the high numbers of police officers assassinated in Northern Ireland, it was not appropriate to continue with the existing policy that they should not carry firearms. He decided that male officers should carry firearms in the regular course of their

duties, but that women police officers would not be equipped with firearms and would not receive training in firearms. As a result, fewer women police officers were required and the Chief Constable therefore refused to renew Mrs Johnston's contract as a police constable. Mrs Johnston challenged that refusal before an Industrial Tribunal. The Tribunal referred to the Court of Justice a number of questions on the interpretation of the Equal Treatment Directive (Directive 76/207) (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that the Chief Constable of the RUC was an 'emanation' of the State, and therefore the Directive could be relied upon directly against him (*Johnston*, at para 56).

It is also likely that local government authorities will be regarded as emanations of the State. For example, in Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR I-1839, Fratelli Costanzo submitted a tender to a municipal authority for a public works contract. The municipal authority eliminated this tender from the tendering procedure and Fratelli Costanzo sought the annulment of the decision to eliminate its tender. The national court referred to the Court of Justice a number of questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ 1971 L185/5 (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that Directives could be relied upon directly against 'all organs of the administration, including decentralized authorities such as municipalities' (*Fratelli Costanzo*, at para 32).

Review Question

> Suppose that you have recently suffered from a respiratory infection contracted while swimming in polluted seawater off a beach in Ireland. Tests indicate that the water contains 2.5 per cent blisterium, a chemical known to produce respiratory infections. (Fictitious) Directive 00/00 provides that the presence of any amount over 2 per cent leads to the awarding of compensation to anyone contracting infection as a consequence. The (fictitious) Sea Watch Agency has the statutory duty under Irish law of monitoring and enforcing environmental standards along the coast. How, if at all, could direct effect apply in this scenario?

p. 121

> ↵ *Answer*: The comments made in the previous review questions would apply equally here. In addition, the defendant here is not the State per se, but will constitute an 'emanation of the State' if it is a legal person governed by public law that is part of 'the State', as widely defined, or is subject to the authority or control of a public body, or has been required by such a body to perform a task in the public interest and been given special powers for that purpose (*Foster*, as interpreted by the Court in *Farrell*). The fact that the (fictitious) Agency has a statutory duty to monitor and enforce environmental standards can be argued to involve a degree of State control. Alternatively, the monitoring and enforcing of environmental standards can be argued to be a task in the public interest, particularly as these duties apply to publicly owned and accessible areas, and the enforcement of standards is likely to constitute a special power because it implies the imposition of sanctions and/or the ability to force a third-party polluter to take action or to refrain from taking action.

The judgment in *Farrell* means that it is now easier for applicants to prove that a body is an emanation of the State, because they need not prove all elements of the *Foster* test. This means that if the facts in *Doughty v Rolls Royce plc* [1992] 1 CMLR 1045 were to arise again, the result reached by the UK courts in that case might be different. In that case, not all elements of the *Foster* test were fulfilled and, on the interpretation of the test prevailing at that time, the claimant lost the case.

The facts of *Doughty* were similar to those of both *Marshall* and *Foster* (see 4.1.4.1 and earlier in this section), but the outcome was very different. Mrs Doughty was employed by Rolls Royce, which had a compulsory retirement policy similar to that of the health authority in *Marshall* and that of British Gas in *Foster*. She was compulsorily retired at the age of 60, in accordance with that retirement policy, whereas the policy applied a retirement age of 65 to her male colleagues. Like Marshall and Foster, Doughty sought to rely on the Equal Treatment Directive (Directive 76/207), which concerned discrimination at work on grounds of sex. The Court of Appeal held that the Directive could not be directly effective against Rolls Royce because it did not fulfil the test set out in *Foster* and so was not an emanation of the Member State. It was 100 per cent owned by the State and therefore any service it provided was under the control of the State. However, it was involved in a commercial undertaking and was not responsible for any public service, and it did not exercise any special powers (for example, of the type enjoyed by British Gas). In the light of *Farrell*, the answer that would be given today on these facts might be that State ownership would be sufficient for Rolls Royce to be an emanation of the State under the second limb of the test (ie that it is subject to the authority or control of a public body).

Nonetheless, the unfairness (criticized by the UK government in its submissions to the Court of Justice in Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723, at para 51) that can result from the Court of Justice's limitation of the direct effect of Directives to vertical (as opposed to vertical and horizontal) direct effect remains.

Thinking Point

> What is that unfairness?

p. 122 ↵ The potential unfairness is that a claimant's success may depend solely on the accident of whether the defendant is, or is not, an emanation of the State, and the claimant may be unable to enforce rights clearly granted to them by a Directive purely because the defendant in their case is not an emanation of the State.

Review Question

> Would a woman employed by a private hospital, but otherwise in the same position as the applicant in Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching) (No 1)* [1986] ECR 723, have been able to rely on the Equal Treatment Directive in the same way as Marshall?
>
> *Answer*: In *Marshall*, the Court of Justice clearly stated that a Directive could not be relied upon against a private body or individual. It would therefore be possible to rely on the Directive in this situation only if the private hospital could be shown to be an emanation of the Member State.
>
> In the light of *Farrell*, it would be necessary for the hospital to be (1) a legal person governed by public law that is part of the State in the broad sense, or (2) subject to the authority or control of a public body, or (3) operating a public interest service under the control of the State, with special powers to do so. It is unlikely that any hospital would satisfy (1). As to (2), further information is required as to any State control over the provision of health care by the private hospital in question—for example there might be some State funding, regulation, and/or an inspection regime that might amount to sufficient 'control'. As to (3), it is established that health care is a public service (*Marshall*). It may be possible to argue that *private* health care is not, but if the private hospital provides public health care to the general public and recoups the cost from the government, this may be a service in the public interest. The hospital is likely to have the ability to dispense controlled medications to patients, which could be argued to be a special power. In those circumstances, an employee might be able to enforce the Directive against it.

The potential unfairness of the restriction of the direct effect of Directives to cases in which the defendant is an emanation of the State was highlighted in Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325. In that case, a consumer sought to cancel a contract with a business pursuant to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L372/31 (the Doorstep Selling Directive), which gave consumers the right of cancellation where the contract was concluded away from business premises and which Italy had not transposed into national law by the deadline date. On a preliminary reference under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure), the Court of Justice responded to the national court's criticism of the restriction on the direct effect of Directives to cases in which the defendant was an emanation of the State. It began by reiterating its reasoning for enforcing Directives directly against the State and its emanations.

Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

> 21. The national court observes that if the effects of unconditional and sufficiently precise but untransposed directives were to be limited to relations between State entities and individuals, this would mean that a legislative measure would operate as such only as between certain legal subjects, whereas, under Italian law as under the laws of all modern States founded on the rule of law, the State is subject to the law like any other person. If the directive could be relied on only as against the State, that would be tantamount to a penalty for failure to adopt legislative measures of transposition as if the relationship were a purely private one.
>
> 22. It need merely be noted here that, as is clear from the judgment in *Marshall*, cited above (paragraphs 48 and 49), the case-law on the possibility of relying on directives against State entities is based on the fact that under Article 189 [EEC, now Article 288 TFEU] a directive is binding only in relation to 'each Member State to which it is addressed'. That case-law seeks to prevent 'the State from taking advantage of its own failure to comply with Community law' [now EU law].
>
> 23. It would be unacceptable if a State, when required by the Community [now Union] legislature to adopt certain rules intended to govern the State's relations—or those of State entities—with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognized that certain provisions of directives on conclusion of public works contracts and of directives on harmonization of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53).

p. 123

The Court of Justice then reiterated its reasoning as to why the nature of Directives meant that they could not also be directly effective against private parties.

Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

> 24. The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community [now Union] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.
>
> 25. It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

The Court concluded that Faccini Dori might be able to enforce her rights through the doctrine of indirect effect (see 4.2) or a separate action for Member State liability (see Chapter 5).

In Case C-192/94 *El Corte Inglés SA v Blásquez Rivero* [1996] ECR I-1281, the Court of Justice repeated its reasoning in para 24 of *Faccini Dori* but extended its reference to the horizontal effect of Regulations to include Decisions also (*El Corte Inglés*, at para 17).

In Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723 (see also 4.1.5), the Court of Justice additionally invoked the principle of **legal certainty** in support of its argument
p. 124 that Directives could not have direct effect against ↵ private parties. It held that 'the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (*Wells*, para 56) ...'.

legal certainty

Legal certainty is the principle that the law must be clear and foreseeable, so that persons subject to that law can foresee the legal consequence of their actions and regulate their conduct accordingly.

A further example of the application of the *Foster* test—now reformulated in *Farrell*—is provided by the judgment of the High Court of England and Wales in *Byrne and others v Motor Insurers Bureau* [2007] EWHC 1268 (QB), [2007] 3 CMLR 15, in which the claimants sought to rely on the Second Motor Insurance Directive (discussed earlier in this section in relation to the Court of Justice's judgment in *Farrell*), which provided for Member States to compensate the victims of road traffic accidents caused by uninsured or untraced drivers. In the UK, this role was performed by the Motor Insurers' Bureau (MIB). The High Court held that the MIB was not an emanation of the State and therefore the Directive could not be relied upon against it. The court considered that the provision of protection and compensation for victims of accidents involving uninsured or untraced drivers was a public service. However, there was no State control over this service—the fact that the Secretary of State had the power to appoint an arbitrator where a dissatisfied applicant sought to appeal against a decision of the MIB was insufficient. There was also a 'complete absence of "special powers"' (*Byrne*,

at para 60) since, contrary to the arguments of the claimant, the MIB did *not* have the power to exclude an insurer from membership with the effect that it would no longer be an authorized insurer and so could not issue insurance policies, and the relations between the MIB and its members were (as was to be expected from a corporate body) governed by its articles of association and not by statute.

Thinking Point

> Try to summarize the *Farrell* test in your own words without looking at the text. If you have difficulty in doing this, reread this section.

4.1.5 Incidental horizontal effect of Directives

Although the Court of Justice has made it clear that Directives cannot directly impose obligations on private parties, it has stated that Directives can, in certain circumstances, produce a degree of horizontal effect on such parties. Principally, this is through the doctrine of indirect effect, which is discussed in detail at 4.2. However, there are also other circumstances in which a horizontal effect, sometimes referred to as incidental horizontal effect, may be produced.

