
Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

Nigel Foster

p. 26

# 3. The Sources, Forms, and Individual Remedies of EU Law

Nigel Foster, LLM Degree Academic Director at Robert Kennedy College, Zurich, and Professor of EU Law Modules, South East European Law Schools' Network (SEELS); Visiting Professor at University of Saarland and The University College of Northern Borneo

https://doi.org/10.1093/he/9780198853190.003.0003

**Published in print:** 06 August 2020

**Published online:** September 2020

## Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary and illustrative diagrams and flowcharts. This chapter includes questions on a wide variety of often overlapping points concerned with the sources of European Union (EU) law. The EU sources of law are the Treaties, Protocols, and the EU Charter of Fundamental Rights, which are regarded as primary sources. There is then the secondary legislation to consider which can be enacted by the institutions of the Union by virtue of the powers given by the Member States and contained in the Treaties. Additional sources of law in the EU legal order are agreements with third countries, fundamental rights, general principles, and the case law of the European Court of Justice (CJEU) establishing, amongst other case law developments, the doctrine of direct effects, supremacy of EU law, and state liability.

**Keywords:** EU law, Treaties, Protocols, Fundamental rights, sources of law, Member States, legal order

## Are You Ready?

In order to attempt questions in this chapter, which contains a number of interconnected topics, you must have covered all of these topics in both your work over the year and in revision:

- The sources of EU law.
- The development of the system of individual remedies, which include:

1 Direct effects
2 The concept of an ‘emanation of the state’
3 Indirect effects
4 State liability
5 Incidental horizontal effects
6 The direct effects of general principles.

## Key Debates

### Debate: The continuing discussion on the horizontal direct effects of Directives

Although this is an old debate it continues to occupy both academic writers and the Court of Justice (CJEU), along with how both seek to get round the limitation of denying such effects.

## Question 1

**Identify the sources of law (other than Treaty provisions and EU secondary law) invoked by the Court of Justice. What is the justification for the recognition and application of such sources in the EU legal order?**

p. 27

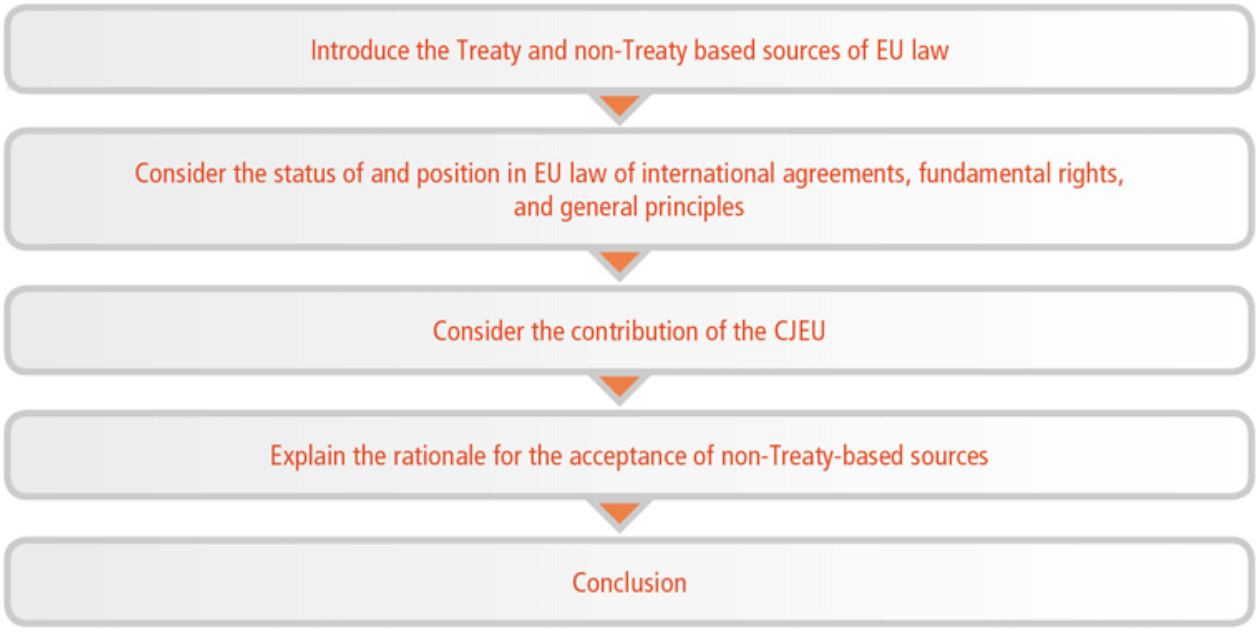
## Caution!

■ This question bypasses a consideration of the internal sources of EU law, namely the Treaties, Regulations, Directives, and Decisions, to consider other sources of law and legal rules which have a presence or an impact in the EU legal order.

■ Concentrate on the provisions of international agreements, general principles of law, and fundamental rights provisions and consider the justifications given by the CJEU to employ these other sources in its judgments.

■ By all means mention the Treaties and Secondary Legislation but do not spend much time on them as they are not the focus of attention of this question.

## Diagram Answer Plan




## Suggested Answer

### Introduction[1]

[1] This is your chance to delineate what you are going to write about and what you are not, to demonstrate to the examiner you have understood and interpreted the question correctly.

The EU Treaties, complete with the EU Charter of Fundamental Rights and the Protocols and the secondary forms of EU law sanctioned by those Treaties—in particular Regulations, Directives, and Decisions under **Art 288 TFEU**—are not the only sources of law or legal rules which have an impact in the EU legal order. Whilst the Treaties and secondary EU legislation are clearly the most important and abundant sources, other external sources have been recognised and employed by the CJEU.

### The sources external to the Treaties and secondary legislation

These other sources[2] can be broadly classified into three categories.

[2] These other sources are the subject matter of this question and thus the ones to concentrate on.

p. 28 One additional source of law arises from the international agreements entered into by the EU on behalf of the Member States, or those, such as the European Road Transport Agreement or the North-East Atlantic Fisheries Convention, where the EU has taken over the competence of the Member States as agreed. Most notable are the WTO and GATT agreements on import duties and trade, association agreements with other European states, and the Lomé and Cotonou Conventions between the Member States and many emerging and former dependent nations. Some of these have been considered in cases[3] and have been held by the CJEU also to give rise to direct effects in the same way as EU sources of law.

[3] Not vital, but you may gain marks if you cite one or two: ***Haegemann* (C-181/73)**, ***Simutenkov* (C-265/03)**.

Other major sources of external law include the categories of fundamental rights and general principles.

Fundamental rights[4] now feature prominently in EU law, and in particular now **Art 6 TEU** provides that the Union shall respect fundamental rights, as guaranteed by the ECHR, and those human rights common to the Member States as general principles of EU law. Furthermore, any applicant states joining the European Union are now obligated by **Art 49 TEU** to have respect for human rights. The actual articles of the ECHR are often referred to directly as in the ***Hauer* (44/79)**, ***Kirk* (63/83)**, and numerous later cases. **The European Charter of Fundamental Rights** which has been attached by Declaration (No 1) to the Treaties by the 2007 **Lisbon Treaty** is now an additional internal source of law and is binding in the European Union with the exception of the internal application[5] in the Czech Republic, Poland, and before Brexit, the UK, which have negotiated an opt-out Declaration and Protocol. Whilst this would not prevent the CJEU from continuing to look at other sources of fundamental rights, clearly the rights Charter should be its first port of call.

