

## **Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability**



Dorota Leczykiewicz

The Oxford Handbook of European Union Law

*Edited by Damian Chalmers and Anthony Arnall*

Print Publication Date: Jul 2015 Subject: Law, EU Law Online Publication Date: Apr 2015

DOI: 10.1093/oxfordhb/9780199672646.013.46

### **Abstract and Keywords**

The chapter discusses the fundamental doctrines of EU law regulating its effect before national courts: direct effect, the obligation of consistent interpretation, Member State liability for breach of EU law, and horizontal effect of general principles and provisions of the Charter of Fundamental Rights. It points to different conceptions of the direct effect doctrine and its limits in horizontal situations with respect to Directives. It shows how the obligation of consistent interpretation substitutes for the absence of horizontal direct effect of Directives and discusses other ways in which Directives generate effects in contractual situations or serve as standards of direct review of national administrative acts. It concludes by asking whether the discussed doctrines constitute a coherent picture of EU law's effectiveness before national courts from the perspective of the values of legal certainty, fairness, and social justice, and how they are related to the principle of primacy of EU law.

Keywords: effectiveness, direct effect, consistent interpretation, horizontal effect, Member State liability, primacy of EU law

---

## **I. Introduction**

THE chapter considers the doctrines developed by the Court of Justice of the EU in order to ensure effectiveness of norms belonging to the EU legal order before national courts. It examines the development of these doctrines, how their recognition was justified by the Court, and how they made it possible for the body of rules found in the Treaty establishing the European Economic Community (EEC Treaty) and the subsequent Treaties, as well as in acts adopted by institutions of the Community and then the Union, to constitute a new legal order, semi-autonomous from the legal orders of the Member States.<sup>1</sup> The chapter explains why the (p. 213) theoretical rationalization of the legal phenomena hidden behind the described doctrines is difficult. The case law of the Court of Justice does not allow us to construct a coherent picture of when EU norms should be effective before

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

national courts. The chapter attempts, however, to explain the considerations that played a role in the judicial development of the doctrines, and to formulate the rules that could be derived from the Court's case law.

## II. Direct Effect and the Case of *Van Gend en Loos*

'Direct effect' is a structural principle of EU law and it is the justification supporting it (the principle of effectiveness or *effet utile*) that explains why its significance could not be restricted to just one Treaty provision or only a set of provisions displaying similar characteristics.<sup>2</sup> Another important factor is the method of precedent applied by the Court of Justice of the EU. While in the common law systems the case has to be significantly similar on facts to be relevant for deciding another case, the Court of Justice makes connections between cases at a much higher level of abstraction. This enables the Court to move freely between formal sources of law and sectors of Union law. Because ensuring effectiveness of EU law is always a relevant consideration, judgments that rely on this justification have a potentially limitless scope of application as precedents for future cases. It should also be recognized that the doctrine of direct effect was unlikely to develop had it not been for the preliminary ruling procedure, which enabled national courts to refer questions of interpretation of Community/Union provisions to the Court of Justice.

The *Van Gend en Loos* case<sup>3</sup> concerned incorrect classification by a Dutch tax authority of a product imported into the Netherlands from Germany. The tariff applied was incorrect in the light of Article 12 EEC, which provided that Member States should refrain from introducing between themselves any new customs duties (p. 214) on imports or exports or any charges having equivalent effect, and from increasing those they had already applied in trade with each other. The Dutch administrative tribunal asked the Court of Justice whether Article 12 EEC had 'direct application within the territory of a Member State'. The question defined 'direct application' as involving the capacity of nationals of a given State to 'lay claim to individual rights', on the basis of the Article in question, which the national courts were under obligation to protect. The Court's reply was positive. Article 12 EEC had 'direct application' because of the Treaty's spirit (the establishment of a Common Market and of institutions with sovereign rights). According to the Court, the functioning of the Common Market was 'of direct concern to interested parties in the Community', which implied that the Treaty was 'more than an agreement which merely create[d] mutual obligations between the contracting states'.<sup>4</sup> The Treaty was held to be able to confer rights on individuals.<sup>5</sup> Article 12 EEC in particular conferred rights because: (1) the provisions contained a clear and unconditional prohibition which was not a positive but a negative obligation; (2) the obligation was not qualified by any reservation on the part of the states which would make its implementation conditional upon a positive legislative measure enacted under national law; (3) the implementation of Article 12 EEC did not require any legislative intervention on the part of the states.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

Only a year after the *Van Gend en Loos* judgment the Court decided another fundamental case, *Costa v ENEL*,<sup>6</sup> which addressed directly the question of the relationship between a Treaty provision relied on by an individual and a national measure that violated the prohibition imposed on the Member States by that provision. The Court held that ‘the EEC Treaty ha[d] created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’.<sup>7</sup> The *Costa v ENEL* judgment did not clearly resolve the issue of the relationship between the principle of Community law precedence, or primacy, as it later became to be called, and the producing of direct effects by a particular provision of Community law. This has led to a persisting uncertainty over that relationship. Primacy is a principle of a higher level of generality and with potentially broader implications. Protection of individual rights is not, unlike in the context of direct effect, the primary concern. The doctrine of primacy is focused on the objective effectiveness of Community law stemming from the need to respect the reciprocal arrangement in which the Member States have entered, and the ability of the organization they created, ie the Community or the Union, to achieve its objectives.<sup>8</sup> These considerations could in principle justify the introduction of other doctrines, which, alongside direct effect, (p. 215) would contribute to the effectiveness of Community/Union law, independently of whether they are also demanded by the need to protect individual rights.

In a number of cases following *Van Gend en Loos* the Court was given the opportunity to embed the doctrine of direct effect into Community law in the face of variations in the cases’ factual circumstances. Direct effect was possible also when the applicant relied on a Treaty provision that envisaged a transitional period,<sup>9</sup> or when a Treaty provision was elaborated by a Directive.<sup>10</sup> In *Reyners*,<sup>11</sup> the Court held that even a Treaty provision envisaging the adoption by the Community of further measures was directly effective at the end of the transitional period. In *Grad*,<sup>12</sup> the applicant was allowed to rely on a Decision, an act of Community secondary law. In this way the path was opened for Directives, another type of Community secondary law, to be recognized to produce ‘direct effects’. This recognition would have to overcome the wording of Article 189 EEC (now Article 288 TFEU), which stated: ‘Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.’ In *van Duyn*,<sup>13</sup> the Court held that:<sup>14</sup>

[i]t 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 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.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

The Court also began to develop the doctrine of horizontal direct effect of Treaty provisions. In *BRT v SABAM*,<sup>15</sup> the Court held that it was clear from the wording of Articles 85(1) and 86 (now Article 101(1) and 102 TFEU) that they were intended to regulate relations between private parties, and therefore that these provisions produced direct effects between individuals. In *Walrave and Koch*,<sup>16</sup> the Court extended horizontal direct effect onto Treaty articles concerning free movement of workers and services, which were addressed only to the Member States. The Court reasoned that the private rules challenged under the provisions on free movement of workers (p. 216) and services were 'regulating in a collective manner gainful employment'.<sup>17</sup> Their arguable 'public law' character justified subjecting them to review against the relevant Treaty provisions. It was *Defrenne*<sup>18</sup> that enabled review against the Treaty of individual private contracts.<sup>19</sup> The case concerned Article 119 EEC (now Article 141 TFEU) on equal pay for equal work between men and women. The Court hesitated the longest to recognize the horizontal direct effect of the free movement of goods provisions (now articles 34 and 35 TFEU). In *Sapod*, the Court held that contractual provisions cannot be regarded as barriers to trade because they were not imposed by a state but agreed between individuals.<sup>20</sup> However, in *Fra.bo* the Court tentatively allowed horizontal application of Article 34 TFEU (then Article 28 EC) on the ground that the private body against whom the provision was invoked in reality held 'the power to regulate the entry into the German market of products ... at issue'.<sup>21</sup> Article 34 TFEU has not been so far used to review the content of a private contract.

## III. Direct Effect and Enforceability of National Measures

The early judgments of the Court about direct effect did not elucidate whether 'producing direct effect' entailed some specific legal consequence which the national court had to recognize and implement in its decision. The *Simmenthal* judgment clarified that the obligation of the national court stemming from the doctrine of direct effect is to disapply or set aside conflicting national rules. This obligation flows directly from the principle of primacy of Community/Union law.<sup>22</sup> One of the persisting questions of EU law is whether this obligation of the national courts is dependent on the provision (p. 217) conferring rights on the individual. Individuals may benefit from inapplicability of conflicting national law also when they have not been granted any rights by the invoked provisions of Union law. For example, if their conduct was prohibited by some national rule, excluding its application would enable individuals to claim that their conduct was legal and avoid punishment. The conferral of rights is not necessary because in many such situations individuals will argue that they were free to act as they did because of *absence of regulation* (when national rules are disapplied), and not because they had a legal right. Such a situation arises also when it is a Directive with which national rules are incompliant. In *Ratti*,<sup>23</sup> the Court held with respect to Directives<sup>24</sup>:

[A] Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

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

The obligation not to apply a national provision incompatible with a Directive arises after the expiry of the Directive's transposition period. After that date, a Member State 'may not apply its internal law—even if it is provided with penal sanctions—which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive'.<sup>25</sup>

The view that a Member State which has not implemented a Directive can never apply national rules incompatible with the Directive against an individual whose conduct is illegal only because of these rules, has become known as the 'estoppel argument'. The direct effect of the Directive is here a sanction imposed on the state which failed to implement the Directive. An individual is given the *right to rely* on a Directive when its provision is unconditional and sufficiently precise and therefore enables the assessment of the national rules' (in)compatibility with the Directive. For this function of direct effect, it is irrelevant whether the individual was conferred a substantive right by the Directive. This is visible in *Becker*,<sup>26</sup> where the Court disagreed with the German government that only provisions that were enacted in the interest of the individual, and were clear and unconditional on their introduction, could be directly effective.<sup>27</sup> The Court's approach is not, however, uniform. *Ratti* and *Becker* can be contrasted with *Enichem Base*,<sup>28</sup> where the Court held that the applicants could not rely on a Directive to set aside a decision of a local authority because on its proper construction the Directive in question did not give individuals a right.<sup>29</sup>