One is where the impact of a Directive is to invalidate an inconsistent national law on which a private party is seeking to rely as a defence to a claim and thereby expose that party to liability on that claim. For example, in Case C-194/94 *CIA Security International SA v Signalson SA and another* [1996] ECR I-2201, CIA sought an order requiring two rival firms to cease unfair trading practices. These practices took the form of alleging that CIA's products were not approved under national rules on technical equipment. The two rival firms counterclaimed
p. 125 for ↵ an order restraining CIA from carrying on business on the ground, inter alia, of that lack of approval. The Court held that Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1983 L109/8, required such national technical rules to be notified by the Member State to the EU Commission prior to adoption. It concluded that since they had not been so notified, they could not be asserted against private individuals and therefore the counterclaims could not succeed, with the result that the two defendants were exposed to liability on the claim of unfair trading.

Similarly, in Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535, Directive 83/189 was again at issue. Goods supplied by Unilever to Central Food had been labelled in compliance with Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ 1979 L33/1, but not in compliance with national rules, and Central Food consequently refused to pay for the goods. The national rules had not been notified to the EU Commission, as required by Directive 83/189. The Court of Justice again held that, as a result of the failure to notify, the national rules could not be applied by the national courts 'in civil proceedings between individuals concerning contractual rights and obligations' (*Unilever*, at para 52). The consequence was to deprive Central Food of its defence to the claim for non-payment.

In neither case was the Directive directly enforced against a private party in the sense of imposing an obligation on them, but in both the imposition of a detriment on a private party under national law was made possible only because the Directive was held to prevent their reliance on other national law that might have afforded a defence.

In Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723 (see also 4.1.4.3), the applicant argued that the grant of a new mining permission to a quarry owner necessitated an environmental impact assessment (EIA) under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L175/40. Her action was brought against the State authorities for their failure to carry out an assessment. However, the Court of Justice's preliminary ruling under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure)—that the Directive required an assessment to be made in this case—had an adverse impact on the quarry owner. The Court held that while the principle of legal certainty prevented a Directive from having direct effect against an individual (see 4.1.4) and thus from having direct effect against the State *if* the State's obligation were 'directly linked to the performance of another obligation falling, pursuant to that directive, on a third party' (*Wells*, at para 56), the obligation on the State in this case—to ensure that an assessment was carried out—was not directly linked to any obligation on the quarry owner. Although the halting of the quarry owner's mining operations pending the outcome of the assessment was a consequence of the belated performance of the State's obligations, 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned' (*Wells*, at para 57).

p. 126 ↵ Another situation in which a Directive may produce a horizontal effect is where a Regulation—which, of course, *can* have direct horizontal effect (see 4.1.2)—makes express reference to the provisions of a Directive. Joined Cases C-37 & 58/06 *Viamex Agrar Handels GmbH and another v Hauptzollamt Hamburg-Jonas* [2008] ECR I-69 concerned Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport, OJ 1998 L82/19, which applied Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal, OJ 1968 L148/24. Regulation 805/68 made payment of the export refunds conditional on compliance with the animal welfare standards laid down in Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport, OJ 1991 L340/17, and the German authorities refused to pay the export refund to the applicant companies on the ground that they had not complied with the Directive. The applicants lodged formal objections to this and the national court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).

Thinking Point

> While reading the following extract, consider what requirements must be satisfied before a reference in a Regulation to a Directive will be sufficient for—effectively—horizontal effect to be given to the provisions of that Directive.

Joined Cases C-37 & 58/06 *Viamex Agrar Handels GmbH and another v Hauptzollamt Hamburg-Jonas* [2008] ECR I-69

> 27. It is true that, according to settled case-law, a directive cannot of itself impose obligations on an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108; Joined Case C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 73; and Case C-80/06 *Carp* [2007] ECR I-0000, paragraph 20).
>
> 28. However, it cannot be precluded, in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty, are observed.
>
> 29. Moreover, the purpose of the general reference made by Regulation No 615/98 to Directive 91/628 is to ensure, for the purposes of the implementation of Article 13(9) of Regulation No 805/68, compliance with the relevant provisions of that directive on the welfare of live animals and, in particular, the protection of animals during transport. That reference, which lays down the conditions for the grant of refunds, cannot therefore be interpreted as covering all the provisions in Directive 91/628 and, in particular, those provisions which have no connection with the principle objective pursued by that directive.
>
> 30. Consequently, it cannot properly be held, as was submitted by the applicant in the main proceedings in Case C-58/06, that that reference is contrary to the principle of legal certainty in so far as it covers all the provisions of Directive 91/628.

p. 127

The Court of Justice held that a reference in a Regulation to the provisions of a Directive could make those provisions applicable, but only if the reference was to specific provisions of the Directive rather than being a general reference to the Directive. Further, to comply with the principle of legal certainty, the Regulation must not refer to provisions of the Directive that did not relate to its principal objective.

However, in C-176/12 *Association de Mediation Sociale v Union Locale des Syndicats CGT and others* [2014] 2 CMLR 41 (see also 4.1.4), the Court held that the reference in Article 27 of the Charter of Fundamental Rights of the European Union (on the Charter, see further 9.4) to the right of employees to information and consultation required more specific detail to be provided in EU or national law in order to be fully effective. The reference was therefore too general to make the rights in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002 L80/29, directly effective in proceedings between an employer and a trade union, both of which were private parties.

Thinking Point

> What conditions must a Directive satisfy in order to have direct effect? In what way do these differ from the conditions applicable to Treaty Articles, Regulations, and Decisions?

4.1.6 Summary of direct effect

The key features of the concept of direct effect are summarized in Figure 4.1.

Note

> Direct effect is one of the most important concepts in EU law. If you are having difficulty understanding this topic, review 4.1 in full before continuing on to the next topic, indirect effect.

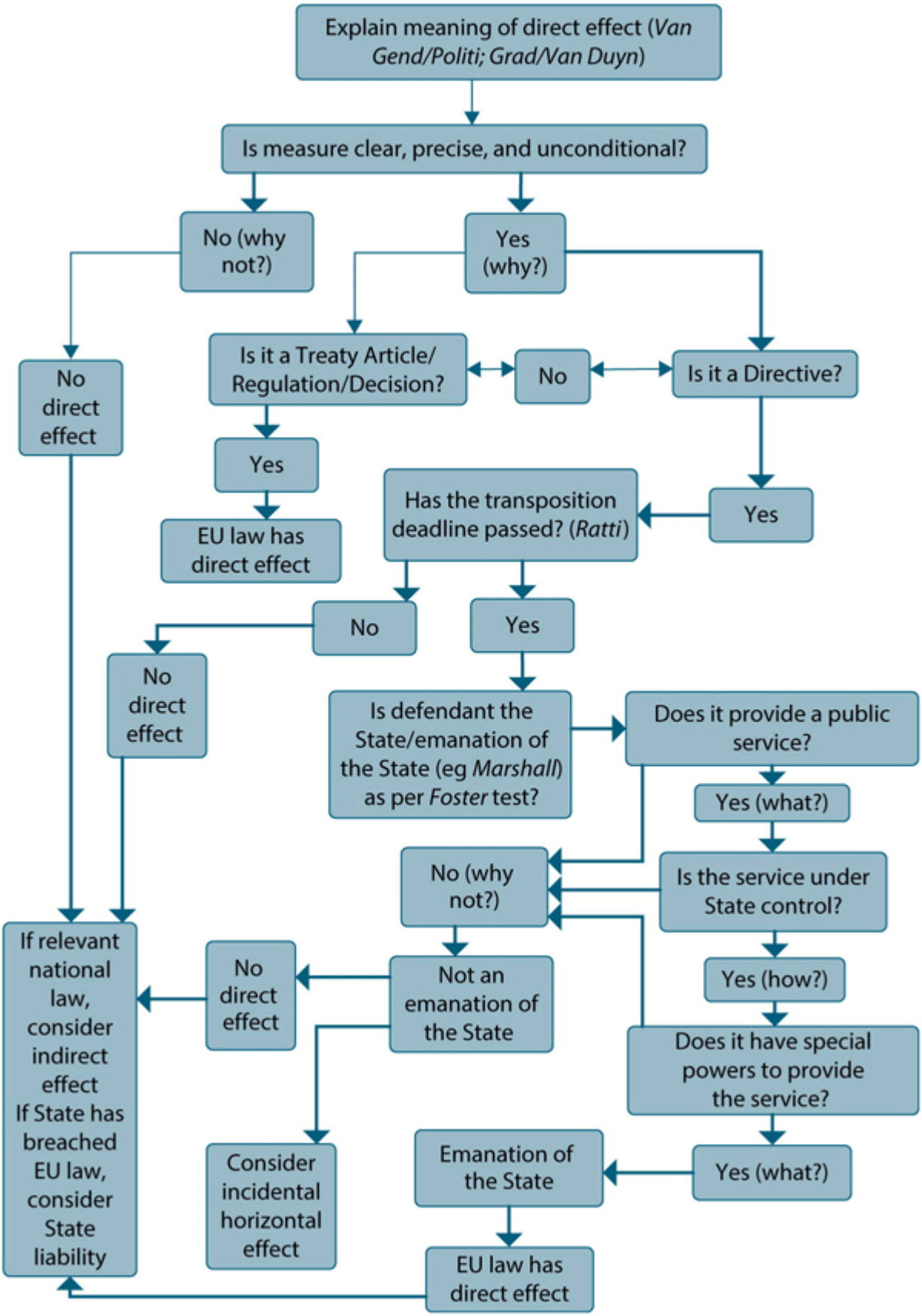

Figure 4.1 Summary of direct effect

p. 128

4.2 Indirect effect

The discussion of direct effect at 4.1 includes a number of points that are relevant to the related concept of indirect effect. First, direct effect was developed by the Court of Justice to make rights provided by EU law enforceable in the national courts. Second, not all provisions of EU law are directly effective in all circumstances. Third, Directives pose particular problems in relation to direct effect. Given that the Court's attempts to make rights enforceable through direct effect have not been successful in all cases, it is not surprising that has developed an alternative method of making rights enforceable or that this alternative has been particularly valuable to applicants seeking to enforce Directives. This alternative method is known as indirect effect.

p. 129 ↵ The term 'indirect effect' refers to the obligation on national courts to interpret national law consistently with EU law. EU law is then said to have an 'indirect effect' since it influences the interpretation of national law (as opposed to a direct effect where EU law is relied upon directly).