[4] These are mentioned ahead of general principles because they now occupy a status of primary law in the EU after the Treaties and protocols.

[5] You might mention and gain extra credit by suggesting that the Charter was not to apply internally in any case as it relates only to EU law and not to national laws.

Fundamental rights therefore, in their various forms and from various sources, play and will continue to play a very important role in the EU.

General principles of law have been used to assist the Court of Justice in the interpretation and application of EU law and by the parties to assist them in challenging the EU institutions or law and the actions of the Member States in the application of EU law. General principles from external sources can arise from particular provisions of other legal systems, in particular the constitutions of Member States, or principles of natural law or justice found in common law or in written form in some Member States or international law and agreements. The public law and legal systems of Germany, France, and the UK have all had a considerable impact on the supply of general principles for the EU legal order. The principles which form a source of EU law need not be present in all of the Member State legal systems, nor indeed in a majority. The CJEU will often conduct a comparative review of ↵ whether or in what form the principle exists in some or all of the Member States with regard to human rights. Often too, the Advocate General (AG) or judges in the case may be particularly influential in the introduction of a certain principle into the EU legal order. The Advocates General from particular countries are more easily able to identify the principles, which may be common in one form or another in a number of the Member States and thus more likely to introduce these principles to the CJEU. For example, the Latin maxim *audi alterem partem* was introduced by the AG in ***Transocean Marine Paint Association v Commission* (17/74)**. He argued that in the absence of Transocean being allowed to present their views on the matter, the Commission's Decision would be in breach of a general principle of law, clearly applicable in the UK and other legal systems.

p. 29

## Justification[6] for the introduction of further sources

[6] Having established what the additional sources are, you should now outline why and how they are justified.

When it comes to considering the rationale for these additional sources of EU law, it is to be noted that the justification for the recognition and application differs according to the type of other source.

The conclusion of agreements with countries associated with the Member States and agreements with other third countries is specifically catered for under **Arts 217–18 TFEU**. In the ***Haegemann v Belgium* (181/73)** case, an agreement between the Community (now Union) and Greece was held to be binding on the Member States even though such agreements are not envisaged by what is now **288 TFEU**. Furthermore, although there is no statement in the Treaty that such agreements entered into

by the Union or by the Member States can give rise to direct effects, the CJEU has held that they may give rise to direct effects providing they satisfy the criteria established in the leading case of ***Van Gend en Loos* (26/62)**. These criteria tend, however, to be more strictly applied. To this extent an investigation of one of the GATT provisions in the case of ***International Fruit (No 3)* (21–22/72)** was held not to be directly effective. However, provisions of the Yaoundé Convention and the EEC–Portugal association agreement were held to be directly effective in the cases of ***Bresciani* (87/75)** and ***Kupferberg* (104/81)**.

Whilst some general principles are clearly imported into the legal system from external sources, others have been developed by the Court of Justice from the Treaty.[7] There are three principal Treaty Articles which provide some justification for the CJEU to introduce general principles into the EU legal order.

[7] Whilst these are not external, they were not provided expressly by the Treaties or secondary legislation either, hence their inclusion in the answer. They include, of course, direct effects, indirect effects, state liability, and the supremacy of EU law.

**Article 19 TEU** is a general guideline set by the **Treaty** for the functioning of the CJEU. It provides that the CJEU shall ensure that in the interpretation and application of the Treaties the law is observed. This is taken to mean the law outside of the **Treaty. Art 19 TEU** has been invoked to introduce very many different general principles of
p. 30 ↵ law, as well as human rights, noted above. More specifically, two further articles of the Treaty mandate the court to take account of general principles of law. **Art 263 TFEU** refers to the infringement of any rule of law relating to the application of the Treaty as one of the grounds for an action for the challenge to the validity of EU law and **Art 340 TFEU**, concerned with damages claims, specifically allows the settlement of claims against the EU institutions on the basis of the general principles of the laws of the Member States. The latter two are specific to the claims raised under those Treaty Articles but they do serve to reinforce the Court of Justice's claim that it can rely on general principles as a source of law in the EU legal order.

The **EC Treaty (Arts 12 and 141)** (now **18 and 157 TFEU)** has also supplied the basis for non-discrimination which applies both in relation to nationality and sex and has been further developed into a general principle of equality and non-discrimination.

More widespread and logical arguments for the inclusion of general principles are that the EU and the Court were morally and socially, if not legally, obliged to observe fundamental human rights, especially those upheld in the constitutions of the Member States. No self-respecting legal system in Europe could ignore, or be seen to be ignoring, such ideologically important rights such as these. Failure to observe them might lead to serious clashes with Member States' constitutional law, which

might have led to severe strains on the EU legal system. The ***Internationale Handelsgesellschaft***[8] **([1974] 2 CMLR 540)** case before the German court showed the potential for conflict and ultimate harm to the EU legal order if the EU fails to uphold human rights provisions.

[8] This case, concerned with supremacy of EU law, showed that Member State courts might not comply with EU law which failed to respect their constitutions' respect of human rights.

Another argument stems from the fact that the Treaties are only framework Treaties and require completion by reference to other laws. For the most part this is done by the specific secondary legislation of the EU, but this only provides the substantive law rules, which also often require interpretation by the CJEU. The EU legal order was established anew and does not have the traditions of the Member States' legal systems to rely on, which are rich in developed principles of law. Therefore, something is needed to assist the CJEU in its task, and general principles, many of which are borrowed from the Member States' legal systems, do just that.

### Conclusion

There is a rich vein of other legal sources in the EU legal order, which have been justified mainly by the CJEU both generally and impliedly by reference to Treaty Articles, but also now expressly in the **Treaty**; see **Art 6 TEU**. The most notable as identified in the body of this answer are fundamental rights from a number of sources, general principles, and the various international agreements the EU has entered into.

p. 31

## Looking for Extra Marks?

■ Whilst headings are not compulsory, adding them, as in the answer above, will show you have planned your answer.

■ Mention that whilst presently not a member of the Council of Europe and the ECHR, the EU has committed itself to Accession by **Art 6 TEU** and is negotiating with the Council of Europe for accession. This will boost the fundamental rights protection in the EU.

## Question 2

While the TFEU suggests that Regulations and Directives are very different types of legislative instrument, the doctrine of direct effects has partly blurred the distinction between them.