## (p. 218) IV. The Doctrine of Consistent Interpretation

In the cases at which we have looked so far it was sufficient for the applicant to succeed if the national court disapplied conflicting national law or if it recognized and protected, using national procedural mechanisms, a right that was conferred on the applicant by a provision of Union law. Clearly, there are also cases where an individual is able to argue that EU law creates rights that the national court must protect, but the remedial and procedural protection offered by national law is ineffective. Does EU law require national courts to do more than they would under national law in order fully to remedy a breach of an individual Union right? In the early 1980s this was a contentious issue that led to the creation of another doctrine of Union law, frequently called the doctrine of 'indirect effect'.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

The case *Von Colson*<sup>30</sup> concerned interpretative obligations stemming for national courts from Community/Union provisions. Under German law, the only compensation which the applicants unlawfully rejected as candidates for a job because of their sex could receive was reimbursement of their travelling expenses (damages were restricted only to the losses 'incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by ... a breach' of the prohibition of discrimination). The right to equal treatment between women and men in employment was guaranteed in Community law by Directive 76/207.<sup>31</sup> Article 6 of the Directive required Member States to introduce into their national legal systems such measures as were necessary 'to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process', but left it to the Member State to choose the precise form of the remedy. The Court held that despite this discretion the sanctions that were required by the Directive had to be 'sufficiently effective' to achieve the objective of the Directive. They had to guarantee 'real and effective judicial protection' and act as 'a real deterrent effect on the employer'.<sup>32</sup> It followed that where a Member State chose to sanction the breach of the prohibition of discrimination by the duty to compensate, the level of compensation had to be 'adequate in relation to the damage sustained'.<sup>33</sup> National courts had a duty 'effectively' to transpose a Directive in the event when the national legislator had failed to enact provisions which achieved the objective of imposing an effective sanction. The (p. 219) Court held that national courts were required to interpret national law in the light of the wording and the purpose of the Directive in order to achieve the result of its implementation.<sup>34</sup> This obligation became known as the doctrine of consistent interpretation, described also, very confusingly, as the doctrine of 'indirect effect' merely because it created another possibility for EU provisions to generate some effect before national courts.

The doctrine of consistent interpretation enabled insufficiently precise and conditional provisions of a Directive to produce some effects in national law. So in *Von Colson*, the task of the German court was to ensure that substantial compensation was available to the claimants by the appropriate interpretation of national law. The Court thus expected the national court, where effectiveness of Union law so required, to change the traditional interpretation of national provisions so as to comply with the Directive's wording and purpose. What it meant in practice was that the national court had to comply with the Court's interpretation of the Directive. In *Von Colson*, the Court did not specify when the obligation of interpreting national law in the light of the Directive would be discharged. The exact limits of the obligation of consistent interpretation were explored in later cases, many of which involved attempts by individuals to rely on Directives against employers, commercial partners, and traders, and thus related to the question of horizontal effect of Union provisions.<sup>35</sup>

## **V. Directives and Obligations of Private Parties**

We have seen that in *Defrenne* the Court held that a Treaty provision guaranteeing the right to equal pay was applicable ‘horizontally’. An individual was able to rely on this provision against their employer regardless of whether it was a private or a public entity. *Von Colson* concerned applicability of the equal treatment principle against an employer, but this time the principle was laid down not by the Treaty but by a Directive. Another case which concerned the same Directive was *Marshall*.<sup>36</sup> The UK Court of Appeal asked the Court of Justice whether (p. 220) the Equal Treatment Directive could be relied upon before the national court by Ms Marshall notwithstanding the inconsistency between the Directive and the UK Sex Discrimination Act, which permitted discrimination by employers when it related to pensions. The employer and the UK argued that a Directive could never impose obligations directly on individuals and that it could only have direct effect against a Member State qua public authority, and not against a Member State qua employer. The Court first dealt with the argument that a Directive could never impose obligations directly on individuals. It held that:<sup>37</sup>

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*.

However, where the applicant was able to rely on a Directive as against the State, they could do so regardless of the capacity in which the latter was acting. So even when the state acted merely as an employer an individual could rely on a directly effective provision of the Directive against it.<sup>38</sup> While the Court did not say it explicitly, the judgment strongly suggested that it was the estoppel argument which had been *the* justification for the effect of an unimplemented Directive’s provisions before national courts, and therefore Directives could be effective also in quasi-horizontal situations, where the state acted as a mere employer. However, due to the fact that the estoppel argument worked only against a state, Directives could not be effective in purely horizontal situations, ie between two private parties.

On the facts, this was confirmed in *Faccini Dori*.<sup>39</sup> The Court was asked to interpret a Directive that created rights for consumers and was clearly sufficiently precise and unconditional to produce direct effect.<sup>40</sup> Under the Directive, a consumer had a right of withdrawal from a contract concluded away from the business’ premises but the Directive was not implemented in Italy. The trader brought proceeding before the (p. 221) Italian court against Ms Faccini Dori for the agreed sum with interest and costs, which she had refused to pay. Despite the criticism of its earlier rejection of the horizontal direct effect of Directives, the Court maintained its ruling as to the Directive’s impossibility of imposing obligations on an individual.<sup>41</sup> The Court explained that it was clear from the *Marshall* judgment and the case law on the possibility of relying on Directives against a State that

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

under Article 189 EEC a Directive was binding only ‘in relation to “each Member State to which it [was] addressed” ’.<sup>42</sup> The judgment listed two further possibilities for ensuring that individual rights conferred by a Directive were made effective. The first was the doctrine of consistent interpretation and the second—the state’s obligation to make good damage caused to the individual through the failure to transpose the Directive, which I will discuss in Section VI.

In *Arcaro*,<sup>43</sup> the Court treated the *Marshall* prohibition as a more general principle which underpinned not only the doctrine of direct effect but also that of consistent interpretation. As a result, if the changed interpretation of national law demanded by the requirement of ensuring the Directive’s objective led to the imposition of a new obligation on a private party, the national court was not obliged to adopt this interpretation.<sup>44</sup> AG Jacobs in *Centrosteeel*<sup>45</sup> argued that *Marshall* did not require such a general constraint on horizontal effectiveness of Directives.<sup>46</sup> Directives could create obligations for individuals, just not ‘by themselves’.<sup>47</sup> It was, however, difficult to reconcile this proposition with a view that a Directive’s effect before national courts stemmed from the estoppel argument. In particular, it would go against its precepts to allow unimplemented Directives to produce effects through the doctrine of consistent interpretation in inverse vertical cases, where Directives were invoked by the state *against* an individual. This concern explains the judgment in *Kolpinghuis Nijmegen*, where the Court held that a Directive could not ‘of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive’.<sup>48</sup> A less strict version of this restriction applies in taxation cases, where (p. 222) the Court accepted that a Member State could impose ‘directive-compliant interpretation’ of national law on individuals, but the national law under interpretation had to be sufficiently precise and clear so that the persons concerned could in advance know the full extent of their rights and obligations.<sup>49</sup> It seems that when this requirement is not met the obligation of consistent interpretation does not apply, which in practice means that also in taxation cases the doctrine of indirect effect cannot lead to the imposition of new obligations on individuals.

But conversely to inverse vertical cases, in horizontal cases the Court gradually did accept far-reaching effects of Directives brought about by the doctrine of consistent interpretation. In *Marleasing*,<sup>50</sup> a company incorporated under Spanish law was entitled to rely on a Directive<sup>51</sup> against another company in order to exclude application of the provisions of the Spanish civil code that enabled the latter to challenge on the grounds of lack of cause the validity of the contract establishing the first company. The Court repeated its ruling in *Marshall* that ‘a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person’, but claimed that the national court was in fact asking whether in a case falling within the scope of the Directive it was 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’.<sup>52</sup> Thus, in *Marleasing*, the Court broke the link between the limits of the obligation of consistent interpretation and the prohibition against allowing Directives to im-



## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

pose obligations on individuals. Moreover, the *Marshall* prohibition was no longer presented as related to the limits of the estoppel argument. Instead, it was interpreted independently and applied *a contrario*, as permitting other ways in which a Directive could affect the outcome of a case before a national court. Both national provisions adopted in order to implement a Directive and those which were adopted before or after the Directive for other reasons than its implementation were covered by the obligation of consistent interpretation.<sup>53</sup> Moreover, the Court asked the national court to interpret national provisions 'as far as possible' 'in order to achieve the result pursued by [the Directive] and thereby comply with the third paragraph of Article 189 of the Treaty' (the state's obligation to implement Directives).<sup>54</sup> In some cases, including (p. 223) *Marleasing*, the Court was even prepared to declare which interpretation of national provisions was precluded by the obligation of consistent interpretation. This shows that the doctrine of consistent interpretation could in fact substitute for direct effect where the latter was not applicable.

The Court's judgment in *Pfeiffer*<sup>55</sup> could be taken as evidence that the *Marshall* prohibition, on its post-*Marleasing* interpretation, in no way restricts the effectiveness of Directives in horizontal situations. The case concerned compatibility of German law with the Working Time Directive.<sup>56</sup> German law made it possible to extend the weekly working time beyond 48 hours and accepted consents given in the form of collective agreements. The Court of Justice had to determine whether the workers' agreement had to be given by each worker individually. It concluded that each worker should have the benefit of an upper limit on weekly working time and minimum rest periods, and that German legislation was incompatible with the Directive.<sup>57</sup> Yet in order for the Directive to affect individual contracts, the Court needed to make it possible for the claimants to rely on the Directive against their employer. The Court found the relevant provision of the Directive direct effective, but did not want to overrule *Marshall* and allow the Directive's *horizontal* direct effect.<sup>58</sup> Instead, it focused on the doctrine of consistent interpretation.<sup>59</sup> It held that it was 'the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective'.<sup>60</sup>

The judgment lays down three interpretational instructions to national courts, whose observance entails that they have properly discharged the obligation of consistent interpretation. First, all national provisions have to be used in the interpretation process so as to avoid a result contrary to that sought by the Directive.<sup>61</sup> Second, the scope of application of national provisions should be restricted by applying them only insofar as they are compatible with the Directive concerned.<sup>62</sup> Third, the national court must do whatever lies within its jurisdiction to ensure compatibility with the Directive.<sup>63</sup> The judgment in *Pfeiffer* shows that the doctrine of consistent interpretation enables an employee to rely on an EU right created by a Directive against another private party to alter the content of an employment contract. The effect is arguably achieved by means of interpretation of national law, but it is indistinguishable from ascribing the Directive 'horizontal direct effect'. Craig argues that in the light of the (p. 224) *Pfeiffer* judgment, it is no longer tenable