The obligation applies to both domestic legislation and domestic case law (see eg Case C-456/98 *Centrosteel v Adipol GmbH* [2000] ECR I-6007, para 17, quoted at 4.2.4).

4.2.1 The measures that may have indirect effect

4.2.1.1 Treaty Articles, Regulations, and Decisions

Although Treaty Articles, Regulations, and Decisions can in principle have indirect effect, it is a relatively unimportant concept in relation to them. This is because they will generally fail to have direct effect only if they are unclear or conditional, in which case they are unlikely to be of much assistance in interpreting national law.

4.2.1.2 Recommendations and Opinions

Although neither Recommendations nor Opinions can have direct effect (see 4.1.1), the Court of Justice ruled in Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407 (see also 4.1.1 and 3.4.2.4) that Recommendations could have indirect effect. It reasoned that since Recommendations must have some legal effect, they should be taken into consideration when interpreting national implementing measures (ie have indirect effect) and also when interpreting EU measures that the particular Recommendation was designed to supplement. As with the Court's ruling on direct effect in this case, this aspect of its ruling can be taken to apply equally to Opinions.

4.2.1.3 Directives

Indirect effect is of most importance in relation to Directives and so this topic will be examined in some detail. Since direct effect is restricted to those Directives that are sufficiently clear and unconditional, and may be relied upon only against the State or an emanation thereof (see 4.1.4), the doctrine of direct effect will often be

insufficient to make EU law rights contained in a Directive effective. However, the possibility exists that a Directive may have indirect effect—that is, it may be used in a national court in interpreting the relevant national legislation.

In Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (see also 4.2.2 and 4.3.2), two men were appointed as social workers and two disappointed female applicants alleged that they had been discriminated against contrary to the Equal Treatment Directive (Directive 76/207), which prohibited discrimination at work on grounds of sex and required that alleged victims be able to pursue claims before the courts. The applicants sought an order that they be offered a contract of employment or payment of six months' salary. Under German law, they were entitled only to recover their travel expenses by way of compensation. The German court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).

p. 130

Thinking Point

> While reading the following extract, consider why the Equal Treatment Directive was held not to be directly effective and what the doctrine of indirect effect required the national court to do.

Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891

> 26. However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the [EC] Treaty [now Article 4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 [EEC, now Article 288 TFEU].
>
> 27. On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

The Court of Justice held that the provisions of the Directive on the sanctions for discrimination were not sufficiently precise and unconditional to be directly effective. However, it held that national law should be interpreted in the light of its provisions, which required that an effective remedy be available. A nominal remedy, such as the award of travel expenses, was not adequate.

4.2.2 The national law to which indirect effect can apply

The domestic legislation in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (see also 4.2.1 and 4.3.2) had been passed specifically in order to transpose the Equal Treatment Directive, and so it was perhaps unsurprising that the Court of Justice took the view that it should be interpreted consistently with the Directive that it was designed to implement. However, in its judgment, the Court referred to 'national law *and in particular* the provisions of a national law specifically introduced in order to transpose Directive
p. 131 76/207' (*Von Colson*, at para 26, emphasis added). This implies that legislation *not* specifically passed ↵ to transpose a Directive could also fall to be construed in accordance with it. Interpreting such legislation consistently with a Directive might prove particularly difficult where the national legislation *predates* the Directive, because such legislation would not have been drafted with the intention of reflecting the Directive. Indeed, it might even predate the State in question joining the EU—or indeed predate the existence of the EU itself. For example, one of the oldest pieces of legislation in the UK, the Statute of Marlborough 1267, would have to be interpreted consistently with any relevant EU law if indirect effect were to be applied to it. However, the contrary argument is that if indirect effect were to be limited to legislation transposing a Directive, an unscrupulous Member State could simply fail to pass any such legislation and thus prevent actions against it based on the indirect effect of a transposing law.

The UK courts initially considered that indirect effect only applied to transposing legislation. In *Litster and others v Forth Dry Dock and Engineering Co Ltd* [1989] 2 CMLR 194 the House of Lords (now the Supreme Court) accepted the principle of indirect effect, but took the view that the duty of consistent construction imposed on national courts by *Von Colson* applied only to legislation 'issued for the purpose of complying with directives'. However, in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, the Court of Justice clarified its position and confirmed the wider application of indirect effect. Spanish law laid down a number of grounds on which a company could be struck off the register, including lack of cause (meaning that the company had no real function). The Spanish law predated First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ 1968 L65/8 (the First Company Law Directive), which omitted this particular ground and which Spain had failed to transpose. When Marleasing attempted to have La Comercial struck off for lack of cause, La Comercial sought to rely on the Directive. The Court of Justice confirmed that a Directive could not have horizontal direct effect and thus that this Directive could not have direct effect against Marleasing (see 4.1.5 on the lack of horizontal direct effect of Directives). However, it held that it could have indirect effect and therefore, as the following extract demonstrates, that the Spanish law, even though it predated the Directive, must be interpreted in accordance with the Directive. This meant that the Spanish law must be interpreted as not including lack of cause as a ground for striking off, and that La Comercial could therefore not be struck off on this ground.

Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135

> 7. However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
>
> p. 132 8. In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the [EC] Treaty [now Article 4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the [EEC] Treaty [now Article 288 TFEU].
>
> 9. It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

It is essential to remember that the Court of Justice has consistently attempted to promote and expand the application of EU law, and for it to have given indirect effect a narrower application would have gone against this policy. In both Joined Cases C-397–403/01 *Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, at para 118, and Case C-212/04 *Adeneler and others v Ellinikos Organismos Galaklos (ELOG)* [2006] ECR I-6057, at para 111 (see also 4.2.3), the Court of Justice held that national courts were required 'to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by domestic law, with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it'.

In the first case involving indirect effect to come before the UK courts after Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 CMLR 259, the House of Lords (now the Supreme Court) accepted that *Marleasing* required it to interpret the Sex Discrimination Act 1975 consistently with the Equal Treatment Directive (Directive 76/207), even though the

Act predated the Directive. However, where a contract is at issue, rather than legislation, the UK courts have held that this is not covered by the ruling in *Marleasing*. In *White (AP) v White and the Motor Insurers Bureau* [2001] 2 CMLR 1, the victim of a motor accident caused by an uninsured driver sought to rely on the agreement made between the Secretary of State for the Environment, Transport and the Regions and the Motor Insurers' Bureau (MIB) to implement the Second Motor Insurance Directive (discussed at 4.1.4.3 in relation to the Court of Justice judgment in C-413/15 *Farrell v Whitty and others* EU:C:2017:745 and also in relation to the decision of the domestic courts in *Byrne and others v Motor Insurers Bureau* [2007] EWHC 1268 (QB), [2007] 3 CMLR 15). The House of Lords (now the Supreme Court) ruled that there was no obligation to
p. 133 interpret the agreement in line with the Directive pursuant to *Marleasing*, since it was not ↵ legislation but a contract between citizens. However, in accordance with the usual domestic rules of statutory interpretation, a purposive approach to the interpretation of the agreement should be taken, and account must therefore be taken of the Directive since the purpose of the agreement was to give effect to the provisions of the Directive.

4.2.3 The time from which Directives can have indirect effect

Thinking Point

> What are the obligations of Member States in the period from the entry into force of the Directive to the deadline for its transposition into national law? If you cannot remember, look back at 3.4.2.

In Case C-212/04 *Adeneler and others v Ellinikos Organismos Galaklos (ELOG)* [2006] ECR I-6057 (see also 4.2.2 and 4.2.4), a number of applicants argued that ELOG's failure to renew their fixed-term employment contracts breached Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L175/43, which required the contracts to be interpreted as being of indefinite duration. The contracts were concluded after the entry into force of the Directive, but before expiry of the deadline for its transposition by Member States. The national court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) on, inter alia, whether the Directive had indirect effect prior to the expiry of the deadline.

Thinking Point

> While reading the following extract, consider what the Court of Justice ruled as to:

(a) the date from which a Directive had indirect effect; and

(b) why national courts were under an (almost) equivalent duty from an earlier date than this.

Case C-212/04 *Adeneler and others v Ellinikos Organismos Galaklos (ELOG)* [2006] ECR I-6057

113. With a view, more specifically, to determining the date from which national courts are to apply the principle that national law must be interpreted in conformity with Community law [now EU law], it should be noted that that obligation, arising from the second paragraph of Article 10 EC [now Article 4(3) TEU], the third paragraph of
p. 134 Article 249 EC [now Article 288 TFEU] and the directive in question itself, has been imposed in particular where a provision of a directive lacks direct effect, be it that the relevant provision is not sufficiently clear, precise and unconditional to produce direct effect or that the dispute is exclusively between individuals.

114. Also, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 43).

115. Accordingly, where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.

116. It necessarily follows from the foregoing that, where a directive is transposed belatedly, the date—envisaged by the referring court in Question 1(c)—on which the national implementing measures actually enter into force in the Member State concerned does not constitute the relevant point in time. Such a solution would be liable seriously to jeopardise the full effectiveness of Community law and its uniform application by means, in particular, of directives.

117. In addition, in light of the date envisaged in Question 1(a) and with a view to giving a complete ruling on the present question, it should be pointed out that it is already clear from the Court's case-law that the obligation on Member States, under the second paragraph of Article 10 EC, the third paragraph of Article 249 EC and the directive in question itself, to take all the measures necessary to achieve the result prescribed by the directive is binding on all national authorities, including, for matters within their jurisdiction, the courts (see, inter alia, *Inter-Environnement Wallonie*, paragraph 40, and *Pfeiffer and Others* [Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835], paragraph 110, and the case-law cited).

118. Also, directives are either (i) published in the Official Journal of the European Communities in accordance with Article 254(1) EC [now Article 297(1) TFEU] and, in that case, enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication, or (ii) notified to those to whom they are addressed, in which case they take effect upon such notification, in accordance with Article 254(3) EC [now Article 297(3) TFEU].

119. It follows that a directive produces legal effects for a Member State to which it is addressed—and, therefore, for all the national authorities—following its publication or from the date of its notification, as the case may be.

120. In the present instance, Directive 1999/70 states, in Article 3, that it was to enter into force on the day of its publication in the Official Journal of the European Communities, namely 10 July 1999.

121. In accordance with the Court's settled case-law, it follows from the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC and the directive in question itself that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any
p. 135 measures liable seriously to compromise the attainment of the result prescribed by it (*Inter-Environnement Wallonie*, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and *Mangold* [Case C-144/04 *Mangold v Helm* [2005] ECR I-9981], paragraph 67). In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive (*ATRAL*, paragraph 59 and *Mangold*, paragraph 68).

122. Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect (see *Francovich and Others* [Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357], paragraph 32; Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 20; and *Pfeiffer and Others*, paragraph 111), the obligation to refrain from taking measures, as set out in the previous paragraph, applies just as much to national courts.

123. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

124. In light of the foregoing reasoning, the answer to the first question must be that, where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive.

The Court of Justice held that the duty to interpret national law consistently with an EU Directive applied only after the expiry of the deadline for transposition of the Directive. However, it noted that the obligation on Member States to avoid measures liable to compromise the result prescribed by the Directive meant that

national courts must try to avoid reaching an inconsistent interpretation from the (earlier) date on which the Directive entered into force.

4.2.4 The extent of the duty: 'as far as possible'

The Court of Justice has held that there is no duty to interpret national law *contra legem* (meaning 'against the law')—see eg Case C-212/04 *Adeneler and others v Ellinikos Organismos Galaklos (ELOG)* [2006] ECR I-6057, at para 110 (see 4.2.2) and Case C-105/03 *Pupino* [2005] ECR I-5285, at para 47 (see also later in this section)—and that the duty of consistent interpretation only applies 'as far as possible'—see eg Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, at para 8. This means that indirect effect will not always enable the rights contained in a Directive to be enforced.

p. 136 ↵ The duty of consistent interpretation is clear and easily stated, as the Court of Appeal of England and Wales noted in *Google Inc v Vidal-Hall and others* [2015] EWCA Civ 311, [2015] 3 WLR 409.

Google Inc v Vidal-Hall and others [2015] EWCA Civ 311, [2015] 3 WLR 409

> 80. The *Marleasing* principle is not in doubt. It is that the courts of Member States should interpret national law enacted for the purpose of transposing an EU directive into its law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by the directive. The critical words (which have given rise to some difficulty) are 'so far as possible'. It is recognised that there are circumstances where it is not possible to interpret domestic legislation compatibly with the corresponding directive even where there is no doubt that the legislation was intended to implement the directive. If a national court is unable to rely on the *Marleasing* principle to interpret the national legislation so as to conform with the directive, the appropriate remedy for an aggrieved person is to claim *Francovich* damages against the state.

However, its application can be much more difficult, as can be seen in the following case.

Thinking Point

> While reading the following extract, compare the provisions of Spanish law and the Directive as to the grounds on which a company could be declared void and therefore struck off the register. Do you agree with the way in which the Court of Justice applied indirect effect?

Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135

3. It is apparent from the grounds set out in the order for reference that Marleasing's primary claim, based on Articles 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing La Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the creditors of Barviesa SA, a co-founder of the defendant company. La Comercial contended that the action should be dismissed in its entirety on the ground, in particular, that Article 11 of Directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them.

p. 137 ↵ [...]

10. With regard to the interpretation to be given to Article 11 of the directive, in particular Article 11(2)(b), it should be observed that that provision prohibits the laws of the Member States from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy.

11. According to the Commission, the expression 'objects of the company' must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association. It follows, in the Commission's view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founders' creditors.

12. That argument must be upheld. As is clear from the preamble to Directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure 'certainty in the law as regards relations between the company and third parties, and also between members' (sixth recital). Furthermore, the protection of third parties 'must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid'. It follows, therefore, that each ground of nullity provided for in Article 11 of the directive must be interpreted strictly. In those circumstances the words 'objects of the company' must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association.

The Court of Justice held that the Spanish law must be interpreted 'as far as possible' in accordance with the Directive (*Marleasing*, at para 8). It considered that this meant that since lack of cause was not a ground on which a company could be struck off under the Directive, La Comercial could not be struck off on this ground —even though Spanish law quite clearly provided for this possibility.

The Court of Justice's application of the law in *Marleasing* may be contrasted with that in Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911 in which, on comparable facts, the Court of Justice took a more restrictive approach to what was 'possible'. Wagner Miret was a senior manager in a company that became insolvent. Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1980 L283/23—the same Directive that was at issue in Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357 (discussed at 4.1.4; see also 5.2 and 5.3)—obliged Member States to set up a fund to recompense employees whose employers became insolvent. Although Spain had set up such a fund, it did not cover payments to higher management staff. The Spanish court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that Directive 80/897 was not sufficiently precise to be directly effective (see 4.1.4 on the conditions that must be met in order for Directives to have direct effect). It then considered whether the Directive could have *in*direct effect.

p. 138

Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911

14. The reply to the first two questions must therefore be that higher management staff may not be excluded from the scope of Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, as amended by Council Directive 87/164/EEC of 2 March 1987, where they are classified under national law as employees and they are not listed in section I of the Annex to the directive.

15. By the third question, the national court in essence asks whether higher management staff are entitled, by virtue of the directive on the insolvency of employers, to request the payment of amounts owing to them by way of salary from the guarantee body established by national law for the other categories of employee or, if this is not the case, whether they are entitled to request the Member State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

16. It should first be observed that Spain has established no guarantee institution other than the Fondo de Garantía Salarial.

17. Secondly, in its judgment of 19 November 1991, (Cases C-6 & 9/90) *Francovich v Republic* [1991] 1 ECR 5357, the Court held that under Article 5 of the directive on the insolvency of employers, the Member States have a broad discretion with regard to the organization, operation, and financing of the guarantee institutions. The Court concluded that even though the provisions of the directive are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely, as against the State, on those provisions before the national courts.

18. With regard, more particularly, to the problem raised by the national court, it should be pointed out that the directive on the insolvency of employers does not oblige the Member States to set up a single guarantee institution for all categories of employee, and consequently to bring higher management staff within the ambit of the guarantee institution established for the other categories of employee. Article 3(1) leaves it to the Member States to adopt the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims.

19. From the discretion thus given to the Member States it must therefore be concluded that higher management staff cannot rely on the directive in order to request the payment of amounts owing by way of salary from the guarantee institution established for the other categories of employee.

20. Thirdly, it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the [EEC] Treaty [now Article 288 TFEU].

p. 139

21. The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned.

22. It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides. If that is the case, it follows from the *Francovich* judgment, cited above, that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

23. The reply to the third question must therefore be that (a) higher management staff are not entitled, under Directive 80/987, to request payment of amounts owing to them by way of salary from the guarantee institution established by national law for the other categories of employee, and (b) in the event that, even when interpreted in the light of that directive, national law does not enable higher management staff to obtain the benefit of the guarantees for which it provides, such staff are entitled to request the State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

The Court of Justice considered that since the relevant Spanish law quite clearly excluded higher management staff, it could not be interpreted as permitting higher management employees to claim from it, despite the obligation in the Directive to establish a fund that covered *all* employees. The only possible remedy for Wagner Miret was that the State should recompense him for his losses, since its failure to transpose the Directive had caused his loss (see further Chapter 5 on the availability of actions against the State).

It is interesting to note, from a UK perspective, that the Court of Appeal in *Google Inc v Vidal-Hall and others* [2015] EWCA Civ 311, [2015] 3 WLR 409 (see also earlier), held that a consistent interpretation might be achievable even if part of a domestic law had to be disapplied, so long as this did not alter a key feature of the domestic legislation and was not inconsistent with its key principles.

Unsurprisingly, the duty to reach a consistent interpretation is greater if the national law at issue was intended to implement EU law. For example, in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, at para 12, the Court of Justice stated that 'in applying the national law *and in particular the provisions of a national law specifically introduced in order to implement the directive*, national courts are required to interpret their national law in the light of the wording and the purpose of the directive' (emphasis added) in order to achieve the result prescribed by the Directive. The duty is even greater—and indeed perhaps absolute—where the national law not only implements EU law, but also reproduces it word for word. In such circumstances, the Court of Justice
p. 140 held in C-306/12 *Spedition Welter GmbH v Avanssur SA* EU:C:2013:650, ↵ [2014] Lloyd's Rep IR 360 that the national court was required to interpret national law consistently both with the Directive in question (Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, OJ 2009 L263/11), and with the German law that transposed it. This was so even though the Directive (and the transposing law) authorized a claims representative to accept service of judicial documents, whereas German law on civil procedure required an agent to be authorized by formal act to accept service.

Review Question

Suppose that you have recently suffered from a respiratory infection contracted while swimming in polluted seawater off a beach in Ireland. Tests indicate that the water contains 2.5 per cent blisterium, a chemical known to produce respiratory infections. (Fictitious) Directive 00/00 provides that the presence of any amount over 2 per cent leads to the awarding of compensation to anyone contracting infection as a consequence. The (fictitious) Irish Sea Act 1827 provides that presence of any amount over 4 per cent triggers a mandatory procedure to reduce the proportion of blisterium to acceptable levels. The Act does not refer to compensation. How, if at all, could indirect effect apply in this scenario?

Answer: National courts are under a duty to interpret domestic legislation consistently with EU law (*Von Colson*) and thus to interpret the Act in line with the Directive. This is so regardless of whether the domestic law was intended to transpose the Directive and even where it predates the Directive (*Marleasing*), so the fact that the Act dates from 1927, long before the Directive was adopted, does not prevent the duty from arising. However, the duty applies only 'as far as possible' (per eg *Marleasing*). Two questions therefore arise.

(a) Is it possible to interpret 4 per cent as 2 per cent?

(b) Is it possible to interpret the Act as granting compensation even though its wording includes no such provision?

The answer is not clear-cut.

On one hand, in *Marleasing*, the Court of Justice held that it was possible to interpret a Spanish law that permitted a company to be declared void for lack of cause as not in fact permitting this, consistently with a Directive that contained no such provision, on the basis that the Directive's provisions were clear. Here, the Directive clearly specifies 2 per cent and the provision of compensation, and thus it could be argued that the Act must be interpreted accordingly, particularly since the Act actually contains broadly similar provisions—ie it does restrict blisterium to a minimum percentage and it does provide for serious consequences if this is exceeded.