**Discuss.**

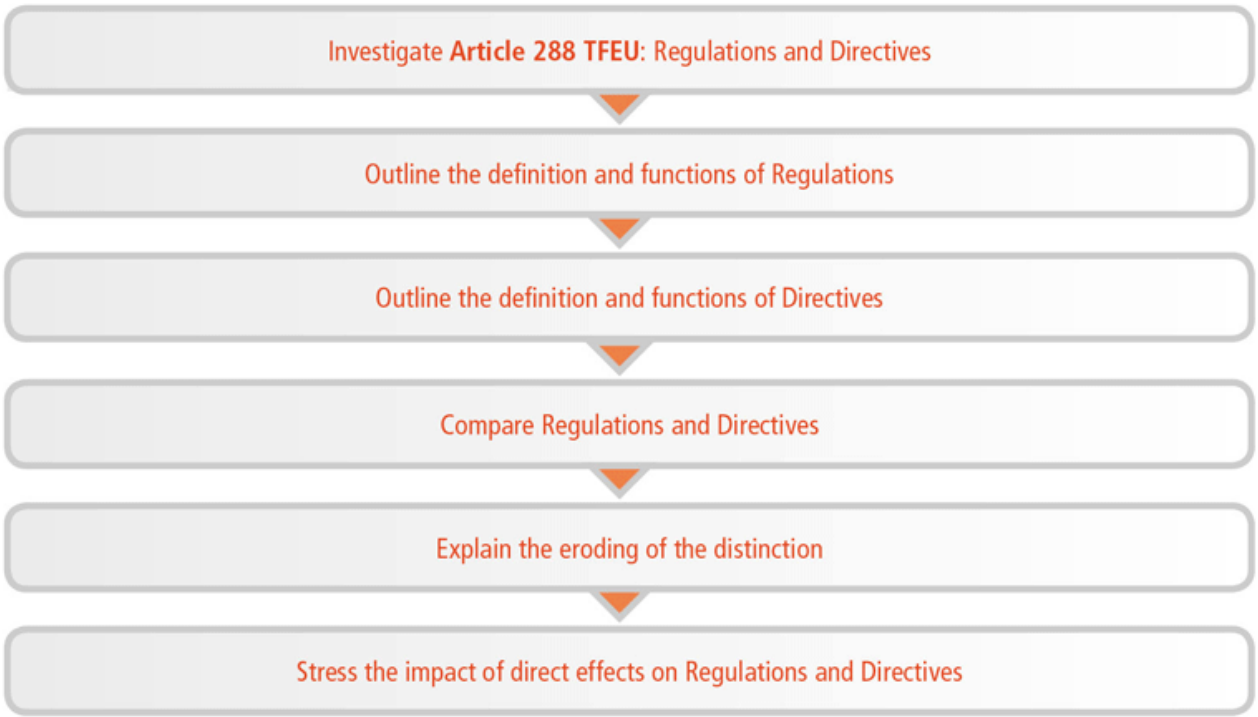
## Caution!

■ This question concentrates on the debate which ensued following the CJEU's gradual development of the doctrine of direct effects.

■ In answering the question you clearly need first to outline both forms of law from their Treaty base and then to explain that they were intended as having different functions.

■ The question itself indicates that you should concentrate your answer on the influence of the doctrine of direct effects on this; this requires therefore a definition and explanation of direct effects.

## Diagram Answer Plan



p. 32

## Suggested Answer

### Article 288 and Regulations and Directives

The question concerns[1] Regulations and Directives, which are at present the two most important forms of secondary law that can be enacted by the institutions of the EU under the power granted by **Art 288 TFEU**.

[1] Here you are addressing, what is the question getting at?—what am I supposed to be answering?

It was considered that the establishment and development of direct effects by the CJEU was undermining the clearly intended distinction between the two forms of secondary EU legislation as set out in the **Treaty**. Essentially the concern was that if both Regulations and Directives could give rise to direct effects then no real difference any longer existed between the two. This answer will explore that argument.

**Article 288 TFEU** provides the following:

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice and form and methods.

### Regulations

Regulations are general or normative provisions of legislation applicable to all legal persons in the EU rather than to specific individuals or groups. They are usually very detailed forms of legislation to ensure that the law in all Member States is exactly the same.

Regulations become legally valid in the Member States without any need for implementation and this process is sometimes described as self-executing. It was held in the case of ***Commission v Italy* (Slaughtered Cows) (39/72)** that Member States cannot subject the Regulation to any implementing measures other than those required by the act itself. There may, however, be circumstances where the Member States are required to provide implementing measures to ensure the effectiveness of the Regulation, as in the case of ***Commission v UK* (Tachographs) (128/78)** where originally the UK had not provided sanctions for companies not fitting tachographs to lorries in contravention of the EU Regulation.

## Directives

p. 33

Directives, in contrast, set out aims which must be achieved, but leave the choice of the form and method of implementation to the Member ↵ States. This was done to ease the way in which national law could be harmonised in line with EU law and give the Member States a wider area of discretion to do this. If, for example, a Member State considers that the existing national law is already in conformity with the requirements of a new Directive then it need not do anything, apart from the standard additional requirement in Directives that the Member State inform the Commission how the Directive has been implemented. Member States are given a period in which to implement Directives which can range from one year to five or more, depending on the complexity of the subject matter and the urgency for the legis-lation. Two years is usual. The 2011 article by Dickson considered the status of Directives in the EU legal system.[2]

[2] Cited in the 'Taking Things Further' section at the end of the chapter.

## Comparison of Regulations and Directives[3]

[3] At this stage, try to summarise the notable differences in the forms of legislation.

Directives are normally aimed at the Member States, whereas Regulations apply to everyone. Regulations were designed to be directly applicable but it would seem from **Art 288 TFEU** that Directives require some form of implementation in order to take effect or have validity in the EU legal order. Directives were designed with the harmonisation of different national rules in mind whereas Regulations were aimed to be prescriptive by providing one rule for the whole of the EU. Hence Regulations would be detailed and precise and Directives more likely to be framework provisions laying down general guidelines and therefore less precise by nature.

Thus, by design, these are very different forms of legislation.[4] In practice a less rigid or distinct division has been observed.

[4] The answer can now consider why the distinction seems to have been blurred in practice.

## Eroding the distinction[5]

[5] This can be covered in two parts, first generally and then with specific attention to direct effects.

It is not always the case that Regulations are precise and complete, as noted above in the case of ***Commission v UK* (Tachographs)**, and further action was required on the part of the Member States. Regulations should be normative but they are often used in respect of specific individuals: for example, the anti-dumping Regulations and others in the area of competition law. On the other hand, Directives can often be very detailed: see e.g. **Directive 2004/38** concerning now quite detailed provisions in support of the free movement of workers and members of the worker's family, which has consolidated a lot of previous case law on the topic.