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

to deny Directives such effect, and concludes that legal certainty would be enhanced by abolishing the *Marshall* prohibition.<sup>64</sup>

The continuing ambiguity concerns the content of the obligation of consistent interpretation. What exactly does the national court have to do to fulfil the obligation? In *Pupino* the Court held that:<sup>65</sup>

[t]he obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

In *Adeneler*, the obligation of consistent interpretation was extended temporarily onto the time after the Directive's entry into force but before the expiry of its transposition deadline.<sup>66</sup> During this time national courts were imposed an obligation to refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition had expired, attainment of the objective pursued by that Directive.<sup>67</sup> In *Impact*,<sup>68</sup> the Court considered a situation where national provisions belatedly implementing a Directive excluded their retrospective effect because, under a rule of that legal system, retrospective application of legislation required a clear and unambiguous indication in the law in question. The Court held that the obligation of consistent interpretation was limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that this obligation could not serve as the basis for interpreting the national law *contra legem*.<sup>69</sup> The Court left it for the national court to ascertain (p. 225) whether domestic law included a provision that enabled retrospective application of the implementing measure, but, in the absence of such a provision, the national court was released from the obligation to give effect to the Directive.<sup>70</sup> However, as the Court explained in *Mono Car Styling*:<sup>71</sup>

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

## **VI. The Principle of Member State Liability**

Liability in damages is a universal enforcement mechanism, which in principle could attach to any form of irregular behaviour. The *Faccini Dori* judgment made it clear that Community law did not possess a perfect system of enforcement. The doctrine of direct effect had significant limitations, some of which stemmed from the requirement of sufficient precision and unconditionality, and some of which arose from the *Marshall* judgment, which excluded the operation of the doctrine of direct effect in horizontal cases. Unimplemented Directives creating obligations for non-state actors or those that could not be invoked against states because of their insufficient clarity and precision would remain ineffective, and no sanction, apart from the Commission starting proceedings against the non-complying state, would be available. As we have seen, the Court extended the doctrine of direct effect onto provisions which left discretion to the Member States. It also developed the doctrine of consistent interpretation. In the line of cases described below it created yet another possibility for individuals to rely on unimplemented Directives.

In *Francovich*,<sup>72</sup> a group of employees brought proceedings against Italy for its failure to implement a Directive guaranteeing a minimum level of protection in the event of the employer's insolvency.<sup>73</sup> The remedies sought included the recovery of unpaid wages or, in the alternative, compensation. The Court found that the rights of employees under the Directive were not unconditional and sufficiently precise because the provisions left the Member States a broad discretion with regard to the organization, operation, and financing of the guarantee institutions. This meant that the relevant provisions of the Directive were not directly effective and the employees could not simply receive the outstanding wages.<sup>74</sup> As a result, the Court of Justice had to focus on the question of the state's liability in damages. It observed that the issues had to be considered 'in the light of the general system of the Treaty and its fundamental principles'. At paragraph 33 the Court held: 'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'

The principle that a Member State is liable for loss and damage caused to individuals as a result of a breach of Community law was held to be 'inherent in the system of the Treaty'.<sup>75</sup> As for conditions, the Court did not refer the Italian courts to their own rules on compensating for damage caused by illegal conduct. Instead, the conditions were set out in the judgment (the granting of rights to individuals, the possibility of identifying the content of those rights on the basis of the provisions of the unimplemented Directive, and the existence of causal link between the state's failure to implement and the loss or damage suffered). These conditions were held to be sufficient to give rise to a right to reparation.<sup>76</sup> However, while national courts were not entitled to use additional conditions of liability, they were permitted to use national rules concerning the designation of competent courts, detailed procedural rules,<sup>77</sup> and arguably also concerning the remaining substan-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

tive issues, such as the level of compensation and the sufficiency of the causal connection.<sup>78</sup>

The conditions of Member State liability were further spelt out in the *Brasserie du Pêcheur/Factortame III* judgment of the Court.<sup>79</sup> The two cases each concerned liability of a Member State for a breach of Community law. The Court held that the right to reparation was ‘the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained’.<sup>80</sup> It submitted (p. 227) that creation of the *Francovich* remedy was legitimate as an ‘interpretation of the Treaty’.<sup>81</sup> Just as in the process of creating the ‘general principles of law’, also here the Court was invoking the fact that its jurisdiction covered the duty to ensure that law was observed, and the ‘generally accepted methods of interpretation’ permitted the Court to refer to ‘general principles common to the legal systems of the Member States’.<sup>82</sup> It found evidence to the effect that liability in damages of public institutions was indeed common to the laws of the Member States in Article 215 EEC (now Article 340 TFEU), which mentioned the laws of the Member States as the basis for the non-contractual liability of the Community for damage caused by its institutions.<sup>83</sup> The principle of state liability was held to apply to ‘any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach’, including the national legislature.<sup>84</sup>

The negative effect of linking *Francovich* liability with Article 215 EEC Treaty was the pressure to unify the conditions of liability applying to Community institutions and to Member States.<sup>85</sup> Because the Community had immunity from liability unless its institutions manifestly and gravely disregarded the limits on the exercise of its powers, the Court introduced a similar requirement with respect to claims brought by individuals against the states. The scope of the state’s discretion under Community law became the crucial issue. Member States have no discretion as to whether to implement Directives, but in individual sectors of Community/Union law they are often left with much autonomy. The Court held that in such circumstances the Member States should be liable only where their breach was ‘sufficiently serious’.<sup>86</sup> According to the Court,<sup>87</sup>

[t]he factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

The important ingredient in the decision as to whether the breach was sufficiently serious was the Court’s own case law, especially when the Court’s judgment had already found the state to be in breach. The conditions set out in the *Brasserie du Pêcheur/Factortame III* judgment were clearly only the minimum conditions of the right to reparation. The state could incur liability under less strict conditions on the basis of national law,<sup>88</sup> but

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

(p. 228) no more onerous conditions were allowed.<sup>89</sup> That meant that it was not permissible for English courts to use the conditions of the tort of misfeasance in public office to impose liability on the UK government. When it came to the condition of fault, only certain factors that are traditionally examined by reference to this concept were accepted as playing a role in deciding on the seriousness of the state's breach.<sup>90</sup> The condition of fault as a separate requirement could not be applied, which was a very sensible dictum given the divergent understandings of this concept in the laws of the Member States. The Court also provided some guidance as to what items of loss were recoverable in a *Francovich* claim. In principle, compensation should be commensurate with the loss or damage sustained. However, the claimant would not obtain full compensation if some losses they incurred could have been avoided if they had acted diligently, or if they had availed themselves in time of all the legal remedies available.<sup>91</sup> Lost profits were held to be recoverable but national rules were to regulate precisely which heads of damage should be compensated, what was required as a matter of proof, and how damages were to be calculated.<sup>92</sup>

The Court's relaxation of the conditions of liability under *Francovich*, in particular the inclusion among them of the requirement of serious breach in situations where the Member States had some discretion, largely disabled the remedy as a method of improving compliance and protecting individual rights.<sup>93</sup> In *British Telecommunications*,<sup>94</sup> the Court held that the UK could not be liable under *Francovich* because the relevant provision of the Directive in question<sup>95</sup> was imprecisely worded and therefore could reasonably bear the meaning accorded to it by the UK government, especially in the light of the fact that no guidance was available in the case law of the Court on how the provision should be interpreted.<sup>96</sup> In *Hedly Lomas*,<sup>97</sup> on the other hand, where the (p. 229) Community enacted a Directive harmonizing national measures necessary to achieve the objective which previously could justify a derogation from a free movement provision, the mere infringement of Community law was sufficient to establish a sufficiently serious breach. In *Dillenkofer*,<sup>98</sup> the Court made it clear that mere non-implementation of the Directive was sufficient to constitute serious breach.<sup>99</sup> It also reconciled a slight difference in the formulation of conditions of liability between *Francovich* and *Brasserie*. According to the Court, while the requirement of serious breach was not mentioned in *Francovich*, it was 'evident from the circumstances of the case'.<sup>100</sup>

The *Francovich* liability underwent two further major developments. Chronologically, first came its extension onto violations of Community law committed by private parties. In *Courage*,<sup>101</sup> the Court was asked whether a party to a contract liable to restrict or distort competition within the meaning of Article 85 EC Treaty (now Article 101 TFEU) could rely on the breach of that provision before a national court to obtain 'relief' from the other contracting party. In particular, the case concerned the right to compensation enforceable against another private party in the situation where under domestic (English) law the claim would be barred by the defence of illegality. The Court held:<sup>102</sup>

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

The *Courage* remedy, while similar in content (it offers compensation for loss caused by a breach of Community/Union law), should in fact be seen as independent from *Francovich*. This is evident in the Court's reasoning in *Courage*. Instead of relying on *Francovich*, the Court returned to the argument from the creation of the Community's own legal order. It discussed extensively the special importance of Article 85 EC Treaty and its recognized horizontal direct effect. The right to compensation enforceable against the claimant's contracting party was created because it 'strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition'.<sup>103</sup> The national court was asked to take into account the economic and legal context of the parties' situation, in particular their respective bargaining powers. In addition, no statement in the judgment supports the conclusion (p. 230) that the Court was introducing a general principle of private party liability for breach of EU law comparable to Member State liability under *Francovich*.<sup>104</sup>

The second major development related to the possibility of Member State liability for a judicial breach of Community/Union law. Judicial breach can consist in an incorrect application or failure to apply EU law, a failure to interpret national law consistently with EU law, a failure to set aside conflicting national provisions, a failure to provide effective remedies to those whose EU rights were violated, or, finally, a failure to refer a preliminary ruling question to the Court of Justice of the EU. Member State liability for judicial breach was recognized by the Court in the judgment in *Köbler*,<sup>105</sup> in response to a reference sent by a Regional Civil Court in Vienna. The Court of Justice held:<sup>106</sup>

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

The conditions of liability were held to be the same as those set out in *Brasserie du Pêcheur/Factortame III*. The most difficult was the question of the appropriate assessment of the condition of the sufficiently serious nature of the breach. The Court took it upon itself to assess whether the Austrian Supreme Administrative Court deciding in the first proceedings committed a serious breach by withdrawing a preliminary ruling reference. The factors that the Court took into account shed some light on what considerations should play a role in deciding on that condition. The Court observed that Community law did not expressly cover the legal point in issue and no reply could be found in the Court's case law.<sup>107</sup> The national court's decision not to maintain a preliminary ruling re-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

quest arose from an incorrect reading of the judgment of the Court, and for this reason it could not be regarded as a manifest error. The Court did not say, however, as it did in *British Telecommunications* with respect to an incorrect implementation of a Directive, whether the 'incorrect' reading was reasonably justified by the wording of the judgment. In the following judgment, *Traghetti del Mediterraneo*,<sup>108</sup> the Court was (p. 231) asked to assess Italian rules that excluded all state liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement was the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court. The Court rejected the possibility of any general exclusionary rule such as the one existing under Italian law. Furthermore, it recalled the relevance of its own case law in determining the correct reading of Union and national law. In practice, state liability for judicial breach is bound to be rare, especially given the imprecise nature of the Court's case law. While absence of 'settled' case law is a sufficient reason for holding that the national court infringed Union law by not referring the case to the Court of Justice, at the same time it makes it possible to conclude that the failure and the resulting incorrect application of Union law did not constitute a manifest error, or sufficiently serious breach, the finding of which is necessary to impose liability under *Francovich*.