On the other hand, in *Wagner Miret*, the Court of Justice concluded that it was not possible to interpret a national law that excluded higher management employees from compensation consistently with a Directive that did not. On this basis, it could be argued that 4 per cent is quite clear and cannot be interpreted as 2 per cent. The position as to compensation may be different; while it could similarly be argued that the lack of provision in the Act is also clear and cannot be interpreted as meaning that compensation should be provided, it could alternatively be argued that this omission creates a neutral position on compensation under the Act and that, since indirect effect imposes a positive duty on national courts where 'possible', the Act must be interpreted so as to provide compensation.

p. 141 ↵ Although it can be difficult to decide when a consistent interpretation is 'possible' and when it is not, it should always be remembered that it is not necessary for a consistent interpretation to be the only, or even the most obvious, interpretation. If there are several 'possible' interpretations, one of which is consistent with EU law, it is this consistent interpretation that must be adopted (see eg *Webb v EMO Air Cargo (UK) Ltd* [1996] 2 CMLR 990 (discussed at 4.2.2)).

Although, in the cases just discussed, the applicants sought to establish the indirect effect of EU law in order to enforce their rights under it, indirect effect can also be used to enforce EU law *against* an individual or business. This is a logical consequence of the horizontal application of indirect effect: whereas Directives can have direct effect only against the State or an emanation of the State (see 4.1.4), they (and all other types of EU law) can have indirect effect against any potential defendant because it is national law that is being enforced directly, not the Directive itself.

There is, however, a restriction on the indirect effect of Directives against individuals. In Case 14/86 *Pretore di Salò v Persons unknown* [1987] ECR 2545, the defendant was prosecuted for an offence under Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life, OJ 1978 L222/1. The national court made a preliminary reference under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) on whether, in the absence of specific transposing measures, national law must be interpreted so as to support such a prosecution. The Court of Justice concluded that a Directive 'cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive' (*Pretore di Salò*, at para 20). As the following extract demonstrates, the Court took a similar approach in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, in which the defendant was prosecuted for an offence under Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, OJ 1980 L229/1. The alleged offence took place after the deadline for transposition of the Directive had passed, but before the Netherlands had amended its national legislation to comply with the provisions of the Directive.

Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969

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

In *Kolpinghuis Nijmegen*, the Court of Justice invoked not only the principle of legal certainty in support of its argument that Directives could not have the indirect effect of imposing criminal liability, but also the principle of **non-retroactivity**.

non-retroactivity

The principle of the non-retroactive application of the criminal law means that an individual can only be prosecuted for an offence if it was an offence at the date they committed the act or omission constituting the offence, and not if it only became an offence after that date. This principle is now enshrined in Article 47 of the EU Charter of Fundamental Rights of the European Union (see further 9.4 on the Charter).

p. 142

Thinking Point

> What is the principle of legal certainty? If you have difficulty in answering this question, review 3.4.5.

However, in Case C-105/03 *Pupino* [2005] ECR I-5285 (see also earlier in this section), the Court of Justice held that this exception—to the duty to give indirect effect to EU law wherever possible—was limited to criminal liability and did not apply to the conduct of criminal proceedings. In that case, criminal proceedings were brought against a teacher, alleging ill-treatment of a number of pupils who were under 5 years old. The prosecution asked the judge to take the testimony of the children prior to the trial and in special facilities, on account of their extreme youth and psychological state. However, the case did not fall within the category of those for which such special arrangements were made available under national law and so the national court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) on the correct interpretation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L315/57—a measure equivalent to a Directive under Article 34 TEU (1992), now repealed—on the status of victims in criminal proceedings. The Court of Justice held that although legal certainty and non-retroactivity prevented the doctrine of indirect effect from leading to the imposition or increase of criminal liability on the basis of EU law alone, independently of national implementing measures, the issue before it did not involve the imposition of such liability, but merely a procedural issue (*Pupino*, at para 46). The national court must therefore interpret the national law at issue, as far as possible, in the light of the wording and purpose of the Framework Directive, which required that young children claiming to be victims of ill-treatment be able to give their evidence with an appropriate level of protection.

It is less clear whether there is a similar restriction on the use of indirect effect to impose civil, as opposed to criminal, liability on an individual or business. In Case C-168/95 *Arcaro* [1996] ECR I-4705, a case involving criminal proceedings brought under Council Directive 76/464/EEC of 4 May 1976 on pollution caused by

certain dangerous substances discharged into the aquatic environment of the Community, OJ 1976 L129/23, the Court of Justice ruled that a Directive could not be used to interpret national law so as to give rise to the imposition of criminal liability, but certain of its comments *appear* to apply also to civil liability, as the following extract demonstrates.

Case C-168/95 *Arcaro* [1996] ECR I-4705

> 42. However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (see the judgment in *Kolpinghuis Nijmegen*, [Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969], paragraphs 13 and 14).

p. 143

The Court's reference to the restriction on the application of indirect effect 'especially' in cases of criminal liability suggests that there may *also* be restrictions in other cases, and its reference to restrictions on the indirect effect of 'an obligation laid down by a directive which has not been transposed' is apt to include civil obligations, as well as criminal liability. However, the Court's judgment in the later case of Case C-456/98 *Centrosteel v Adipol GmbH* [2000] ECR I-6007, a case involving civil liability, suggests that the restriction on indirect effect in cases of criminal liability (ie to prevent national law from being interpreted consistently with a Directive where this would result in the imposition of criminal liability) may not apply to prevent the imposition of civil liability. In that case, Centrosteel, which had acted as commercial agent for Adipol, claimed against it for payment of commission. Under Italian law, Centrosteel was prohibited from recovering sums due to it under the agency contract because it was not registered as a commercial agent. However, making the validity of an agency contract conditional on the registration of the agent was prohibited by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L382/17, and the Court of Justice held that the national court must interpret national law consistently with the Directive.

The Court of Justice's reasoning did not explicitly address the principle of whether an untransposed Directive could impose civil liability on an individual or business, but its ruling had the result that such liability was imposed on Adipol because Adipol was obliged to pay the amount due to Centrosteel under the contract whereas, under Italian law interpreted without reference to the Directive, the contract would have been unenforceable and Adipol would not have been obliged to pay.

4.2.5 The relationship between indirect effect and the supremacy of EU law

Thinking Point

> How does the concept of indirect effect relate to what you learned about the sovereignty of EU law? If you have difficulty in answering this, look back at 3.1.

First, indirect effect is a practical manifestation of the sovereignty of EU law (see further 3.1.2), because an interpretation of national law that is consistent with EU law takes precedence over an interpretation that does not. Second, where national law clearly conflicts with EU law and cannot be interpreted consistently with it, the national court is under a duty to refuse to apply the conflicting elements of national law.

p. 144 ↵ The duty on national courts to disapply national law that conflicts with EU law was established in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* (*'Simmenthal II'*) [1978] ECR 629 (see also 3.1.2), in which the applicants sought repayment of a fee on their imports that the Court had earlier ruled, in Case 35/76 *Amministrazione delle Finanze dello Stato v Simmenthal* (*'Simmenthal I'*) [1976] ECR 1871, to be contrary to EU law on the free movement of goods (see Chapter 10).

Thinking Point

> While reading the following extract, consider why the Court of Justice considered that Italian law that was contrary to EU law must be disapplied.

Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* (*'Simmenthal II'*) [1978] ECR 629

14. Direct applicability in such circumstances means that rules of Community law [now EU law] must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.

15. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.

16. This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.

17. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community [now Union] provisions.

18. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.

19. The same conclusion emerges from the structure of Article 177 of the [EEC] Treaty [now Article 267 TFEU] which provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of interpretation or validity relating to Community law is necessary to enable it to give judgment.

p. 145

20. The effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court.

21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

> 22. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.
>
> 23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of community law were only temporary.
>
> 24. The first question should therefore be answered to the effect 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 refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

The Court of Justice based the requirement to disapply national law on the basis of 'the precedence of [EU] law' (*Simmenthal II*, at para 17) and the need to ensure the effectiveness of what is now Article 267 TFEU (see further Chapter 6). In subsequent cases, the Court has emphasized that the obligation on national courts to disapply conflicting national law arises only where that national law cannot be interpreted consistently with EU law (see eg C-306/12 *Spedition Welter GmbH v Avanssur SA* EU:C:2013:650, [2014] Lloyd's Rep IR 360, at para 28).

Where the conflicting national law imposes a duty or prohibition on an applicant that is contrary to EU law, the applicant could benefit from it being disapplied. For example, in Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd* ('*Factortame II*') [1991] ECR I-3905 (see further 3.1.2, 5.4.1, and 6.10.2), the applicants were Spanish fishermen who were prohibited from fishing in British waters by the provisions of the Merchant Shipping Act 1988. They therefore sought (successfully) to have the Act disapplied so that they could legally resume fishing.

This situation of direct conflict should be distinguished from a situation in which national law gives the applicant rights that are not as favourable as those granted by EU law. In this latter situation, the applicant could actually be *worse off* if the national law is disapplied. This is because if the EU measure in question has no direct or indirect effect, the applicant's only rights are under national law. In these circumstances, national law would not be disapplied.

p. 146

Note

> The indirect effect of EU law is of considerable practical importance. If you have difficulty in understanding indirect effect or its application (and most students do!), you should review 4.2 before going on to the next topic.

4.2.6 Summary of indirect effect

The key features of the concept of indirect effect are summarized in Figure 4.2.