### The impact of direct effects on the distinction

The biggest assault on the distinction arose when the CJEU held that it was not only Treaty Articles and Regulations which could give rise to rights which could be directly enforced by individuals before the national courts; also other forms of EU law could also give rise to direct effects. This is the term given to judicial enforcement of rights arising from provisions of EU law which can be upheld in favour of ↵ individuals in the courts of the Member States. The term 'directly effective' may also be used and it describes the right to rely directly on EU law in the absence of national law or in the face of conflicting national law. The cases of ***Grad* (9/70)** and ***Van Duyn v Home Office* (41/74)** confirmed that other forms of law, including Decisions and Directives, could also give rise to direct effects. They must also satisfy the criteria required of Directive effects as initially laid down in the case of ***Van Gend en Loos* (26/62)** and that the time limit given to the Member State has expired (**case 148/78 *Pubblico Ministero v Ratti***). Therefore, although Directives are not directly applicable in that they are not automatic and general in application and give rights without further implementation, they have been held to give rise to directly enforceable rights in specific circumstances, i.e. where they have not been implemented or have been incorrectly implemented (**case 51/76 *Verbond van Nederlandse Ondernemingen***). The argument then arises as to whether the distinction has been eroded, in that both Regulations and Directives can be enforced by individuals in the national courts and in practice there is really not a great deal of difference between them.[6]

p. 34

[6] This is where the very important ***Marshall*** case comes in.

This might have been, or become, more likely if the CJEU had not decided in the case of ***Marshall* (152/84)** that Directives could not give rise to rights which could be enforced against other individuals, the so-called 'horizontal direct effects'. Thus a distinction remains as Regulations are capable of horizontal direct effects.

To date, the Court has upheld this position, although there is a line of case law developing which suggests that in an action between private parties, a Directive may be relied on incidentally. In the case of ***CIA Security v Signalson* (C-194/94)**, CIA was able to rely on the Directive's requirement that Member States notify the Commission to get clearance for national technical standards, in an action by a competitor accusing them of not meeting legal requirements. Belgium had not notified the Commission, thus their standards were held to be inapplicable. These incidental direct effects cases do not, however, blur the fundamental distinctions between Regulations and Directives.

### Conclusion

Whilst it may be argued that in practice the gap between Regulations and Directives has narrowed, clear distinctions remain and they are still used for different purposes as the occasion demands, i.e. either a harmonising rule to accommodate different previous positions or laying down a new rule or sets of rules entirely. Furthermore, even when it comes to considering direct effects, Directives are only enforceable by individuals in a limited number of cases where approved by the CJEU and not universally and they do not provide rights directly enforceable between individuals. Thus a distinction remains. ↵

p. 35

## Looking for Extra Marks?

■ If there is time you could suggest that despite calls from the AG from time to time, and in particular in the case ***Faccini Dori* (C-91/92)**, to allow horizontal direct effects of Directives, the CJEU has declined to follow this advice.

■ You could also mention the development of cases starting with the case of ***Mangold* (C-144/04)**, in which general principles were held to have direct effects, thus diverting attention away from any erosion of the difference between Regulations and Directives.

## Question 3

**Does the distinction between vertical and horizontal direct effects cause difficulties for individuals in actions involving EU law? If so, what has been done to mitigate these difficulties?**

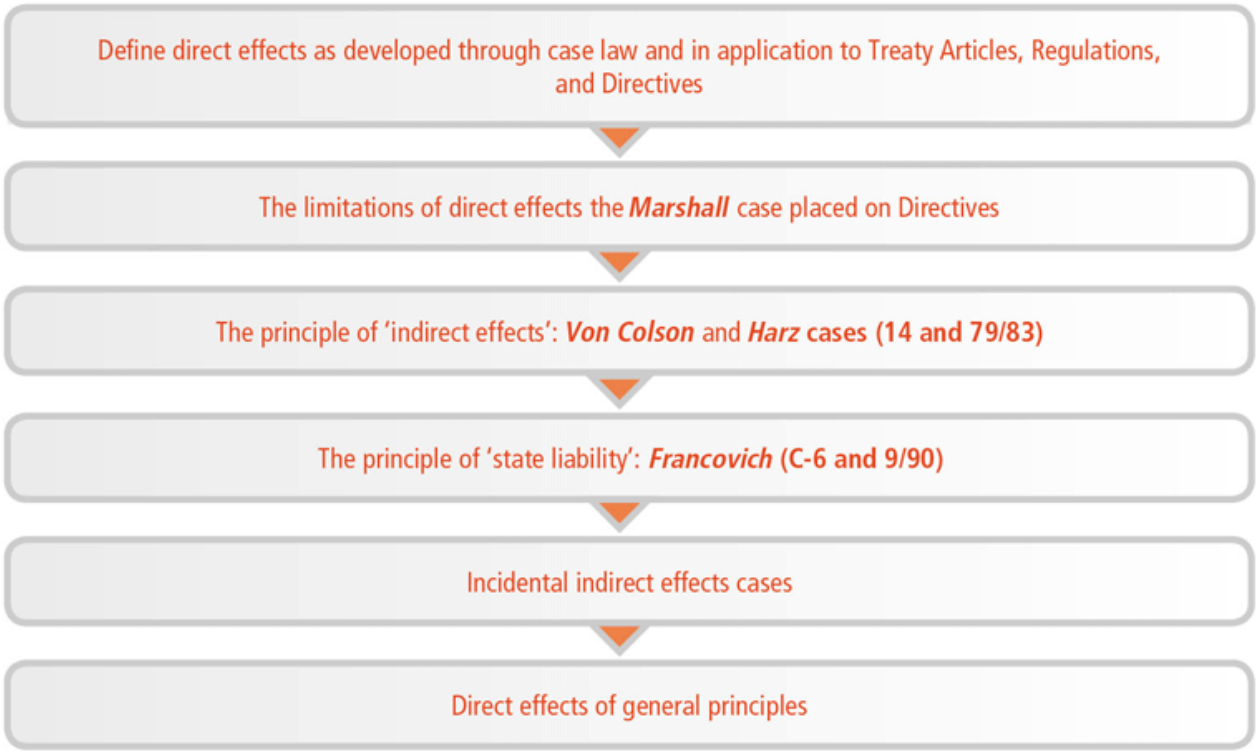
## Caution!

■ You need to concentrate on the consequence of the CJEU ruling in ***Marshall* (152/84)** and subsequent case law which denied individuals the ability to enforce Directives against other individuals.

■ Don't overdo coverage on the general aspects of the direct effects of Treaty Articles, Regulations, and Directives.

■ Don't rehearse the arguments for and against having horizontal direct effects of Directives as these go beyond the required answer for this question.

## Diagram Answer Plan



p. 36

## Suggested Answer[1]

[1] This question picks up where the last one left off; it asks you to consider the arguments in respect of horizontal direct effects and whether this causes problems for individuals in certain circumstances.

### What are direct effects?[2]

[2] The answer requires a definition of what is meant by both types of direct effect and requires you to know and explain that it is impliedly referring to the direct effects of Directives which cause the difficulties.

Direct effects is the term given to judicial enforcement of rights arising from provisions of EU law which can be upheld in favour of individuals in the courts of the Member States. To be capable of direct effects a provision must satisfy the criteria established by the CJEU, initially in the case of ***Van Gend en Loos* (26/62)**, that the provision:

- should be clear and precise
- should be unconditional
- should not require implementing further measures by the state or Union institutions
- should not leave room for the exercise of discretion by the Member State or Union institutions.