## VII. Incidental Effect of Directives

Despite the doctrines of direct effect and consistent interpretation there still remained a question as to whether Directives could generate any other effects. There were three directions of the possible more extensive effect of Directives. First, Directives could be used as general criteria of national law's compatibility with EU law (regardless of their precision and unconditionality and regardless of whether they conferred rights on individuals). Second, Directives could be used as grounds of review of private contracts to the extent that their use would not lead to the imposition of a new obligation on an individual. Third, Directives could be used as grounds of review of national administrative decisions.

The first type of situation arose in the case *CIA Security*.<sup>109</sup> The dispute before the national court concerned the cessation of unfair trading practices in the form of marketing alarm systems which did not meet the requirements of Belgian law. The law, which imposed requirements as to the marketing of alarm systems in Belgium, had not been notified to the Commission, as envisaged by Directive 83/189 (the Notification Directive).<sup>110</sup> The Belgian court established that it was the defendant in (p. 232) the proceedings, the firm CIA Security, which had breached Belgian law, but was unsure whether the national provisions should at all be used in assessing the practices of the parties involved given the fact that as technical regulations they should have, but were not, notified to the Commission. Could the Notification Directive be directly effective to exclude application of the Belgian unnotified technical regulation?

To answer this question, the Court assessed unconditionality and the level of precision of the Directive's provisions imposing the obligation to communicate technical regulations.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

It held that they laid down 'a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles [could] be relied on by individuals before national courts'.<sup>111</sup> This shows that the doctrine of direct effect is the primary gatekeeper of the Directive's applicability. But then the Court, separately from the issue of direct effect, discussed the legal consequences to be drawn from the Member States' failure to notify the technical regulation. The legal consequence to which the Court referred was 'inapplicability' of national rules understood as unenforceability against individuals.<sup>112</sup> The Court recalled that the aim of the Directive was to protect freedom of movement for goods by means of preventive control and that the obligation to notify was essential for achieving such Community control. Once again, it is the argument from effectiveness which provided the main justificatory ground:<sup>113</sup>

The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

The horizontal dimension of the case is invisible in the judgment. The Court is not concerned with the fact that unenforceability of the technical regulation against an individual meant that they were able to succeed in a lawsuit against other private parties. Yet these other parties, in compliance with the narrow reading of *Marshall*, had no obligations imposed on them by means of the Directive. They simply had to tolerate the activities of CIA Security as legal, which probably led to some indirect negative consequences for them in the form of smaller profits from the sale of alarm systems. The application of the Directive to make Belgian technical regulations unenforceable had therefore 'incidental effect' for private parties. In the constellation set out by the Court of Justice, they became 'third parties' because the Court was more concerned about the vertical relationship between the state that breached Community law by failing to notify a technical regulation and the party whose conduct would be characterized as illegal should the unnotified technical regulation apply to them.

(p. 233) The broad and unyielding judgment of the Court in *CIA Security* caused problems at two levels. At the conceptual level it was difficult to reconcile it with the logic of the *Marshall* and *Faccini Dori* judgments, which aimed at protecting individuals from the effects of unimplemented Directives. At the practical level, the unlimited invocability of Directives, leading to the exclusion of application of incompliant national rules, had undesirable consequences. For example, in *Lemmens*,<sup>114</sup> the person charged with driving a vehicle while under the influence of alcohol argued that the administrative rules which specified how the testing of the alcohol content of the driver's breath should be carried out was an unnotified technical regulation. The Court needed to determine whether, if the obligation to notify a technical regulation on breath-analysis apparatus had been infringed, the effect of the Directive was that evidence obtained by means of the apparatus authorized in accordance with the unnotified regulation, could not be relied upon against an individual charged with driving while under the influence of alcohol.<sup>115</sup> To avoid this



## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

absurd result, the Court imposed an additional requirement on when the Notification Directive could lead to disapplication of national rules: not only should the rules constitute technical regulations which have not been notified to the Commission but their application has to be liable to create an obstacle to trade.<sup>116</sup>

The relationship between the obligations stemming for the Member States from Directive 83/189 and the free movement of goods in the context of the Directive's horizontal invocability was further explored in the case of *Unilever*.<sup>117</sup> The case concerned a contractual arrangement between Central Foods, which ordered extra virgin olive oil, and Unilever, which delivered the right quantity of oil but in packaging which did not comply with Italian law on the labelling of olive oil. A draft of that law was communicated to the Commission but, in breach of the standstill obligation, Italy proceeded with its adoption. Unilever argued that the law which was adopted in violation of the standstill obligation was affected by the same substantial procedural defect which rendered the Belgian law inapplicable in the case *CIA Security*. Central Foods, on the other hand, maintained that the contract had not been performed because the labelling of the olive oil was not compliant with Italian law, and refused to pay for the delivery.

AG Jacobs delivered a powerful opinion in the case, underlining its context, that of civil proceedings between individuals arising from a contract.<sup>118</sup> He argued that it was not necessary to permit individuals to rely on Directive 83/189 when the (p. 234) interest of the Community was sufficiently served by the possibility to rely on the Treaty provision on the free movement of goods.<sup>119</sup> Unenforceability of unnotified technical regulations was, according to the Advocate General, justified by the need to ensure the effectiveness of the control mechanism under the Directive, and the Court could not have intended in *CIA Security* that this sanction should apply in all proceedings between individuals.<sup>120</sup> This view was supported by two arguments; the argument from the principle of legal certainty and the argument from injustice. AG Jacobs pointed out that trade required certainty as to which regulations apply to the sale of goods and in the light of the transparency problems in the Directive's control mechanism it would be difficult for individuals to know which laws applied. The Advocate General also submitted that it would be unfair to allow that an individual lost a case not because of their own failure but because of the failure of the Member State. The Advocate General then attempted to distinguish *CIA Security* on the ground that it concerned unfair trading practice proceedings, which although initiated by a private party, the defendant's competitor, were not very different in nature from state enforcement activities.<sup>121</sup> Lastly, he distinguished the notification obligation from the standstill requirement on the ground that its violation did not pose the same threat to the effectiveness of Community control under the Directive.<sup>122</sup> At paragraph 108 AG Jacobs implicitly asked the Court to observe the principle of proportionality in its rulings about the legal consequences stemming from the desire to ensure the effectiveness of the Directive. It claimed that in the circumstances he outlined the sanction of unenforceability would be 'disproportionately severe'.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

The Court's judgment in *Unilever* does not engage with the very convincing arguments of AG Jacobs. The national court's obligation to refuse to apply a technical regulation is extended to a situation where the Member State notified its draft but failed to comply with the standstill requirement. This extension is justified solely by the fact that in the *CIA Security* judgment the Court discussed this requirement in conjunction with the notification obligation.<sup>123</sup> The Court did raise as a separate issue the question of whether inapplicability of technical regulations could be invoked in civil proceedings between individuals concerning contractual rights and obligations. Yet, it took the *CIA Security* judgment to have established that inapplicability of technical regulation could be invoked in proceedings between individuals, regardless of their character. So, while the Advocate General maintained that in *CIA Security*, exceptionally, the legal consequence of inapplicability was permitted *despite* the horizontal nature of the proceedings before the national court, the Court held that it was precisely *because* the earlier case had been (p. 235) horizontal that inapplicability of national provisions could be demanded in another horizontal case had been, namely *Unilever*. As a result of the Italian law's inapplicability, Central Food was legally obliged to pay Unilever for the delivery of the oil.<sup>124</sup> It could be argued, of course, that this obligation arose out of the contract and a general rule of national law about enforceability of contractual promises. But it is undisputable that without the Directive's invocability, Central Foods could claim non-performance by Unilever and refuse to pay for the delivery. Thus, it would have possessed powers, liberties, or rights that were removed by Unilever's ability to invoke the Directive. Does this then mean that the *Unilever* judgment implicitly recognizes the horizontal direct effect of Directives, prohibited by *Marshall* and *Faccini Dori*?

The attempts to solve the conflict between *Unilever* and *Marshall/Faccini Dori* have generally focused on two questions. The first concerned the impact of direct effect, on the one hand, and of the *CIA Security/Unilever* doctrine, on the other, on national rules. If national rules were merely excluded by the application of a Directive (the invocability of exclusion), the direct effect was arguably not triggered and therefore, even in a horizontal case, we could not speak of a violation of the *Marshall* prohibition, which was considered to concern only 'horizontal direct effect'. The *Marshall* judgment could be reinterpreted to exclude only the invocability of substitution, ie a situation where a Directive substitutes for the incompatible national rule and constitutes the legal basis for the judgment of the national court, but allow of the invocability of exclusion—the so-called theory of exclusionary effect.<sup>125</sup> The second attempt to solve the conflict focused on the nature of direct effect. Direct effect was linked with the protection of individual rights. Whenever a Directive did not confer any such rights we could not speak of its horizontal 'direct effect' even if the Directive was applied in a horizontal case.<sup>126</sup> The principle of primacy arguably made it possible to use any norm of EU law as a ground of review of national law regardless of the character (vertical or horizontal) of the case. Naturally, neither of these two solutions actually solves the problem posed by the *CIA Security* and *Unilever* judgments. As explained by Arnulf,<sup>127</sup> claiming (p. 236) that all cases in which the desired consequence was disapplication of national law could be justified by the theory of exclusionary effect, and not direct effect, would require a retrospective rejection of a lot of the Court's case

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

law in which it was the doctrine of direct effect that generated this consequence. More fundamentally, the criterion of distinction between the two types of invocability does not clarify why the requirements to which the effectiveness of Directives is subjected should differ depending on how (directly or by a mere exclusion of national rules) an individual is imposed an obligation as a result of the Directive's invocability. The same objection should be voiced against the second solution; restricting the meaning of direct effect to Union provisions that created individual rights. Moreover, the second solution does not offer an explanation as to why the removal of an existing right (eg not to pay for a contractual delivery) should be treated differently from the imposition of a new obligation. After all, in *Faccini Dori*, the defendant also wanted only to remove her obligation to pay and yet the Court excluded that possibility as incompliant with the permitted scope of the Directive's effectiveness. The argument that in *Unilever* the Court did not actually review the content of a private contract is equally unconvincing given the fact that it was an (implied) term of the contract that the goods to be delivered by Unilever conformed to the law.