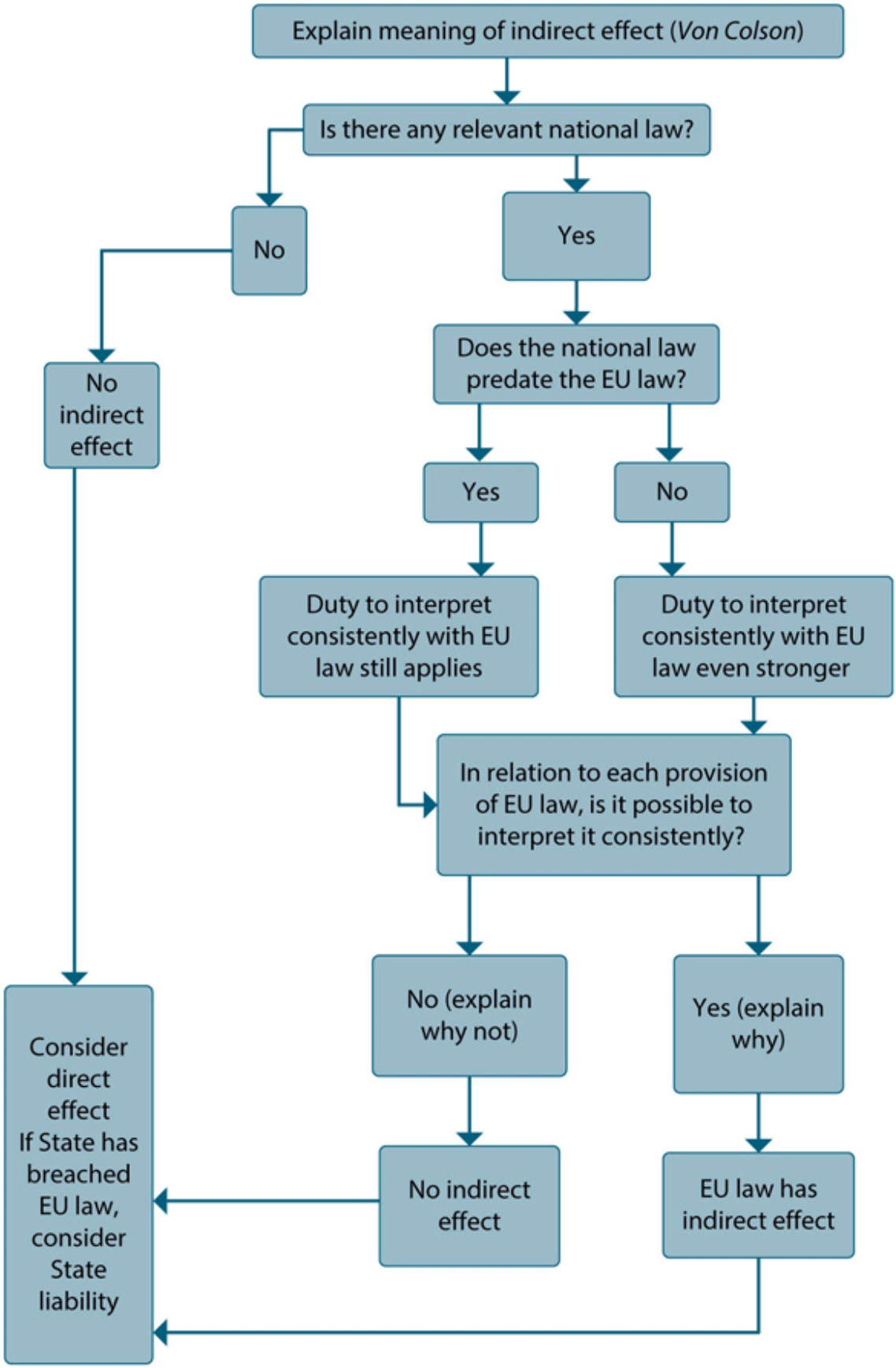

Figure 4.2 Summary of indirect effect

p. 147

4.3 Remedies

The obligation on Member States to ensure that a remedy is available in the national courts for breaches of EU law is enshrined both in Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (on the Charter, see further 9.4).

Article 19 TEU

> 1. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Charter of Fundamental Rights of the European Union

Article 47

Right to an effective remedy and to a fair trial

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

A remedy may be awarded in the national courts for a breach of EU law where:

- the EU measure is directly effective and has been breached by the defendant;
- the EU measure is indirectly effective and national law, interpreted consistently with it, has been breached by the defendant; or
- a Member State has breached its obligations under EU law and is liable in damages as a result (see further Chapter 5).

Damages or the annulment of a provision of EU law may also be awarded for breaches of EU law committed by the EU itself, but actions against the EU must be brought before the CJEU, which will apply the relevant remedy under EU law (see Chapters 7 and 8).

In an action in the national courts, the award of any remedy for breach of EU law is governed by national law (see eg Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989). This is perhaps surprising, given that the cause of action is based directly or indirectly on EU law and given the Court of Justice's enthusiasm for making EU law rights enforceable.

Thinking Point

> While reading the following extract, consider why the Court of Justice held that the award of a remedy is governed by national law.

p. 148

Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

> 5. Applying the principle of cooperation laid down in Article 5 of the [EC] Treaty [now Article 4(3) TEU], it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law [now EU law].
>
> Accordingly, in the absence of Community [now Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.
>
> Where necessary, Articles 100 to 102 and 235 of the [EEC] Treaty [now Articles 115–117 and 352 TFEU] enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.
>
> In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.
>
> The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect …

However, this approach poses potential threats to the uniform application of EU law and even to the effective protection of rights granted by it. The Court of Justice has therefore attempted to mitigate these problems by laying down a number of principles with which the award of a remedy by the national courts must comply. These principles have been developed somewhat ad hoc by the Court over a number of years, and are not as clear and coherent as they might be; indeed, in some respects they appear to conflict.

Before discussing these principles, it is important to note the strictness of the obligation to provide a remedy for breach of directly effective EU law.

Thinking Point

Suppose that a directly effective Directive is due to be replaced by a Regulation. The Regulation has been enacted by the EU, but has not yet come into force. If a Member State has not complied with the Directive, but has already complied with the Regulation, do you think that the Member State should still be held in breach of the Directive?

These were broadly the facts in C-64/20 *UH v An tAire Talmhaíochta and others* EU:C:2021:207. In that case the Court of Justice held that until the Directive was repealed by the Regulation, the provisions of the Directive
p. 149 remained binding so for so long as the Court itself had not ↵ ruled those provisions invalid. It noted that 'the Court [of Justice] alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it' (*UH* at para 36), but that in the absence of such a suspension the Member State was legally obliged to remedy its incorrect transposition of the Directive. The Court expressly ruled that it was irrelevant that transposition of the Directive might be disproportionate, whether owing to the cost of the transposition or to it serving no purpose due to the forthcoming application of a replacement Regulation with which national law was already compatible.

4.3.1 Equivalence

The Court of Justice has held on many occasions that any remedy for breach of EU law must be available on conditions as favourable as those applicable to a remedy for breach of an equivalent national law. For example, in Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 (see 4.3), the applicants claimed for the repayment of certain customs duties that had been levied on them and which had been declared by the Court of Justice to be contrary to Article 30 TFEU (see 10.4). The action was dismissed for failure to bring it within the applicable time limits and the applicants alleged that this dismissal was contrary to EU law. The Court of Justice held that an action based on EU law could legitimately be dismissed on such a basis, because the procedure leading to the award of a remedy was governed by national law—but only as long as certain conditions were met. One of the conditions set by the Court in this case, the principle of effectiveness, is discussed at 4.3.2; the other is the principle of equivalence.

p. 152

Thinking Point

> While reading the following extract, note the wording used by the Court of Justice to explain the principle—a formulation that appears in many of its judgments.

Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

> 5. … The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.
>
> This is not the case where reasonable periods of limitation of actions are fixed.
>
> The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned.
>
> 6. The answer to be given to the first question is therefore that in the present state of Community law [now EU law] there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.

p. 150

In Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951 (see also 4.3.2), the Court of Justice re-examined the principle of equivalence. In that case, the applicant had brought an action to recover charges levied in contravention of EU law. The action was dismissed because it had not been brought within the three-year time limit applicable under national law to claims for repayment from the State, although it had been brought within the ten-year time limit applicable to claims between private parties. The applicant argued that the ten-year time limit should be applied because the application of the three-year time limit discriminated against claims based on EU law.

Thinking Point

> While reading the following extract, consider why the Court of Justice reached the decision that the application of the shorter time limit in this case was compatible with the principle of equivalence.

Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951

> 24. It is clear from those judgments that a Member State may not adopt provisions making repayment of a tax held to be contrary to Community law [now EU law] by a judgment of the Court, or whose incompatibility with Community law is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question.
>
> [...]
>
> 36. Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues (see, to that effect, Joined Cases 66/79, 127/79, and 128/79 *Amministrazione delle Finanze dello Stato v Salumi* [1980] ECR 1237, paragraph 21). That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law.
>
> 37. Thus, Community law does not preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.

p. 151 ↵ The Court concluded that it was not contrary to EU law for national courts to apply a stricter time limit to an action based on EU law than to some other actions, so long as the stricter time limits were also applied to similar actions based on national law.

The Court of Justice provided guidance on how a national court should determine an appropriate comparative action under national law in Case C-326/96 *Levez v Jennings Ltd* [1998] ECR I-7835.

Thinking Point

> While reading the following extract, make a note of the guidance offered by the Court of Justice on whether actions can be regarded as equivalent.

Case C-326/96 *Levez v Jennings Ltd* [1998] ECR I-7835

> 43. In order to determine whether the principle of equivalence has been complied with in the present case, the national court—which alone has direct knowledge of the procedural rules governing actions in the field of employment law—must consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Palmisani* [Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025], paragraphs 34 to 38).
>
> 44. Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts (see, *mutatis mutandis*, *Van Schijndel and Van Veen* [Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705], paragraph 19).

4.3.2 Effectiveness

The Court of Justice has repeatedly stated that national laws on the award of a remedy for breach of EU law must not interfere with the 'effectiveness' of rights guaranteed under that law. However, the standard of effectiveness is not particularly high. In Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 (see also 4.3 and 4.3.1), the Court of Justice explained that the principle of effectiveness would be breached only where 'the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect' (*Rewe-Zentralfinanz eG and Rewe-Zentral AG*, at para 5). In subsequent cases such as Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951 (see also 4.3.1), the Court refined the phrase used to encapsulate the principle of equivalence.

p. 155

Thinking Point

> While reading the following extract, make a note of the phrase used by the Court of Justice to summarize the principle of effectiveness—a formulation that has appeared in many of its subsequent judgments.

Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951

> 34. This diversity between national systems derives mainly from the lack of Community [now EU] rules on the refunding of national charges levied though not due. In such circumstances, as pointed out in paragraph 19 of this judgment, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law [now EU law], provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

One type of remedy that has led to many allegations of breach of the principle of effectiveness is the award of damages, and national restrictions on the availability or amount of damages have been held to impair the effectiveness of EU law on a number of occasions. For example, in Case C-271/91 *Marshall v Southampton and South West Area Health Authority (No 2)* [1993] ECR I-4367 (for the facts, see *Marshall (No 1)*, discussed at 4.1.4), Marshall disputed the severe restrictions that the Sex Discrimination Act 1975 imposed on the amount of damages that could be awarded to her and argued that interest should also be awarded. The House of Lords (now the Supreme Court) made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).The Court of Justice ruled that the UK Act conflicted with the UK government's obligation under what is now Article 288 TFEU (see further 3.4.2) to ensure that the objectives of Directives were fulfilled. The objective of the Equal Treatment Directive was to achieve real equality of opportunity, which required that where such equality had not been achieved, the victim of discrimination could be reinstated or compensated in full for the loss and damage sustained.