In ***Van Gend en Loos*** it was held that the institutions of the Community (now Union) are endowed with sovereign rights, the exercise of which affects not only Member States but also their citizens, and that Community (now EU) law was capable of conferring rights on individuals which become part of their legal heritage.

### Vertical and horizontal direct effects[3]

[3] The distinction was highlighted by the ***Marshall*** case, which should be discussed.

Direct effects have been found to arise from many Treaty Articles, which often obligate not just organs of the state as in a vertical relationship, and it was confirmed by the CJEU that employers are obligated to comply with the requirements of a Treaty Article and other individuals may enforce

corresponding rights directly against the obligated party who has failed to comply with EU law, termed horizontal direct effects. Confirmation came in ***Defrenne v Sabena (No 2)* (43/75)**, in which the rights of an air hostess for equal pay under now **157 TFEU** were upheld against the employing state airline,[4] Sabena, who were in breach of the obligation. That Directives could also give rise to direct effects was confirmed by the CJEU in the cases of ***Van Duyn* (41/74)** and ***Ratti* (148/78)**.

[4] Although state owned the airline enjoyed registered company status and was thus in a horizontal relationship with its staff.

The question of whether Directives could be held further to give rise to horizontal direct effects and be enforceable against other individuals was open to speculation. However, the CJEU decided in the case of ***Marshall* (152/84)** that Directives could only be enforced against the state or arms of the state and not against individuals. ↵ Even though the Health Authority was held to be a part of the state, the Court of Justice nevertheless used the occasion of the case to settle the matter. A claim against private employers would fail in the same circumstances.

p. 37

## The consequences of the *Marshall* decision[5]

[5] Here you must display your knowledge of the consequences of the ***Marshall*** decision.

***Marshall*** decided there could be no horizontal direct effects of Directives because Directives are not addressed to individuals, therefore individuals should not be obligated by them. The result of this decision is that the scope of the concept of public service as opposed to a private body is crucial. This results in no uniform application of EU law either in a Member State or between Member States or between public and private employers, because there are different concepts of what is the state and what are private and public employers. Furthermore, this position can be further complicated by the movement of utilities and companies in and out of public ownership. Certain individuals are thus denied rights that employees in the public sector can enforce in the face of non-compliance by Member States. The uniformity of the EU law is undermined in important areas of law dealing with employment rights, where many Directives are relevant to private employers and the protection of individuals and their rights; e.g. **Art 157 TFEU** on equal treatment can create horizontal direct effects but the Directive providing other rights cannot (**Directive 2006/54**). An example of the consequences for individuals is the ***Duke* case ([1988] 1 CMLR 719)** in the UK, which considered the same question as in the ***Marshall* case (152/84)**. However, in ***Duke*** a private employer was involved and the House of Lords held that Mrs Duke could not uphold her claim for equal treatment in retirement because Directives could not give rise to direct effects which could be relied on horizontally. The decision has thus led to an arbitrary and uneven protection of individual rights.[6]

[6] You have thus identified that the consequences following the ruling concerning Directives is unfortunate.

## Case law addressing the consequences: the concept of the state[7]

[7] The final part must concentrate on how the difficulties have been avoided or circumvented by reference to case law which has provided alternative solutions.

One way pursued by the CJEU is by expanding the concept of public sector in the case law and thus including more individuals capable of protection of EU law; see e.g. the cases of ***Johnson v RUC* (222/84)** and ***Foster v British Gas* (C-188/89)** which showed that, although the concept was wide enough to include nationalised industry and includes any form of state control or authority, a distinction nevertheless remains between public and private employers. It still allows a variation as between public and private employees and between the Member States. The difficulties of and limits to this approach are demonstrated in the UK case of ***Rolls Royce plc v Doughty* ([1992] 1 CMLR 1045)**, in which the Court of Appeal considered that the nationalised Rolls Royce was not a public body for the purposes of the claim to direct effects. Privatisation ↵ of once nationalised companies also affects the rights of individuals. In ***Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen Finanzierungs AG* (C-157/02)**, it was held that the provisions of a Directive capable of having direct effect may be relied upon against a legal person governed by private law where the state has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person. Thus, private companies undertaking a public duty also come within the scope of the ***Foster*** ruling. The Farrell case (C-413/15) made clear that the Foster test was either or and not both.

p. 38

## Indirect effects

Another line of case law has developed, however, which may provide an alternative for individuals defeated by the absence of horizontal direct effects. In the cases of ***von Colson* (14/83)** and ***Harz* (79/83),** both cases concerned **Art 6 of the old Equal Treatment Directive (76/207)**[8] respectively involving a public and private employer; thus the contrast of available remedies was starkly visible. Rather than highlight the unfortunate results of the lack of horizontal direct effects of Directives, which would have helped ***von Colson*** but not ***Harz***, the CJEU concentrated on **Art 5 EC (now 4(3) TEU)** which requires Member States to comply with Union obligations. The Court held that this requirement applies so that courts are obliged to interpret the implementing national law in such a way as to ensure obligations of a Directive are obeyed. The ***von Colson*** line of argument requires there to be national law to interpret, or rules which the national court can, and is willing to, construe to

achieve the correct result. Further cases which develop the boundaries of this principle are ***Marleasing (C-106/89)***, which required the national courts to apply Community law regardless of whether the national law was based on any particular Directive and regardless of the intent or even existence of national law, and ***Kolpinghuis (80/86)***, which held that a Member State which has not implemented a Directive cannot use direct effects to worsen the position of an individual. Neither goes as far to protect the rights of individuals to the same extent as would be achieved by the extension of horizontal direct effects to Directives. In ***Pfeiffer v Rotes Kreuz (Cases C-397–401/01)***, the CJEU has confirmed that national courts are bound to interpret national law so far as possible to achieve the result sought by a Directive taking into account national law as a whole, as opposed to narrowly looking at a particular national provision.

[8] Old cases will refer to old and often replaced legislation; you simply have to learn this.

## State liability[9]

[9] The development of the principle of state liability has come to the aid of individuals who might otherwise have suffered from a lack of legal redress against other individuals.