The opportunity to reconcile the traditional concerns of contract law, such as legal certainty and the binding effect of contracts, with the desire to ensure effectiveness of the control mechanism under Directive 83/189 came with the case *Sapod Audic*.<sup>128</sup> The dispute concerned payment for disposal of waste carried out in accordance with French provisions implementing the Community Waste Directive.<sup>129</sup> Sapod claimed that the French provisions were technical regulations within the meaning of Directive 83/189, which had not been notified to the Commission, and which could not therefore be relied upon against them. The Court first held that it was for the national court to determine whether the provisions in question constituted technical regulations<sup>130</sup> and proceeded to examine what consequences should follow if the national court decided that the French law in question was a technical regulation, given the fact that it had not been notified to the Commission. It relied on *CIA Security* and *Unilever* to hold that if the national court interpreted French law as establishing an obligation to apply a mark or label, and therefore constituted a technical regulation, 'it would be incumbent on that court to refuse to apply that provision in the main proceedings'.<sup>131</sup> But the Court continued that:<sup>132</sup>

(p. 237) the question of the conclusions to be drawn in the main proceedings from the inapplicability of [the French law in question] as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found.

The ruling in *Sapod Audic* should be interpreted as permitting the national court to enforce a contractual obligation that referred to national rules constituting technical regulations which should have been notified to the Commission under Directive 83/189. Review of the content of private contracts is not permitted unless the EU provision has 'horizon-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

tal direct effect' (as in *Defrenne*), which means that a Directive could never serve as the ground of such review.

The exception to this rule is the case of *Ruiz Bernáldez*.<sup>133</sup> In issue were three Directives relating to insurance against civil liability in respect of the use of motor vehicles.<sup>134</sup> Mr Ruiz Bernáldez caused a road accident while driving intoxicated. The Spanish court ordered him to make reparation for damage to property he had caused, but absolved the insurance company because Spanish law excluded from the insurance policy cover damage to property caused by an intoxicated driver. An appeal was brought by the victim of the property damage, who argued that Spanish law could not be interpreted as releasing the insurance company from the obligation to pay compensation.

The Court held that it stemmed from the Directives in question that:<sup>135</sup>

*a compulsory insurance contract* may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. It may, on the other hand, provide that in such cases the insurer is to have a right of recovery against the insured.

The Directive was then allowed to have a direct bearing on the content of a private insurance contract. If the Court had intended to comply with the rule that (unimplemented) Directives should not serve as grounds of review of private contracts, it should have held that the Directive precluded national law which removed from the contract the obligation of the insurance company to compensate the victim of property damage where the insured person who caused the damage through their driving was intoxicated. Alternatively, it should have stated that national law (p. 238) should be interpreted in the light of the Directive's objective, and could not invalidate a contractual term which offered insurance cover for the situation in question. However, such rulings would not have brought about the result compliant with the Directive (availability of the insurance cover) if the contract itself excluded from the policy property damage caused by an intoxicated driver. This perhaps explains why the Court addressed the insurance contract directly and held what it could not provide. The Directive was thus permitted to create a new legal obligation for a private insurance company, an obligation that did not exist under the contract or the national law.

The case that evades both rationalizations of the conflicting strands of the Court's case law on the effect of Directives (the invocability of exclusion theory and the narrow understanding of the direct effect) is *Wells*.<sup>136</sup> It concerned the obligation to carry out an environmental impact assessment imposed by a Directive.<sup>137</sup> The UK Secretary of State issued a planning permission for quarrying activities without examining whether it was necessary to carry out an environmental impact assessment. Ms Wells requested that the Secretary of State revoke or modify the planning permission. The UK High Court of Justice was unsure whether Ms Wells could rely on the Directive or should be prevented in doing so due to the limitations imposed on the doctrine of direct effect. On the superficial understanding, the *Wells* case should obviously be seen as vertical and not raising any dif-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

difficult issues. The applicant invoked a Directive against a state body. However, the applicant's aim was not to exclude application of the national law, but to subject authorities taking planning permissions directly to the requirements stemming from the Directive.<sup>138</sup> It follows that the Directive is used as a standard of the legality of a national administrative decision, which happens to guarantee certain rights to a third party, a private entity.

The Court's reasoning implies that applicability of Directives before national courts to review national administrative decisions depends on their 'direct effect'.<sup>139</sup> Sufficient precision and unconditionality of the relevant provisions of the Directive were not considered in the judgment, probably because they were presumed to be present.<sup>140</sup> It is clear that their direct effect could not (p. 239) have been taken for granted if the doctrine had been understood to require a conferral of a substantive right on the individual who invoked the Directive. An important step in the Court's reasoning was the discussion of the *Marshall* prohibition, which was held to lay down a rule that for individuals 'the provisions of a directive [could] only create rights'. 'Consequently,' the Court continued, 'an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party'.<sup>141</sup> The *Marshall* prohibition was thereby extended to cases where a third (private) party would be imposed an obligation because of the applicant's reliance on the Directive against the state. 'Obligations' were, however, contrasted with 'mere adverse repercussions on the rights of third parties', which the Court did not regard as problematic. If a third (private) party were to suffer 'mere adverse repercussions', individuals were to be permitted to rely on a Directive.<sup>142</sup> In *Wells*, the fact that the mining operations would have to be halted to await the results of the impact assessment, constituting the belated performance of that state's obligations, did not justify an exception to the Directive's effectiveness.

The insistence on the Directive's effectiveness despite the negative consequences for a private party was counterbalanced by the Court's acceptance of the national courts' discretion in determining what measures were necessary to ensure that projects were subjected to impact assessment. The Court held that they 'included', but not 'entailed', revocation or suspension of a consent already.<sup>143</sup> It then held that:<sup>144</sup>

it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

The only logical interpretation of this paragraph is that the Court contemplated the possibility that a planning permission granted without the required environmental impact assessment would be neither suspended nor revoked, and instead the individual who relied on the Directive would obtain compensation for the harm suffered. The Court stated that

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

the choice and the availability of particular remedies were to be governed by domestic law. Thus, it seems to be saying that in the case of national remedies the principle of effectiveness, acting here as a limitation on national procedural autonomy, would be satisfied if, with her consent, (p. 240) Ms Wells was granted only compensation, and the defective planning permission remained in force. So the possibility to rely on a Directive to instigate a review of a national administrative decision does not necessarily entail under the EU law the possibility of obtaining its revocation.

## VIII. Enforceability of Directives through General Principles

Despite various inroads into the prohibition of the horizontal direct effect of Directives, it still remains the case that in principle Directives cannot ‘of themselves’ impose obligations on private parties. Weatherill has pointed out that this creates a situation of ‘remedial imbalance’, whereby economically focused Treaty provisions are to a large extent enforceable against private parties, while more socially focused Directives are not.<sup>145</sup> This observation overlooks the fact that the two of the most broadly horizontally enforceable provisions of the Treaty are Article 141 TFEU on equal pay for women and men, and Article 18 TFEU and the principle of non-discrimination on the ground of nationality. It is difficult to perceive these two provisions as protecting merely economic interests. It is also clear that Directives are often used in commercial disputes.

The Court has found a way of improving enforceability of ‘social’ Directives by relying on the concept of ‘general principles’. General principles of law were first introduced by the Court of Justice into Community law as a way of incorporating into that law a fundamental rights review. Initially, that review was directed against Community acts, although in practice Community acts were rarely found invalid due to their incompatibility with general principles of fundamental rights. Member States were also bound by general principles when they acted with the scope of Community law. Some general principles of fundamental rights were expressed already in the Treaties, such as the aforementioned principles of non-discrimination between women and men with respect to pay or on the grounds of nationality. However, general principles could not themselves generate rights for individuals enforceable against the state or a private party.<sup>146</sup> They required (p. 241) legislative implementation, usually in the form of Directives, which at the expiry of their transposition period become enforceable against the state, but have only limited enforceability against private parties via the doctrine of consistent interpretation.