Similarly, in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (see also 4.2.1.3 and 4.2.2), two women who had attended job interviews, but failed to secure the post, brought claims for damages on the grounds of sex discrimination. The Court of Justice ruled that the compensation must be adequate in relation to the damage sustained and that a German law which limited the amount of compensation to a 'purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application' (*Von Colson*, at para 24), did not effectively protect the applicants' rights under EU law.

 ↵ Similar problems occur in the context of business as well as personal losses. For example, in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* ('*Factortame III*') [1996] ECR I-1029 (see also 4.3.4, 5.4.1, and 5.5), the Court of Justice ruled that the total exclusion of loss of profit as a head of damages that could be awarded for breach of EU law was incompatible with EU law because '[e]specially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible' (*Factortame III*, para 87).

However, limited damages may nonetheless provide an effective remedy for breaches considered to be minor. In Case C-180/95 *Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195, the Court of Justice ruled that a national law that prescribed an upper limit of three months' salary as compensation for sex discrimination in the appointment of candidates to a job was contrary to EU law. However, the Court qualified this ruling by stating that such a rule was only invalid insofar as it applied to applicants who would have obtained a post had it not been for the discriminatory selection process. Where an applicant would not have obtained the position anyway and therefore suffered little or no loss, the ceiling of three months' salary was compatible with EU law.

In Joined Cases C-295, 296, & 298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, a number of policyholders claimed damages in respect of increased insurance premiums that had been payable pursuant to an agreement between certain insurance companies, which the Court of Justice had ruled to be in breach of what is now Article 101 TFEU (see Chapter 13). Italian law did not recognize a right to punitive damages. On a further reference under Article 267 TFEU to the Court of Justice (see further Chapter 6 on the preliminary reference procedure), the Court ruled that the principle of effectiveness required that the policyholders be able to seek compensation not only for their actual loss, but also for loss of profit (as in *Factortame III*) *plus* interest (as in *Marshall No 2*) (see earlier in this section).

Similarly, in Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 (see 15.11) the Court of Justice held that the fact that Crehan had been a party to an anti-competitive agreement did not prevent him from subsequently relying on Treaty provisions that invalidated the agreement, or from seeking damages for loss caused by the agreement. The Court held that the effectiveness of the prohibitions on anti-competitive agreements in what is now Article 101 TFEU (see Chapter 13) would be impaired if some individuals, for example those party to the agreements, could not claim damages for losses caused by such agreements.

Claimants have also sought to rely on the principle of effectiveness in order to overcome another procedural hurdle, that of time limits. As with the award of damages, any time limits on bringing an action are governed by national procedural rules (three years for most actions in the UK), but these will not apply if they make it 'virtually impossible or excessively difficult' to exercise EU law rights.

In Case C-208/90 *Emmott v Minister for Social Welfare and another* [1991] ECR I-4269, Ireland had failed to transpose a Directive equalizing disability benefits until two years after the deadline by which it should have been transposed (see 3.4.2 on the transposition of Directives,). Emmott claimed compensation in respect of benefits underpaid during this two-year period, but the Irish authorities alleged that her claim was outside the three-month time limit set by Irish law. This time limit ran from when the grounds for the application
p. 154 arose. The national court made a preliminary reference to the Court of Justice under Article 267 TFEU
↵ (see further Chapter 6 on the preliminary reference procedure). The Court of Justice ruled that the time limit should not start to run until the Directive had been properly transposed, and therefore the claim was admissible.

In contrast, in Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951 (see earlier in this section and 4.3.1) the Court of Justice ruled that a time limit of three years on the commencement of actions to recover charges that had been levied in contravention of EU law was compatible with EU law, even though the relevant Directive had not been properly transposed into national law at the

time those charges were levied. This was because the charges had been levied between 1986 and 1992, and the Directive was correctly transposed in 1993, so it was still possible to bring an action for recovery of some of the charges once the Directive had been transposed (albeit not for all of them).

Review Question

> What was the key distinction between *Emmott* and *Edis*?
>
> *Answer*: In both cases, the applicants were unaware of their EU law rights at the time those rights were infringed by the defendant Member States, because those Member States had failed to transpose the relevant Directive by the deadline date. However, the time limit in *Emmott* made it impossible for Emmott to exercise her EU law rights, because the three-month time limit for her entire claim had expired long before the relevant Directive was transposed, and therefore before she could have become aware of her rights. In contrast, the time limit in *Edis* had expired only in relation to the earliest unlawful charges, and an action in respect of later levied charges was still possible.

Thus where a time limit on the bringing of another action does not make the exercise of EU law rights *virtually impossible*, that time limit will not be in conflict with EU law and will therefore be valid. So, in other cases that were similar to *Edis*, such as Case C-410/92 *Johnson v Chief Adjudication Officer* [1994] ECR I-5493 and Case C-338/91 *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel* [1993] ECR I-5475, the Court of Justice has made it clear that time limits that do not prevent the bringing of an action at all, but simply limit the arrears of benefit payable, do not breach the principle of effectiveness.

Although much of the case law on the principle of effectiveness relates to the issues of damages or time limits, the principle of effectiveness can impact on a variety of other aspects of national law on the award of a remedy.

For example, alternative dispute resolution (ADR) procedures were at issue in Joined Cases C-317–320/08 *Alassini and others v Telecom Italia SpA* [2010] ECR I-2213, in which the applicants alleged breaches of contracts concerning the provision of telephone services. Italian law imposed a mandatory out-of-court procedure as a condition for the admissibility of the action before the Italian courts. The applicants failed to initiate that out-of-court procedure and the Italian court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) as to the correct interpretation of Directive 2000/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ 2002 L108/51 (the Universal Services Directive) on the use of out-of-court procedures in disputes concerning the provision of communications services.

Thinking Point

> While reading the following extract, consider what reasons the Court of Justice gave for holding that the principle of effectiveness was not breached.

Joined Cases C-317–320/08 *Alassini and others v Telecom Italia SpA* [2010] ECR I-2213

52. As regards the principle of effectiveness, it is admittedly true that making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals by the Universal Service Directive.

53. However, various factors show that a mandatory settlement procedure, such as that at issue, is not such as to make it in practice impossible or excessively difficult to exercise the rights which individuals derive from that directive.

54. First, the outcome of the settlement procedure is not binding on the parties concerned and thus does not prejudice their right to bring legal proceedings.

55. Secondly, the settlement procedure does not, in normal circumstances, result in a substantial delay for the purposes of bringing legal proceedings. The time-limit for completion of the settlement procedure is 30 days as from the date of the request and, on expiry of the deadline, the parties may bring legal proceedings even if the procedure has not been completed.

56. Thirdly, for the duration of the settlement procedure, the period for the time-barring of claims is suspended.

57. Fourthly, there are no fees for the settlement procedure before the Co.re.com. In the case of the settlement procedures before other bodies, there is nothing in the documents before the Court to suggest that they entail significant costs.

58. However, the exercise of rights conferred by the Universal Service Directive might be rendered in practice impossible or excessively difficult for certain individuals—in particular, those without access to the Internet—if the settlement procedure could be accessed only by electronic means. It is for the referring court to ascertain whether that is the case, having especial regard to Article 13(1) of the dispute settlement rules.

59. By the same token, it is for the referring court to ascertain whether, in exceptional cases where interim measures are necessary, the settlement procedure allows, or does not preclude, the adoption of such measures.

60. In those circumstances, it must be held that the national legislation at issue in the present case complies with the principle of effectiveness in so far as electronic means is not the only means by which the settlement procedure may be accessed and in so far as interim measures are possible in exceptional cases where the urgency of the situation so requires.

p. 156

61. Secondly, it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and

which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (see *Mono Car Styling*, paragraph 47 and the case-law cited).

62. In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.

63. Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, Case C-28/05 [*Dokter and others*] [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty v United Kingdom*, no. 37112/97, §33, ECHR 2001-XI (extracts)).

64. However, as the Italian Government observed at the hearing, it must first be noted that the aim of the national provisions at issue is the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, and they thus pursue legitimate objectives in the general interest.

65. Secondly, the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem—in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment—disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.

66. In the light of the foregoing, it must be held that the national procedure at issue in the main proceedings also complies with the principle of effective judicial protection, subject to the conditions referred to in paragraphs 58 and 59 of this judgment.

Another area where the principle of effectiveness has impacted national law governing the award of remedies is the availability of legal aid. In Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* [2010] ECR I-3849 (see also 9.4.4) the applicant company applied for legal aid to pursue an action for Member State liability in damages (see Chapter 5). German law permitted proceedings to be brought only if the applicant paid court costs in ↵ advance, but this payment could be waived if the applicant was legally

aided. However, a legal entity such as a company was eligible for legal aid only if, in addition to it being unable to pay the costs of the proceedings, failure to pursue the action would be contrary to the public interest. The applicant's claim for legal aid was rejected on the ground that discontinuance of the action was not contrary to the public interest. The German court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) as to the correct interpretation of the principle of effectiveness in these circumstances. The Court made extensive reference to the principle of effectiveness enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (set out at 4.3; on the Charter generally, see further 9.4), to which it had also referred in Joined Cases C-317–320/08 *Alassini and others v Telecom Italia SpA* [2010] ECR I-2213, and ruled that the principle of effectiveness could be relied upon by legal persons. However, whether legal aid was necessary in order to ensure the effectiveness of EU law rights in any particular case depended on the specific facts of that case.

Thinking Point

> While reading the following extract, note the factors that the Court laid down for a national court to consider when assessing whether an award of legal aid was necessary to ensure the effectiveness of EU law in relation to a particular applicant.

Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* [2010] ECR I-3849

> 58. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.
>
> 59. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.
>
> 60. With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

p. 158

4.3.3 New remedies need not be created

The principle that new remedies need not be created was stated by the Court of Justice in Case 158/80 *Rewe Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt* [1981] ECR 1005. In that case, cruises that went beyond German territorial waters had been organized by certain retailers so that goods could be technically 'exported', traded, and 'imported' again, thus incurring certain customs and tax advantages. Land-based retailers claimed that this practice was in breach of a number of EU Regulations and Directives on exemptions from import duties. The German court made a reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) on the interpretation and validity of the relevant EU laws, and on the remedies that should be available for any breach of them.