A significant alternative development by the CJEU is the use of general provisions of the Treaty, **Arts 5 and 189 EC (now 4(3) TEU and 288 TFEU)**, originally in the ***Francovich* case (6 and 9/90)**, to

p. 39 ↵ impose liability on the state for the non-implementation of Directives. In ***Francovich***, the relevant Directive was held to be not capable of giving rise to direct effects, but the requirements of the effective and uniform application of Community (now EU) law gave rise to a liability on the part of the state to compensate for its failure to implement the Directive where the Directive had conferred rights on individuals and there was a link between the breach and the damage caused. It does, however, take the emphasis away from the difficulty caused by the lack of horizontal direct effects of Directives. ***Francovich*** has now been followed by the ***Brasserie du Pêcheur*** and ***Factortame III* (46 and 48/93)** cases in which the CJEU held that all manner of breaches of Community (now EU) law by all three arms of state could lead to liability to individuals. Thus it expands the circumstances which might give rise to liability in cases where there would be no rights because either there are no horizontal direct effects or even no direct effects at all. The focus though has been moved to the seriousness of the breach.[10] These later cases require that, in order for liability to arise on the part of the Member State, there must have been a sufficiently serious breach of a rule of law intended to confer rights on individuals. This has provoked further case law to help decide how serious a breach is required for Member States to incur liability. ***British Telecom* (C-392/93)** takes a less generous view of what constitutes a breach but this can be contrasted with the ***Hedley Lomas* case (C-5/94)** where a mere infringement will invoke potential liability. The difference is explained by the degree of

discretion the Member State had in implementing EU law: the less, the more likely a liability would ensue. Thus, if there is a breach, Member States must compensate according to the principles established in ***Francovich***. In other words, a ***von Colson*** failure under EU law should not be the end of the litigation line. The ***Francovich*** judgement was considered by Bebr to be ***Van Gend en Loos*** come full circle in his 'Case Note on *Francovich*' (1992).[11]

[10] Mention that ***Factortame III*** introduced the revised criteria that the breach must be analogous to liability of the EU institutions under Art 340(2) TFEU; see ***Bergaderm*** **case (C-352/98P)**.

[11] Cited in the 'Taking Things Further' section at the end of the chapter.

## General principles[12]

[12] This is the final, thus far, development which gets round the difficulties caused by the distinction introduced by the ***Marshall*** case.

Cases which appear to introduce horizontal effects are ***Mangold*** **(Case C-144/04)** and ***Adeneler v ELOG*** **(Case C-212/04)** and ***Kükükdeveci*** **(Case C-555/07)**. These provide that general principles of EU law can also give rise to direct effects. Alternatively, the ***von Colson*** sympathetic interpretation principle can also be applied to general principles of the EU, which in these cases involved the general principle of no discrimination, rather than looking closely at the Directive, which may have problems of either not applying horizontally or that the implementation period had not expired or both.

## Conclusion

It may be concluded that the difficulties caused by the ***Marshall*** **(152/84)** decision, whilst not changed, have been mitigated in most circumstances. ↵

p. 40

## Looking for Extra Marks?

■ Mention the possible use of Treaty Articles as an alternative to relying on Directives which may cause the problems generated by the ***Marshall*** case.

■ As was mentioned in the answer itself, the inclusion of a discussion of the least important post-***Marshall*** development of incidental/triangular effects may gain marginal additional marks, particularly as time and space for this will be short.

## Question 4

As part of its social programme, under Art 157 TFEU, the Council adopted two (fictitious) Directives on 1 January 2018. The first Directive 2018/1 provides ***inter alia*** that 'Member States shall take such steps as they consider appropriate to encourage employers to adopt the same pension arrangements for men and women doing the same kind of work.' The second Directive 2018/2 provides that 'Member States shall ensure that employers do not discriminate between men and women in respect of holiday entitlement.'

Member States were given two years in which to implement both Directives. At the present time (January 2020) the UK has taken no steps to implement either Directive and there are no national laws covering these issues.

In July 2019, a Local Authority Purchasing Department engaged Mrs Evans and Mr Rees as clerks. Their work is the same and they are paid the same. However, Mr Rees' contract of employment provides that he is entitled to five weeks' holiday a year and is included in the company's own pension scheme, whereas Mrs Evans' contract of employment provides that she is entitled to three weeks' holiday a year and can only join the company's pension scheme after one year.

In January 2020, the Local Authority Purchasing Department engaged a further clerk, Mrs Jones, who is employed on the same terms as Mrs Evans.

Mrs Evans and Mrs Jones are unhappy with their contracts of employment. Advise Mrs Evans, who made a claim in December 2018, and Mrs Jones, who now claims, whether there are any provisions of EU law on which they could rely in an action brought before a British Court or Tribunal.

**How would your advice be different if the place of employment at which they were working had been privatised?**

## Caution!

■ Do not answer this question as if it was a general question on direct effects and equally do not write just about direct effects and leave out the alternatives.

■

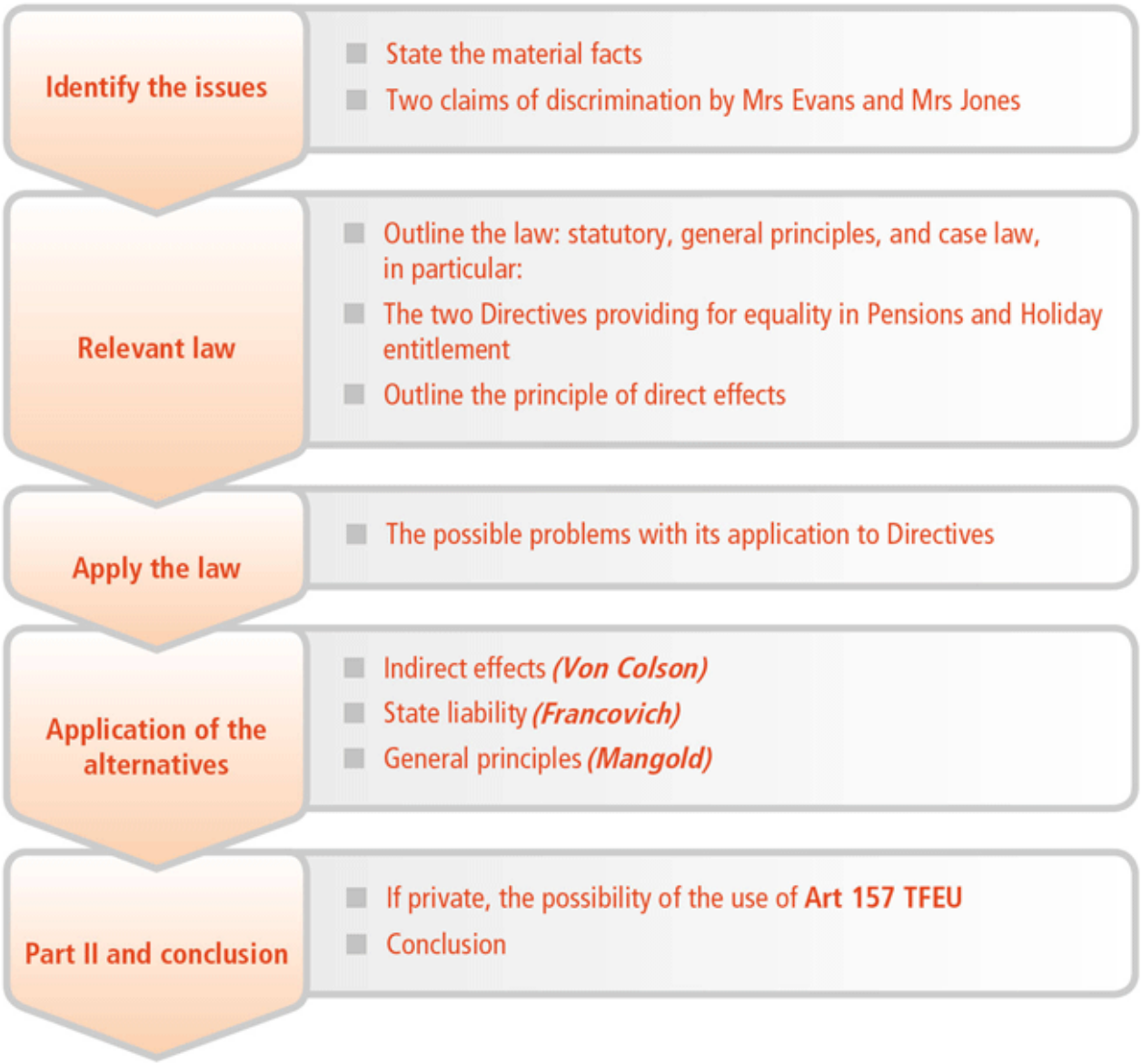
As with all problem questions, pace your answer; don't spend too much time on one aspect to the deficit of other parts, which may have warranted greater coverage.