All these tenets were put in doubt with the Court’s judgement in *Mangold*.<sup>147</sup> The Court allowed an employee to rely directly on a general principle of non-discrimination on the ground of age to disapply national provisions enabling the employer to conclude a fixed-term contract with an individual who was 52 years old or older. After the Court had established that Germany had breached its obligation under a Directive<sup>148</sup> progressively to take concrete measures for the purpose of approximating its legislation to the result prescribed by the Directive,<sup>149</sup> it focused on the final question of the German court concern-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

ing the legal consequences which should be drawn from the German legislation's incompatibility with the Directive. Here the Court observed that:<sup>150</sup>

Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

According to the Court, two consequences followed from that fact. Because observance of the general principle of equal treatment, in particular in respect of age, was not as such conditional upon the expiry of the period allowed the Member States for the transposition of a Directive, the individual could rely on the principle, as concretized in the Directive, already before the end of the transposition period.<sup>151</sup> Second, the Court held that national courts were under an obligation to ensure that the principle was 'fully effective' by setting aside any provision of national law that might conflict with Community law, even where the period prescribed for transposition of the Directive had not yet expired.<sup>152</sup>

It is important to note two points about the *Mangold* judgment. Just as in *CIA Security* and *Unilever*, the national court is asked only to *disapply* national law which has been found incompatible with Community/Union law. However, the incompatibility is here substantive in nature. Moreover, the individual clearly derives a right from the general principle of non-discrimination on the grounds of (p. 242) age and the existence of this right, as well as the need to ensure its effective judicial protection, is mentioned by the Court as a justification for the national court's obligation to disapply national law. Is it horizontal direct effect of Directives through the back door? Yes, if one believes that direct effect is about giving individuals the possibility to invoke a Directive that creates rights for them.<sup>153</sup> A contractual term is reviewed against a general principle that is taken to have the same substantive content as a Directive. But just as in *Unilever*, the source of the rights and obligations is technically speaking not the Directive but the contract between the parties and the remaining body of national law. This might explain why for many commentators what was most problematic about the *Mangold* judgment was not the expansion of horizontal enforceability of Directives but the surprising invention of the principle of non-discrimination on the grounds of age as a 'general principle of Community law'.<sup>154</sup>

The *Mangold* judgment was confirmed in the *Kücükdeveci* case.<sup>155</sup> It reinforced the significance of the principle by pointing to the fact that discrimination on the ground of age is prohibited by Article 21(1) of the EU Charter of Fundamental Rights. The reference to the Charter of Fundamental Rights in the *Kücükdeveci* judgment opened up debate about the potential horizontal applicability of this document, either independently or as an expression of 'general principles' of Union law.<sup>156</sup> Horizontal applicability of the Charter, within limits, has now been confirmed in a Grand Chamber judgment of the Court of Justice in

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

*Association de médiation sociale (AMS)*.<sup>157</sup> The case concerned the Employees' Consultation Directive,<sup>158</sup> which gives workers the right to be informed and consulted about certain circumstances concerning their establishment, and for this purpose to be represented, as provided by national law. Workers have the right to be represented and consulted also under the Charter (Article 27) 'under the conditions provided for by Union law and national laws and practices'. The AMS was an association promoting reintegration into working life of unemployed persons or persons with social and professional difficulty in gaining access to employment. When a representative of a trade union was (p. 243) appointed to the AMS, the association challenged this appointment. It argued that it had no duty to offer workers representation because in accordance with French law certain categories of workers employed by the AMS, for example those with 'assisted' contracts, which were necessary to make up the minimum number of employees that created the duty, were excluded from the calculation. Horizontal direct effect of Article 27 of the Charter would make it possible to exclude this rule of French law and include workers with 'assisted' contracts in the calculation.

The Court of Justice first interpreted the Directive and ruled that it precluded a national provision, such as that of the French Labour Code, under which workers with 'assisted' contracts were excluded from the calculation of staff numbers in the undertaking when determining the legal thresholds for setting up bodies representing staff.<sup>159</sup> Then the Court assessed whether the relevant provision of the Directive was directly effective due to its unconditionality and sufficient precision, and came to the conclusion that it was.<sup>160</sup> However, the Court recalled that 'even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties'.<sup>161</sup> From this it followed that the other parties could not rely on the Directive against an association governed by private law, such as the AMS. Because it was clear that the French provisions could not be interpreted 'consistently' with the Directive, the Court proceeded to assess whether 'the situation in the case in the main proceedings [was] similar to that in the case which gave rise to *Kücükdeveci*'.<sup>162</sup> *Kücükdeveci* was thus taken to introduce a new doctrine into EU law, by which Charter provisions 'could be invoked in a dispute between individuals in order to preclude the application of the national provision'.<sup>163</sup> What the *AMS* judgment clarified is that in a horizontal case the Charter right would not always trigger the application of the Directive. The Court took a close look at Article 27 of the Charter and observed that it subjected the right to information and consultation to the conditions provided for by EU law and national laws and practices. From this the Court concluded that the provision 'must be given more specific expression in European Union or national law' before it becomes 'fully effective'.<sup>164</sup> It seems that the Court accepted that the Directive could in principle constitute such a more specific expression of Article 27 of the Charter, but the minimum content of the legal rule would nevertheless have to be inferable from the wording of Article 27 and the Charter's Explanations.<sup>165</sup> The *Kücükdeveci* doctrine was not applicable because, unlike the (p. 244) principle of non-discrimination on grounds of age laid down in Article 21(1) of the Charter, Article 27 was not sufficient to confer an individual right. The *AMS* judgement can be seen as introducing into EU law the concept of the 'hor-



## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

horizontal direct effect' of the Charter. This effect is not possible if the Charter provision is conditional upon further legislative implementation and the right or the prohibition, on which a party before the national court relies, cannot be inferred directly from the Charter. And in a horizontal case, the Directive that concretises the Charter provision cannot be invoked to supply the missing elements because this would amount to the circumvention of the *Marshall* prohibition.<sup>166</sup>

## IX. Conclusion: Complementarities or Contradictions?

In this chapter we looked at the fundamental doctrines regulating the effect of EU law before national courts. From this perspective these doctrines appear to complement each other in the effort to achieve the broadest possible enforceability of EU norms, and in this way contribute to the attainment of the EU's objectives. More locally, the doctrines complement each other in the protection of individual rights and in the creation of incentives for the Member States to fulfil their obligations under Union law. From the perspective of the judicial function, the doctrines described in this chapter do not all operate at the same stage of the legal process. We have noticed that the doctrine of direct effect is addressed not only to courts but also to administrative authorities and that it enables a provision of EU law to act as the source of a legal norm to which facts are subsumed, and thus to regulate in substance the particular situation. The doctrine of consistent interpretation retains the national rule as the law applicable to the facts of the case, but with a changed content. *Francovich* is a remedial rule concerned with a situation in which an individual has suffered a loss as a result of the state's breach of Union law. *Courage* is also a remedial rule suspended between national private law and the standards set out by the Court in the judgment. Thus, it would be wrong to look for much coherence (p. 245) between direct effect and consistent interpretation, on the one hand, and *Francovich* and *Courage*, on the other. The direct effect of a particular Union law provision should not entail the necessary existence of a compensatory remedy under that law. This is particularly true where the defendant is a private party. An EU provision's enforceability against individuals and the right to compensation should be seen as distinct questions governed by different policy rationales.<sup>167</sup>

If we focus just on the doctrines aimed at invocability of EU law by individuals before national courts, we can legitimately ask whether they paint a coherent picture. In this context, we face a number of incoherencies, especially in the context of Directives. If legal certainty prevents Directives from imposing of themselves obligations on individuals, why doesn't it prevent other negative consequences for individuals, such as when the Directive's application leads to the removal of a liberty, power, or right under national law? And if legal certainty is the most important concern in horizontal cases, how can one explain the very extensive effect of the obligation of consistent interpretation? Finally, if individuals should not be imposed obligations by EU law against the wording of national law, why is such an effect permitted where the obligation is contained in a general princi-

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

ple of Union law or a Charter right? In legal reasoning we are, of course, also concerned about values other than legal certainty. We ask about fairness between the parties and social justice. This is a type of reasoning which the Court does not use very often. It does not ask when it is 'fair' to interfere into the content of a private contract. Its rulings are sometimes justified by the need to protect the weaker party, but the horizontal effects of Directives go beyond the range of instances which could be justified by that rationale, as evidenced by such cases as *CIA Security* and *Unilever*. Neither can these two judgments be explained by social justice considerations, in particular the perceived problem of remedial imbalance in EU law.

The literature on direct effect and invocability of Directives has traditionally regarded the estoppel argument to be the most convincing. The state in breach of Union law should be neither entitled to rely on their conflicting laws nor use their conflicting laws as a defence against arguments based on Union law. The justificatory force of the estoppel argument has led some authors to the conclusion that problematic judgments, such as *CIA Security*, *Unilever*, *Marleasing*, *Pfeiffer*, or *Mangold*, might in fact be explained as 'disguised' vertical cases, as cases with a public law dimension arising from the state's administrative failure.<sup>168</sup> Regrettably, (p. 246) this explanation is not supported by an argument of principle. Member States may breach EU law in various ways, including by failing to provide adequate protection against the rights-violating conduct of private parties, or by failing to provide access to effective remedies. While these failures add a 'public law dimension' to the cases, the Member States' misconduct is not normally taken to justify the imposition on individuals of negative consequences (the 'disguised' vertical effect). It is true that individuals should be discouraged from exploiting the fact of a Member State's breach to their advantage (what Dougan calls 'opportunistic behaviour'), but it cannot be assumed that every employer or trader who relies on incorrect national law is doing so with the intention of benefiting from the fact that the state failed to fulfil its obligations under EU law. While various cases show that the private party's opportunistic behaviour could be one of the implicit motivations of the Court's decision to allow a Directive to produce effects before national courts, the judgments do not go so far as to inquire about the quality of the defendant's conduct as a way of justifying horizontal enforceability.

The doctrines developed by the Court of Justice to ensure effectiveness of Union law raise also the issue of the limits of judicial power and of the role of unrepresentative institutions in transforming the status of the provisions of a legal system of which they form part. We have seen that the textual basis for the doctrine of direct effect and for the obligation of consistent interpretation is very thin. But convincing substantive arguments are available. In the case of the *CIA Security* doctrine, on the other hand, the only substantive argument that can be discerned from the judgment is that without the national provision's unenforceability the practical effect of the control mechanisms established by the Directive would be weakened. The Court's motivation is thus to contribute, through its case law, to the functioning of the internal market. The only way in which the Court can make this contribution is by making legal acts intended to realize the internal market objective more effective. The EU is an entity created by law and acting primarily through

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

law.<sup>169</sup> The principle of primacy arguably provides an explanation for why potentially all national measures, legislative, administrative, or judicial, in all situations falling within the scope of EU law should be subjected to review against that law.<sup>170</sup> Dougan has called it a 'primacy' model of the relationship between EU law and national law.<sup>171</sup> The alternative model, the 'trigger' model, makes direct effect a pre-condition of EU law's cognizability or justiciability before national courts. (p. 247) The 'trigger' model leaves in an uncertain place the doctrine of consistent interpretation, which, according to some authors, and now also in the Court's view, should be given priority among the judicial methods of ensuring effectiveness of EU law.<sup>172</sup> In the model that gives priority to the obligation of consistent interpretation, EU law and national law are in dialogue, inspiring each other in the construction of their respective content. Moreover, a theory that governs the questions discussed in this chapter should also explain the place of individuals vis-à-vis EU law, when they act both as beneficiaries and as burden-bearers of its rules. Constructing such a theory, in particular in relation to the democratic accountability of Union institutions, is a task that still lies before the scholars of EU law.