The Court held that all actions available to enforce national law must be available to enforce EU law, but acknowledged that national courts need not create new remedies to ensure that EU law is fully effective if those remedies do not exist in national law.

This principle may, on occasion, conflict with the principle of effectiveness, as the Court of Justice noted in Case C-432/05 *Unibet Ltd v Justitiekanslern* [2007] ECR I-2271. In that case, Unibet had been prevented by the Swedish authorities from advertising its betting services. It brought an action seeking a declaration that it

was entitled to promote its services and also an interim declaration that the prohibition on advertising did not apply to it. Swedish law did not provide for such an action. The Swedish courts made a reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure).

Thinking Point

> While reading the following extract, note how the Court attempted in this case to reconcile the principle that new remedies need not be created by Member States, with the principle of effectiveness.

Case C-432/05 *Unibet Ltd v Justitiekanslern* [2007] ECR I-2271

> 40. Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community [now EU] Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law [now EU law] other than those already laid down by national law (Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44).
>
> 41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet* [Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043], paragraph 16; and *Factortame and Others* [Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* ('*Factortame I*') [1990] ECR I-2433], paragraphs 19 to 23).

p. 159 ↵ The Court of Justice held that since other forms of proceedings were available to Unibet as a matter of Swedish law, a new remedy need not be created in order for there to be effective judicial protection of Unibet's EU law rights.

In Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* ('*Factortame I*') [1990] ECR I-2433 (see also 3.1.2) the applicants sought the suspension of the Merchant Shipping Act 1988, which restricted the right to fish in British waters to individuals and businesses with British nationality or residence. They had already alleged that the Act conflicted with EU law, and the House of Lords (now the Supreme Court) had requested a preliminary ruling on this issue from the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). However, the applicants then claimed that the Act should be suspended pending that ruling being given. The House of Lords considered that it had no power under English law to order such an interim suspension, and made a further preliminary reference to the Court of Justice on this particular issue.

The Court of Justice referred to its judgment in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* (*'Simmenthal II'*) [1978] ECR 629 (see 4.2.5), in which it had ruled that national law that conflicted with EU law must be disapplied. It applied similar reasoning in concluding that interim suspension must be awarded, as the following extract demonstrates.

Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* (*'Factortame I'*) [1990] ECR I-2433

> 20. The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law [now EU law] by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community [now EU] rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 March 1978 in *Simmenthal* [Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* (*'Simmenthal II'*) [1978] ECR 629], paragraphs 22 and 23).
>
> 21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.
>
> 22. That interpretation is reinforced by the system established by Article 177 of the EEC Treaty [now Article 267 TFEU] whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.
>
> 23. Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

p. 160

4.3.4 No further substantive conditions

Where liability has arisen under EU law, no further substantive conditions may be imposed by national law prior to the award of a remedy. In the case that established this principle, Case C-177/88 *Dekker v Stichting VJV* [1990] ECR I-3941, Dekker's name had been put forward as the most suitable candidate for a job, but, after she informed the employer that she was pregnant, she was rejected because the employer's insurance would not

cover the cost of a replacement worker during her maternity leave. Dekker sought to rely on the Equal Treatment Directive (Directive 76/207), which prohibited discrimination at work on grounds of sex. Under Dutch law, Dekker was required to prove not merely discrimination, but unjustified discrimination. The employer claimed that his action was justified because his insurance would not cover the cost of her maternity leave in these circumstances. The Dutch court made a reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court of Justice held that since the Directive imposed liability purely on the basis of discrimination, regardless of any fault, national provisions requiring such fault to be proved could not be applied.

A further example of this principle is provided by the Court of Justice's statement in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* ('*Factortame III*') [1996] ECR I-1029, at para 79 (see also 4.3.2, 5.4.1, and 5.5) that if the conditions for Member State liability are satisfied, no further requirement of proof of fault may be imposed by national law.

4.4 The impact of Brexit

When the UK left the EU (see further Chapter 16 and 3.1), EU law largely ceased to be directly or indirectly effective in the UK. However, by way of exception, Article 4 of the Withdrawal Agreement (see further 16.2.2) states that any provisions of EU law which apply to the UK under the Withdrawal Agreement will continue to have direct effect, and that the UK must continue to disapply inconsistent provisions of national law. It also provides that the Withdrawal Agreement itself will have direct effect.

p. 161

Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

Article 4

> Methods and principles relating to the effect, the implementation and the application of this Agreement
>
> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
>   Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
>
> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
>
> 5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.

It is interesting to note that the concept of direct effect is also referred to in the Explanatory Notes to the UK's European Union (Withdrawal) Act 2018. As discussed at 16.2.2, ss 2–7 of this Act converted the provisions of EU law at the end of the transition period into domestic UK law, and retained UK laws that were passed to implement EU law. In the Explanatory Notes to the Act, the UK government noted these included some directly effective EU law rights such as rights arising under Directives where those rights had already been recognized by the CJEU or a UK court, and some rights under the EU Treaties. The Explanatory Notes provides an illustrative list of such Articles (including key TFEU Articles on the free movement of goods and persons, competition law, and equal pay).

p. 162

4.5 Conclusions

It is essential to the supremacy and effectiveness of EU law that it should be capable of being enforced in national courts, as a matter both of principle and of practice. The Court of Justice has therefore developed the doctrine of direct effect and, after this proved to have gaps in its protection, the doctrine of indirect effect. In the national courts, the most satisfactory course of action for a litigant is, of course, to rely directly on EU law (or on any national transposing legislation).

If an applicant is successful in enforcing EU law, whether directly or indirectly, the availability and nature of any remedy will be governed by national law, subject to a number of guidelines laid down by the Court of Justice. The primacy of national law in this area means that there is no guarantee of uniformity across the Member States of remedies for breaches of EU law. It also means that a remedy awarded may be insufficient to fully recompense the claimant for their loss or to deter future breaches.

As discussed in Chapter 5, the Court of Justice has developed an alternative cause of action for those whose EU law rights may not be sufficiently guaranteed by either direct effect or indirect effect—namely, an action for damages from the Member State.

Summary

■ Direct effect refers to a characteristic possessed by some EU legislation—that it may be enforced directly and produce legal effects. Treaty Articles, Regulations, Decisions, and Directives are all—in principle—capable of direct effect. However, a particular measure will have direct effect only if it is clear and precise (*Politi*; *Grad*; *Van Duyn*). In addition, if it is a Directive, the deadline for its transposition into national law must have passed (*Ratti*) and it may be enforced only against an emanation of the State (*Marshall*). An emanation of the State is an entity which is governed by public law and part of the State, as widely defined, or which is subject to the authority or control of a public body, or which has been required by such a body to perform a task in the public interest and have been given special powers for that purpose (*Farrell*).

■ Indirect effect refers to another characteristic of some EU legislation—that it may be enforced indirectly through influencing the interpretation of national law. All national law, whatever its date or purpose, must be interpreted consistently with EU law (*Marleasing*). However, sometimes, the national law in question is so different from the relevant EU law that it is simply not possible to interpret it in that way (*Wagner Miret*).

■ Remedies may be awarded for breach of directly effective EU law, or for breach of national law interpreted in accordance with EU law.

■ In either event, remedies are governed by national law, both in substance and in procedure.

■ However, the Court of Justice has ruled that any remedy awarded for breach of EU law rights must be equivalent to that awarded for breach of national law and effective.

Brexit

■ Although EU law no longer generally has direct effect in the UK, the Withdrawal Agreement provides that any EU laws which continue to apply to the UK as a result of the Agreement will continue to have direct effect.

p. 163

Further Reading

Articles

A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36(1) EL Rev 51

Examines the principle of effectiveness in the jurisprudence of the Court of Justice.

P Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34(3) EL Rev 349

Analyses the effect given to Directives by the Court of Justice and the underlying policy reasons.

S Drake, 'Twenty Years after *Von Colson*: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30(3) EL Rev 329

Discusses indirect effect and incidental horizontal effect.

CNK Franklin, 'Limits to the Limits of the Principle of Consistent Interpretation?' (2015) 40(6) EL Rev 910

Examines the possible impact of the *Spedition* case on the doctrine of indirect effect.

P Koutrakos, 'Is There More to Say about the Direct Effect of Directives?' (2018) 43(5) EL Rev 621

Critiques the judgment in *Farrell* as a useful clarification of direct effect, particularly the meaning of 'special powers'.

K Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13

Examines the extent to which the principles of effectiveness and equivalence have affected national procedural autonomy.

M Lenz, 'Horizontal What? Back to Basics' (2000) 25(5) EL Rev 509

Discusses direct effect, with particular reference to horizontal effects and the supremacy of EU law.

P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (2014) 40(2) EL Rev 135

Discusses the rationale for, and workings of, direct effect.

K Sawyer, 'The Principle of "*interprétation conforme*": How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?' (2007) 28(3) Stat LR 165

Evaluates the extent of the obligation to give indirect effect to EU law through a consistent interpretation of national law.

Questions

Rashid works f or Humber plc, an Irish company created to build and operate a railway bridge across the Shannon estuary in Ireland. It is authorized to do so under s1 of Ireland's (fictitious) Estuary Bridges Act 2012, which also gives it powers to regulate the connecting train service. (Fictitious) Directive 2020/2020 requires Member States to take all measures necessary to ensure that bridge workers are provided with appropriate safety equipment, including hard hats. The Act merely provides that licence holders must ensure that their employees are aware of safety hazards and are advised to wear appropriate clothing.

Rashid sustained a serious head injury when a cable fell on him during construction of the bridge and, as a result, he is unfit to work. He claims that his injury was caused by Humber plc's failure to provide workers with hard hats. Humber plc claims that it had made Rashid aware of the risks and had advised him to wear a hard hat, although the company itself did not provide them. It argues that the Act only requires the provision of information and advice.

1. Advise Rashid as to how he might enforce his rights under EU law against Humber plc.
2. How, if at all, would your answer to the first question differ if Humber did not have the power to regulate the train service, but was wholly owned by the State?
3. If Rashid is successful in a claim based on the direct or indirect effect of the Directive, what remedy is he entitled to as a matter of EU law?

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-4-guidance-on-answering-assessment-questions?options=showName>***, and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-4-self-test-questions?options=showName>* **with feedback.**

www.oup.com/he/eulaw-complete5e *<https://www.oup.com/he/eulaw-complete5e>*

Related Books

View the Essential Cases in EU law

Related Links

Visit the online resources for this title *<https://learninglink.oup.com/access/eulaw-complete5e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780192846419>*