■ You may ignore the fact that there may be real Directives covering the same ground or providing the same or similar rights.

p. 41

■ You must have studied and revised all the possible remedies available to individuals because: 1) they are so interconnected; and 2) often you may not be able to secure a remedy through direct effects alone and will be forced to consider other alternatives in order to assist the parties you are asked to advise. So look at the following checklist and make sure you can indeed check off the following list of prerequisite knowledge blocks before attempting to answer.

## Diagram Answer Plan




## Suggested Answer[1]

[1] For this first problem question in the book, I have provided a more extensive breakdown of the question and answer.

## The facts[2]

[2] In order to provide a solution you should identify the issues or particular problems arising as a result of the facts of the case.

There are two Directives which have not been implemented by the UK which provide pension and holiday entitlement rights for workers, which should have been implemented by 1 January 2020. One complaint relates to discrimination from July 2019 and the other from January 2020. Mrs Evans and Mrs Jones claim they have suffered discrimination relating to pension arrangements and paid holiday entitlement.

p. 42

## EU statutory law[3]

[3] Law can include statutory law, general principles, and case law. EU law means Treaty provisions or provisions of secondary EU law, i.e. the Regulations, Directives, and Decisions.

The legal basis for these claims is **Art 288 TFEU** which sets out the secondary laws of the EU and, in particular, obligates Member States to achieve a required result when implementing Directives.

### General principles and case-developed law

The doctrine of direct effects will allow individuals to enforce EU rights before their national courts. The further developments by the CJEU of indirect effects and state liability also need to be considered, as well as the case of ***Mangold* (C-144/04)** and subsequent cases. These provide that in certain circumstances Directives, where implementation periods have not expired, may nevertheless help determine the outcome of a case in favour of individuals before the national courts by the reliance on general principles instead.[4]

[4] These latter three developments will only need to be considered if you are unable to secure the claimants' rights under direct effects.

Directives can give rise to direct effects[5] providing they satisfy the criteria as laid down in ***Van Gend en Loos* (26/62):** i.e. are the relevant provisions clear, precise, and unconditional? The special concerns of Directives and the time limits given for their implementation were considered in ***Publico Ministero v Ratti* (148/78)**, which concerned the prosecution by the Italian authorities for breaches of national law concerning product labeling. Mr Ratti had complied with two Directives; however, the expiry period

for implementation of one of these Directives had not been reached. The Court held he could rely on the one for which the time period had expired provided it satisfied the other requirements, but not for the Directive whose implementation period had not expired. So, when the time period has expired an individual can rely on the Directive if it fulfils the criteria. In the case of ***Marshall* (152/84)**, the CJEU held, however, that Directives could not be enforced against other individuals but could only be enforced vertically against the state to whom they were addressed. The more recent cases of ***Mangold* (C-144/04)**, ***Adeneler v ELOG* (Case C-212/04)**, and ***Kükükdeveci* (Case C-555/07)** provide that under certain circumstances it may not be necessary to wait for the implementation period to have expired because individuals may rely on general principles of EU law which were held to give rise to direct effects.

[5] It would be useful to briefly define direct effects and the particular considerations applicable in respect of Directives.

So, with the facts and law established, the claims of the two workers must be considered.

## Application[6]

[6] Apply the legal rules to the issues and come to conclusions on each issue. Where helpful or necessary you should introduce any relevant case law to come to a conclusion on the problems or aspects of it.

### The claims

Mrs Evans and Mrs Jones seek to rely on both Directives, Mrs Evans from July 2019[7] and Mrs Jones from January 2020. To determine this, the criteria adopted by the CJEU must be applied. Three questions arise, all of which must be addressed. They are: 1) are the claims ↵ vertical against the state? 2) have the time limits for the implementation of the Directives expired? and 3) are the relevant provisions directly effective?

p. 43

[7] It is necessary to know whether, in the absence of the UK implementing legislation at the material time, they can rely directly on the Directives.

### Vertical or horizontal direct effect?

It is clear that as these are claims against the local authority, the claims are vertical and thus are permissible under the direct effects of Directives according to the ***Marshall*** case, noted above.

### Directives and time limits[8]

[8] Here the ***Ratti*** limitations are outlined subject to the case of ***Mangold*** and the possibility that the direct effect of general principles can effectively override this restriction.

Only if the time limit has expired can the Directives be relied on. So, in respect of any claim to rely on either of the Directives before January 2020, the time limits will not have expired and the claim will fail. The UK should have implemented the Directives by 1 January 2020. Therefore, applying the ***Ratti* (148/78)** case, when the first claim by Evans was made the time limit had not expired and therefore the Directive cannot give rise to direct effects at that time. The time limit had expired for the second claim made in January 2020, i.e. Mrs Jones' claim, so we can move on and consider whether both Directives can give rise to direct effects.

### Are the Directives directly effective?[9]

[9] Here the basic criteria are applied to determine whether the actual provisions of the Directives are clear, etc.

The claim in respect of equal pensions is covered by the first Directive, but does it satisfy the criteria for direct effects? Is it clear, precise, and unconditional, etc? The answer to this is that it is probably not clear enough given the words 'Member States shall take such steps as they consider appropriate to encourage'. Therefore, there will not be direct effects and the Directive cannot be relied upon before the national courts; see generally the cases of ***Van Gend en Loos* (26/62)** and ***Van Duyn***(41/74).

The second Directive relates to the holiday entitlement. Does it satisfy the criteria of direct effects? Yes, the Directive is clear, precise, legally perfect, complete, and requires no further legislative intervention or implementation. It imposes a clear and unconditional obligation on Member States to ensure that employers do not discriminate between men and women doing the same kind of work in respect of holiday entitlement. The word 'shall' is a clear obligation. The provision therefore meets the requirements for direct effect, and can be relied on before a national court, but only as outlined above when the implementation period has expired, subject to ***Mangold***.

## Alternative remedies[10]

[10] As only Evans has succeeded this far on holiday pay but not on pensions, it is necessary to consider what, if any, alternatives there are.