## Bibliography

Anthony Arnall, *The European Union and its Court of Justice* (2nd ed, 2006)

Paul Craig, 'Once upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 4 *Oxford Journal of Legal Studies* 453

Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349

Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, 2011) 323

Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931

Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 *Cambridge Law Journal* 586

Michael Dougan, 'In Defence of *Mangold*?' in Anthony Arnall, Catherine Barnard, Michael Dougan, and Eleanor Spaventa (eds), *A Constitutional Order of States?* (2011) 219

Pablo V. Figueroa Regueiro, 'Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives' Jean Monnet Working Paper 7/02

Carol Harlow, '*Francovich* and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 199

Dorota Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' (2009) 12 *Cambridge Yearbook of European Legal Studies* 257

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

(p. 248) Dorota Leczykiewicz 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479

Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287

Leone Niglia, "Form and Substance in European Constitutional Law: The 'Social' Character of Indirect Effect"(2010) 16 *European Law Journal* 439

Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (2007)

Mattias Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *Common Market Law Review* 307

Malcolm Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality' (2006) 31 *European Law Review* 476

Francis Snyder 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19

Takis Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 *Common Market Law Review* 301

Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, 2007)

Stephen Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *European Law Review* 177

Stephen Weatherill, 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (2000) 87

### Notes:

<sup>(1)</sup> Eric Stein, 'Lawyers, Judges and the Making of a European Constitution' (1981) 75 *American Journal of International Law* 1; Joseph H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; Paul Craig, 'Once upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 4 *Oxford Journal of Legal Studies* 453; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, 2011) 323.

<sup>(2)</sup> On the constitutional implications of effectiveness, see Malcolm Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality' (2006) 31 *European Law Review* 476.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(3)</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

<sup>(4)</sup> *Van Gend & Loos* (n 3) 12.

<sup>(5)</sup> *Van Gend & Loos* (n 3) 12 (emphasis added).

<sup>(6)</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 1141, English version: [1964] ECR 585.

<sup>(7)</sup> *Costa* (n 6) 593.

<sup>(8)</sup> Effectiveness is often considered to have two guises, a subjective and an objective one. Subjective effectiveness is oriented towards ensuring effective protection of individual rights conferred by Union law. Objective effectiveness concerns efficient operation of regimes created by Union law, such as the Common Market, regardless of whether, or beyond the extent to which, they create individual rights.

<sup>(9)</sup> Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade, Rome* [1968] ECR 661.

<sup>(10)</sup> Case 33/70 *SpA SACE v Finance Minister of the Italian Republic* [1970] ECR 1213.

<sup>(11)</sup> Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631.

<sup>(12)</sup> Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825.

<sup>(13)</sup> Case 41-74 *Yvonne van Duyn v Home Office* [1974] ECR 1337.

<sup>(14)</sup> *Van Duyn* (n 13), para 12.

<sup>(15)</sup> Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECR 51.

<sup>(16)</sup> Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405.

<sup>(17)</sup> *Walrave and Koch* (n 16), para 17. See also Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767

<sup>(18)</sup> Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

<sup>(19)</sup> *Defrenne* was followed, among others, in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139 and Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(20)</sup> Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031, para 74.

<sup>(21)</sup> Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)—Technisch-Wissenschaftlicher Verein*, judgment of 12 July 2012, para 31.

<sup>(22)</sup> Case 35/76 *Simmenthal SpA v Ministero delle Finanze italiano* [1976] ECR 1871, para 17.

<sup>(23)</sup> Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629.

<sup>(24)</sup> *Ratti* (n 23 ), para 22.

<sup>(25)</sup> *Ratti* (n 23 ), para 23.

<sup>(26)</sup> Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

<sup>(27)</sup> *Becker* (n 26 ), para 30.

<sup>(28)</sup> Case 380/87 *Enichem Base and others v Comune di Cinisello Balsamo* [1989] ECR 2491.

<sup>(29)</sup> *Enichem Base* (n 28 ), para 11.

<sup>(30)</sup> Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>(31)</sup> Council Dir No 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 (Official Journal 1976, L39, p 40) ('The Equal Treatment Directive').

<sup>(32)</sup> *Von Colson* (n 30 ), para 23.

<sup>(33)</sup> *Von Colson* (n 30 ), para 23.

<sup>(34)</sup> *Von Colson* (n 30 ), para 26.

<sup>(35)</sup> On the role of the doctrine of consistent interpretation in enhancing effectiveness of EU social policy, see Leone Niglia, 'Form and Substance in European Constitutional Law: The "Social" Character of Indirect Effect' (2010) 16 *European Law Journal* 439.

<sup>(36)</sup> Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

<sup>(37)</sup> *Marshall* (n 26 ), para 48 (emphasis added), hereinafter: 'the *Marshall* prohibition'.

<sup>(38)</sup> *Marshall* (n 26 ), para 49. This means that provisions of a Directive could be relied on not only against tax authorities (*Becker*), local or regional authorities (Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839), but also against constitutionally independent authorities responsible for the maintenance of public order and safety (Case

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651) and public authorities providing public health services (*Marshall*) acting as employers. In Case C-188/89 A. *Foster and others v British Gas plc* [1990] ECR I-3313, para 20, the Court held 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’.

(<sup>39</sup>) Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325.

(<sup>40</sup>) Council Dir 85/577/EEC, concerning protection of the consumer in respect of contracts negotiated away from business premises (OJ 1985 L372, p 31)

(<sup>41</sup>) *Faccini Dori* (n 39 ), para 20.

(<sup>42</sup>) *Faccini Dori* (n 39 ), para 24. In Case C-201/02 *The Queen, on the application of Deleena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723, para 56, the Court explained that it is the principle of legal certainty which prevents Directives from creating obligations for individuals.

(<sup>43</sup>) Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705.

(<sup>44</sup>) *Arcaro* (n 43 ), para 42.

(<sup>45</sup>) Case C-456/98 *Centrosteeel Srl v Adipol GmbH* [2000] ECR I-6007, Opinion of AG Jacobs of 16 March 2000.

(<sup>46</sup>) *Centrosteeel* (n 45), para 34 of the Opinion.

(<sup>47</sup>) *Centrosteeel* (n 45 ), para 35 of the Opinion: ‘While that process of interpretation cannot, of itself and independently of a national law implementing the directive, have the effect of determining or aggravating criminal liability, it may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed.’

(<sup>48</sup>) Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969, para 14.

(<sup>49</sup>) Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795, paras 44–45.

(<sup>50</sup>) Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135

(<sup>51</sup>) First Council Dir 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

of companies within the meaning of the second paragraph of Art 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ 1969 L65, p 8).

<sup>(52)</sup> *Marleasing* (n 50 ), para 13.

<sup>(53)</sup> *Marleasing* (n 50 ), para 8.

<sup>(54)</sup> *Marleasing* (n 50 ), para 8.

<sup>(55)</sup> Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

<sup>(56)</sup> Council Dir 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ 1993 L307, p 18).

<sup>(57)</sup> *Pfeiffer* (n 55 ), para 100.

<sup>(58)</sup> *Pfeiffer* (n 55 ), paras 106 and 108.

<sup>(59)</sup> *Pfeiffer* (n 55 ), paras 112-113.

<sup>(60)</sup> *Pfeiffer* (n 55 ), para 111.

<sup>(61)</sup> *Pfeiffer* (n 55 ), para 115.

<sup>(62)</sup> *Pfeiffer* (n 55 ), para 116.

<sup>(63)</sup> *Pfeiffer* (n 55 ), para 119.

<sup>(64)</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349. The author is sceptical about the importance that is attached in the Court's case law on the horizontal effect of Directives to 'the humble pronoun "itself" '. One of the reasons why before the Lisbon Treaty the Court was reluctant to extend the doctrine of direct effect onto cases subjected to the doctrine of consistent interpretation stemmed from the pre-Lisbon wording of Art 34 TEU, setting out the measures which the Union could adopt in the field of Police and Judicial Cooperation in Criminal Matter (the Third Pillar). This provision stated that framework decisions, one of the possible measures, could not entail direct effect. In *Pupino*, the Court held that this was no obstacle to imposing on national courts the obligation of consistent interpretation. Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para 60.

<sup>(65)</sup> *Pupino* (n 64 ), para 47. In Case C-212/04 *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] I-6057, para 112, the Court applied this principle to Directives.

<sup>(66)</sup> *Adeneler* (n 65 ), para 121. The Member States to which the Directive is addressed must refrain from taking any measures liable seriously to compromise the attainment of



## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

the result prescribed by it already after the Directive's entry into force but before its deadline for implementation.

<sup>(67)</sup> *Adeneler* (n 65 ), para 123.

<sup>(68)</sup> Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483.

<sup>(69)</sup> *Impact* (n 68 ), para 100.

<sup>(70)</sup> *Impact* (n 68 ), paras 102–103.

<sup>(71)</sup> Case C-12/08 *Mono Car Styling SA, in liquidation v Dervis Odemis* [2009] ECR I-6653, para 63.

<sup>(72)</sup> Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci v Italian Republic* [1991] ECR I-5357.

<sup>(73)</sup> Council Dir 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 (Official Journal 1980 L283, p 23).

<sup>(74)</sup> *Francovich* (n 72 ), paras 25–26.

<sup>(75)</sup> *Francovich* (n 72 ), para 35.

<sup>(76)</sup> *Francovich* (n 72 ), para 41.

<sup>(77)</sup> Such as eg, those concerning the length of the limitation period to bring the *Francovich* cause of action. See Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025.

<sup>(78)</sup> Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and others v Republik Österreich* [1999] ECR I-3499. In Case C-94/10 *Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet* [2011] ECR I-9963, the Court held that the national legal system could not interpret the condition of a direct causal link in such a way as to make it virtually impossible or excessively difficult to obtain compensation for the damage suffered (para 36).

<sup>(79)</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029.

<sup>(80)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 22.

<sup>(81)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 25.

<sup>(82)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 27.

<sup>(83)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 28.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(84)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), paras 32 and 36.

<sup>(85)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 42.

<sup>(86)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 51.

<sup>(87)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), paras 55–56.

<sup>(88)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), para 66.

<sup>(89)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), paras 70–74.

<sup>(90)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), paras 78–79. See also Case C-140/09 *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri* [2010] ECR I-5243 and Case C-429/09 *Günter Fuß v Stadt Halle* [2010] ECR I-12167.