### Indirect effects

If direct effects were not established, other remedies may be available using the ***von Colson* (14/83)** line of case law. The CJEU held in ***von Colson*** that, although a Directive may not be directly effective, the p. 44 ↵ Member States' courts should take the provisions of the Directive into account when applying national law. However, there are no rights in national law, so a national court cannot make an interpretation according to EU law. In these circumstances the ***Marleasing* (C-106/89)** and ***Koplinghuis* (80/86)** cases should be applied to state that there are general obligations under **Arts 4(3) TEU** and **288 TFEU** for the Member States to ensure compliance with EU law but it is up to the national courts and they are not obliged to go against national rules of interpretation. Therefore, it is unlikely indirect effects will help and a further alternative is required to assist both Evans and Jones.[11]

[11] It helps to keep a running conclusion if time and space permit.

### State liability

If, for whatever reason, the national courts cannot or will not interpret national law to read in compliance, the case of ***Francovich* (C-6 and 9/90)** might apply. If an individual suffers damage as a result of the failure of a Member State to implement a Directive, the Member State may be liable to pay damages, providing the Directive itself defined and conferred a right on individuals, the content of which was clear and not open to differing interpretations (***British Telecommunications* (C-392/93)**). The fact that the UK has not taken any steps to implement the Directives by the prescribed time has been held by the CJEU to be sufficient to find a sufficiently serious breach of EU law (***Dillenkofer* (C-178, 179, 189, and 190/94)**). Therefore Mrs Jones and Mrs Evans may have a claim for compensation against the UK. Any damages must compensate them in full for losses directly incurred because of the breach (***Bonifaci* (C-94 and 95/95)**) but subject to the national court determination of national rules. Therefore Evans is probably helped by state liability but the claims for Jones are still problematic.

## Direct effects of general principles[12]

[12] This is the third alternative if the others have failed to help.

Later cases lend support to the sympathetic interpretation of ***von Colson***, but mark a further development by the Court of Justice. The cases of ***Mangold, Lindorfer*** **(C-144/04 and C-227/04)**, and ***Kükükdeveci*** **(Case C-555/07)** encourage national law to take any measures they can to provide for the rights in EU law regardless of the state of national law. However, they also provide, in particular in the ***Mangold*** and ***Kükükdeveci*** cases, that despite the fact that a Directive's implementation period had not expired it may be possible nevertheless to achieve the requirements of the Directive. In these cases, the CJEU held that despite the fact that the Directive was not past its implementation date, the principle breached by the Member State was discrimination, which was a general principle of EU law. Hence, then, it could not be affected by the unexpired transposition period of a Directive which provided the framework in which the general principle was applied. Thus, the general principle applied, not the ↵ Directive. The argument in the case was that both a strict application of **Art 6 of Directive 2000/78** and the application of the general principle would have the same result; therefore, in order to get over difficulties of transition period or the lack of direct effects, it was better to use the general principle. This would help claims which were premature but also where the Directive for whatever reason gave rise neither to direct effects nor indirect effects and damages were not possible. In this case, equality of treatment between men and women is most certainly a general principle stated of **EU law**, which would lead to the claim by Mrs Jones succeeding.

p. 45

## Private employer[13]

[13] This is the alternative question addressed but you need to recognise that this is a minor part and does not need as much coverage.

It can be generally stated that the CJEU has repeatedly emphasised that direct effects of Directives only arise as against the Member States, and not against private individuals (see ***Marshall*** **(152/84)** and ***Dori*** **(C-91/92)**), thus none of the claims would succeed here. However, whilst Directives cannot give rise to horizontal direct effects, Treaty Articles can. It may be argued that as pensions have been held to constitute pay which is covered by **Art 157 TFEU**, a claim is therefore not dependent on the Directive and can be lodged relying on **Art 157 TFEU** itself, which is clear and precise and has been held to give rise to direct effects in the case of ***Defrenne v Sabena (No 2)*** **(43/75)** and applied to pensions in the case of ***Barber*** **(C-262/88)**. Whether holiday entitlements could also be interpreted to be pay is uncertain as there is no previous case which has considered this. The case of ***Garland*** **(12/81)** held that low fare travel facilities for the family of ex-workers could be considered to be pay, but

whether this would extend to holiday entitlement is not guaranteed, although it is likely in view of the fact that even sick pay has been held to come within the meaning of pay in ***Rinner-Kuhn v FWW* (171/88)**. So a claim for equal pensions provisions is very likely to succeed if lodged under **Art 157 TFEU**. In this case the application of the indirect effects principle would equally succeed or the ***Mangold*** and ***Lindorfer*** cases could also apply to achieve the same result. As a final resort, should these other claims fail, a claim for damages under the state liability principle could be made.

### Conclusion

In conclusion, there is such an array of remedies available to individuals under EU law today that both claims would in all likelihood succeed either in being upheld to establish discrimination or in obtaining compensation from the Member State if not. Evans will in all probability succeed in the holiday pay claim under direct effects, and under indirect effects for the pension claim. Jones will probably succeed under general principles for both. If private, **Art 157 TFEU** could come to the rescue of both.

p. 46

## Looking for Extra Marks?

- You don't have to include headings; only do so if you have time. In other words, if when including some headings you fail to finish the answer or miss some points, you will lose more marks than the marginal mark or two you might gain.
- Use clear concise writing without unnecessary repetition and provide a concise summary at the end.
- Recognise the relative importance of the alternative ending.

## Taking Things Further

- Bebr, G, 'Case Note on *Francovich*' (1992) 29 CML Rev 557.

*Explanation of how the Francovich case plugged the gap left by earlier developments*.

- Dickson, J, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?' (2011) 17 ELJ 190.
- Cabral, P, and Neves, R, 'General Principles of EU Law and Horizontal Direct Effect' (2011) 17 EPL 437.

*Looking at this more recent development concerned with general principles*.

- Easson, A, 'The Direct Effect of EEC Directives' (1979) 28 ICLQ 319–53.

*Setting the basics of direct effects*.

■ Prechal, S, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 EBL Rev 299.

*Comparison of remedies*.

■ Schiek, D, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 329.

*Considers the development of the direct effects of general principles as another way of getting around the limitation with the direct effects of Directives*.

■ Special Report of the EU Commission of 15 July 2009 on the 'Case law of the Court of Justice of the European Union connected with claims for damages relating to breaches of EU law by Member States,' available at http://www.ec.europa.eu/eu_law/infringements/pdf/jur_09_30385_en.pdf *<http://www.ec.europa.eu/eu_law/infringements/pdf/jur_09_30385_en.pdf>*.

*What it says on the label: it is a report of the cases in which the Member States have been sued under the state liability principle, which may be used as examples*.

■ Winter, J, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) 9 CML Rev 425.

*This clarifies and explains the at times confusing overlap of these two concepts.*

## Online Resources

**www.oup.com/uk/qanda/** *<http://www.oup.com/uk/qanda/>*

For extra essay and problem questions *<https://iws.oupsupport.com/ebook/access/content/eu-qanda3e-resources/eu-qanda3e-chapter-3-extra-questions?options=name>* on this topic and guidance on how to approach them, please visit the online resources.

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/9780198853190>*