<sup>(91)</sup> *Brasserie du Pêcheur/Factortame* (n 79 ), paras 82–84. See Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* [2009] ECR I-2119. Cf Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd, Hoechst AG and Hoechst (UK) Ltd v Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727 and Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* [2010] ECR I-635.

<sup>(92)</sup> See Case C-66/95 *The Queen v Secretary of State for Social Security, ex p Eunice Sutton* [1997] ECR I-2163, para 34.

<sup>(93)</sup> Takis Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 *Common Market Law Review* 301. Cf Carol Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 199.

<sup>(94)</sup> Case C-392/93 *The Queen v H.M. Treasury, ex p British Telecommunications plc* [1996] ECR I-1631.

<sup>(95)</sup> Council Dir 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L297, p 1).

<sup>(96)</sup> *British Telecommunications* (n 94 ), paras 43–44.

<sup>(97)</sup> Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553.

<sup>(98)</sup> Joined cases C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-4845.

<sup>(99)</sup> *Dillenkofer* (n 98 ), para 26.

<sup>(100)</sup> *Dillenkofer* (n 98 ), para 23.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(101)</sup> Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd* [2001] ECR I-06297.

<sup>(102)</sup> *Courage* (n 101 ), para 26.

<sup>(103)</sup> *Courage* (n 101 ), para 27. See also Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-6619.

<sup>(104)</sup> See Dorota Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' (2009) 12 *Cambridge Yearbook of European Legal Studies* 257.

<sup>(105)</sup> Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-1239.

<sup>(106)</sup> *Köbler* (n 105 ), para 33.

<sup>(107)</sup> *Köbler* (n 105 ), para 118. This links Member State liability for judicial breach with the *CILFIT* criteria for when the national court from whose judgment there is no further remedy is permitted not to make a reference to the Court of Justice. See Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

<sup>(108)</sup> Case C-140/09 *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri* [2010] ECR I-5243

<sup>(109)</sup> Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201.

<sup>(110)</sup> Council Dir 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, p 8), as amended by Council Dir 88/182/EEC of 22 March 1988 (OJ 1988 L81, p 75).

<sup>(111)</sup> *CIA Security* (n 109 ), para 44.

<sup>(112)</sup> *CIA Security* (n 109 ), para 45.

<sup>(113)</sup> *CIA Security* (n 109 ), para 48.

<sup>(114)</sup> Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711.

<sup>(115)</sup> *Lemmens* (n 114 ), para 27.

<sup>(116)</sup> *Lemmens* (n 114 ), paras 34–35; confirmed in Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535, para 8.

<sup>(117)</sup> *Unilever* (n 116).

<sup>(118)</sup> *Unilever* (n 116), Opinion of 27 January 2000.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(119)</sup> *Unilever* (n 118 ), para 86 of the Opinion. However, at the time, the *horizontal* direct effect of the free movement of goods provisions had not been yet recognized.

<sup>(120)</sup> *Unilever* (n 118 ), paras 88 and 97 of the Opinion.

<sup>(121)</sup> *Unilever* (n 118 ), para 98 of the Opinion.

<sup>(122)</sup> *Unilever* (n 118 ), para 106 of the Opinion.

<sup>(123)</sup> *Unilever* (n 116), para 44 of the Opinion.

<sup>(124)</sup> For comment, see Stephen Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *European Law Review* 177.

<sup>(125)</sup> The distinction was first introduced by AG Léger in Case C-287/98 *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster* [2000] ECR I-6917. He argued that the effectiveness of the Directive is subject to different requirements depending on the type of effect which is being sought by the parties. See also Pablo V. Figueroa Regueiro, 'Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives' Jean Monnet Working Paper 7/02.

<sup>(126)</sup> Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287, 304–305. According to the authors, direct effect should be restricted only to cases where individuals claim rights directly from a Directive, a situation which does not obtain when rights are being created by the principle of *the binding effect of contracts* or the general terms of national legislation.

<sup>(127)</sup> Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, 2006) 241–243. The author also observes that the theory of exclusionary effect would render the principle of consistent interpretation redundant because the provision of national law in its in compliant interpretation could simply be disapplied (at 243). The Court of Justice has never endorsed the distinction between the exclusionary and the substitutive effect and its implications, and could even be regarded to have implicitly rejected it in *Pfeiffer* (n 55).

<sup>(128)</sup> Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031.

<sup>(129)</sup> Council Dir 75/442/EEC of 15 July 1975 on waste (OJ 1975 L194, p 39), as amended by Council Dir 91/156/EEC of 18 March 1991 (OJ 1991 L78, p 32).

<sup>(130)</sup> *Sapod Audic* (n 128 ), paras 29–32.

<sup>(131)</sup> *Sapod Audic* (n 128 ), para 51.

<sup>(132)</sup> *Sapod Audic* (n 128 ), para 53.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(133)</sup> Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-1829.

<sup>(134)</sup> Council Dir 72/166/EEC of 24 April 1972 on the approximation of the laws of the 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, English Special Edition 1972(II), 360), the Second Council Dir 84/5/EEC of 30 December 1983 (OJ 1984 L8, 17), and the Third Council Dir 90/232/EEC of 14 May 1990 (OJ 1990 L129, 33).

<sup>(135)</sup> *Bernáldez* (n 133 ), para 24 (emphasis added).

<sup>(136)</sup> Case C-201/02 *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723.

<sup>(137)</sup> Council Dir 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, p 40).

<sup>(138)</sup> Such cases are sometimes described as ‘direct review’ cases, where Union law serves as a standard of review and where the legal consequence, in the event of the national measure’s incompatibility, is its disapplication. See Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, 2007) 69–71.

<sup>(139)</sup> In Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839 the Court held that ‘when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions’.

<sup>(140)</sup> See Case C-244/12 *Salzburger Flughafen GmbH v Umweltsenat*, judgment of 21 March 2013.

<sup>(141)</sup> *Wells* (n 136 ), para 56.

<sup>(142)</sup> *Wells* (n 136 ), para 57.

<sup>(143)</sup> *Wells* (n 136 ), para 65.

<sup>(144)</sup> *Wells* (n 136 ), para 69.

<sup>(145)</sup> Stephen Weatherill, ‘Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective’ in Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (2000) 87.

<sup>(146)</sup> Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne* [1978] ECR 1365, paras 26–29.

<sup>(147)</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(148)</sup> More specifically, under Clauses 2, 5, and 8 of the Framework Agreement on fixed-term contracts concluded on 18 March 1999 and put into effect by Council Dir 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP (OJ 1999 L175, p 43), and of Art 6 of Council Dir 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303, p 16).

<sup>(149)</sup> *Mangold* (n 147 ), paras 72–73.

<sup>(150)</sup> *Mangold* (n 147 ), para 74.

<sup>(151)</sup> *Mangold* (n 147 ), para 76.

<sup>(152)</sup> *Mangold* (n 147 ), paras 77 and 79.

<sup>(153)</sup> See Editorial, ‘Horizontal Direct Effect—A law of Diminishing Coherence?’ (2006) 43 *Common Market Law Review* 1 and Alan Dashwood, ‘From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?’ (2006–2007) 9 *Cambridge Yearbook of European Legal Studies* 81.

<sup>(154)</sup> Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák of 15 February 2007, para 94. The *Honeywell* decision of the German Federal Constitutional Court, BVerfG, 6 July 2010, 2 BvR 2661/06, NJW 2010, 3422.

<sup>(155)</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

<sup>(156)</sup> Dorota Leczykiewicz ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 *European Law Review* 479.

<sup>(157)</sup> Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT*, judgment of 15 January 2014.

<sup>(158)</sup> Dir 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, p 29).

<sup>(159)</sup> *Association de médiation sociale* (n 157 ), para 29.

<sup>(160)</sup> *Association de médiation sociale* (n 157 ), para 35.

<sup>(161)</sup> *Association de médiation sociale* (n 157 ), paras 36–37.

<sup>(162)</sup> *Association de médiation sociale* (n 157 ), para 41.

<sup>(163)</sup> *Association de médiation sociale* (n 157 ), para 41.

<sup>(164)</sup> *Association de médiation sociale* (n 157 ), paras 44–45.

## Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability

---

<sup>(165)</sup> Explanations relating to the Charter of Fundamental Rights (OJ 2007 C303, p 2). This seems to be the only possible interpretation of the following cryptic paragraph in the judgment (*Association de médiation sociale* (n 157 ), para 46): ‘It is not possible to infer from the wording of Art 27 of the Charter or from the explanatory notes to that article that Art 3(1) of Dir 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.’

<sup>(166)</sup> See also, Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, judgment of 24 January 2012, para 42.

<sup>(167)</sup> Dorota Leczykiewicz, ‘Private Party Liability in EU Law: In Search of the General Regime’ (2009) 12 *Cambridge Yearbook of European Legal Studies* 257. Cf. Sara Drake, ‘Scope of Courage and the Principle of “individual liability” for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice’ (2006) 26 *European Law Review* 841.

<sup>(168)</sup> Michael Dougan, ‘The “Disguised” Vertical Direct Effect of Directives?’ (2000) 59 *Cambridge Law Journal* 586; ‘In Defence of *Mangold*?’ in Anthony Arnall, Catherine Barnard, Michael Dougan, and Eleanor Spaventa (eds), *A Constitutional Order of States?* (2011) 219 and ‘The Application of General Principles of EU Law to Horizontal Relationships’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (2013) 71.

<sup>(169)</sup> Mauro Cappelletti, Monica Seccombe, and Joseph Weiler (eds), *Integration through Law. Vol 1: Methods, Tools and Institutions. Book 1* (1986).

<sup>(170)</sup> Koen Lenaerts and Tim Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law’ (2006) 31 *European Law Review* 287. According to the authors, horizontal cases display an indirect review situation but are in principle no different from the direct review situations present in vertical cases.

<sup>(171)</sup> Michael Dougan, ‘When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy’ (2007) 44 *Common Market Law Review* 931.

<sup>(172)</sup> Sacha Prechal, ‘Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union’ in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (2007) 35. Dougan argues that the doctrine of consistent interpretation should be seen as flowing from the direct effect of Art 4(3) (previously Art 10 EC) laying down the principle of sincere cooperation. See Dougan (n 171 ). In Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, judgment of 24 January 2012, para 23, the Grand Chamber of the Court held that ‘the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible’.

# **Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability**

**Dorota Leczykiewicz**

Department of Law, European University Institute